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## THE LAW AND THE STATE

### INTRODUCTION

THIS paper was completely prepared, if not completely written, long before the outbreak of the present war, which for the past three years has brought desolation and destruction upon the earth. It is not, therefore, a paper adapted to circumstances; nor can it be said to have been written to bias judgment, or with any such idea in mind. It will, then, it is hoped, have only greater weight in showing that German doctrines of public law in the nineteenth century from Kant to Jhering and Jellinek were, for the most part, mere apologies for the use of force; and that under the cover of juridical theories they had only for their object the reestablishment of absolutism of the State, and especially of the prince who represents it at home and abroad: while, on the contrary, the persistent effort of French juridical doctrine has ever been, from 1789 to the present time, to find the true juristic basis for legal limitation upon the power of the State, and to insure its sanction. Its conceptions have been diverse. They have varied from the purest individualism to the completest socialism. But the end in view has always been the same; namely, to prove that the powers of the State are limited by a jural principle (*une règle de droit*) superior to the State itself.

It would be incorrect and unjust, however, not to recognize that certain great German jurists, notably Gerber and Gierke, have affirmed the same principle and have tried to prove it. But they have remained isolated; and their appeals have never received recognition.



## I

Does there exist a jural principle (*une règle de droit*) superior to the State, which forbids it from doing certain things and commands it to do certain others? Such is the fundamental question of public law. If the answer is no, then there is no public law, since no act or refusal to act on the part of the State will be contrary to law. The question is not to determine whether one department or another of the State may or may not be under obligation to do or refrain from doing certain things; it is to learn whether there are obligations of a legal kind, positive or negative, which bind the State, considered by itself, delimiting the power of its several departments, with the result of imposing duties of action or inaction upon its several departments, legislative as well as executive.

It is moreover necessary to understand thoroughly the meaning and scope of the question. It is not an economic question. It is not a moral question. It is solely and exclusively a question of law. And for that reason, in the recital of the various doctrines, which is to be the object of this paper, only theories of law, properly so called, will be discussed. No discussion of any question involving the theories taught by such historians as Treitschke or by generals like Bernhardi will be attempted, inasmuch as their abominable theories have for the past two years been time and again exposed in books, reviews, and periodicals. They and their likes have never had the desire to expound a juridical theory, but simply to formulate a principle of political and military action, which is wholly contained in the oft-repeated principle of Treitschke: "Der Staat ist Macht."<sup>1</sup> The events of the last three years have proved that their influence has been great in Germany. Although they have attracted less attention, the influence of theories of law, properly so called, has not been less.

Politically and economically, the question of the limitation of the powers of the State is certainly a problem of capital. The question is one of determining to what extent the State is to interfere, with the powerful means of action at her disposal, to assure the economic,

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<sup>1</sup> Treitschke, *Politik*, Vorlesungen gehalten an der Universität zu Berlin, Leipzig, 1899-1900. Among the numerous works which have been written upon Treitschke's political theory, the citations will be limited to the paper of M. Durkheim: *L'Allemagne au dessus de tout, la mentalité allemande et la guerre de 1915*; and a book written by M. Posada, entitled *Tratado de derecho politico*, Introduction, p. 27.

intellectual, and moral development of the people. It is not only a question which, in a practical way, confronts each and every individual of the State, but which has caused and will continue to cause theoretical controversies without end. It is one which devolves upon economists and politicians for solution, not according to a superior principle *a priori*, but according to the circumstances — according to the material and moral needs of each country.

On the other hand, we can and must ask ourselves if there exist moral duties which are imposed on men holding political power, if there exists a moral law (*une règle morale*) which limits their actions and constrains them to perform certain obligations. That these moral duties exist there can be no doubt; and all in all it has never been contested, even by the most pronounced absolutists, whatever principle be given as the basis of such moral law (*règle morale*). The notion of such a rule implies that a free will must wish certain things because they are good in themselves and refrain from wishing certain others because they are evil in themselves. It implies, in a word, the distinction between right and wrong in itself, whatever be given as the criterion of this distinction. It is then evident that no one would think that the men who hold political power are not obliged, in exercising that power, to conform to a certain rule, according to which they must do certain things and abstain from doing certain others. By what criterion shall such duties be determined? Diverse and innumerable answers can be and have been given to the question. Systems of political ethics, like systems of individual ethics, are innumerable. But in reality there is no mind which does not admit of some sort of moral code, and consequently there are none who deny the existence of a certain rule of moral conduct binding upon those who govern.

## II

The problem of limitations upon the State, as stated, is purely juridical in its nature. It resolves itself into the determination of the question whether there is a jural principle (*une règle de droit*) which is imposed juridically upon the State, which controls its action, creates obligations for it, and delimits its power. This jural principle (*une règle de droit*) may be clearly distinguished from the moral rule (*la règle morale*) by its principle, by its consequences, and by its sanction.



The jural principle (*la règle de droit*) forbids or commands a certain thing be done, not because taken in itself such act is good or bad according to some principle conceived *a priori*, but because it is contrary to or in agreement with social relations in a fixed human collectivity. The moral law considers man in the fulness of his being, both with respect to his mental states and his outward conduct. The jural principle (*la règle de droit*) looks only to the outward manifestations of the human will. It applies only to wills entering into relation with other wills. This is true whatever be the basis of the jural principle (*la règle de droit*). Little does it matter whether the autonomy and inviolability of the individual be granted, and whether the obligation to respect them be affirmed as binding on every human will, or that the jural principle (*la règle de droit*) be admitted in itself as being the social discipline, the organic rule of all social grouping. Its concept always implies the idea of a principle applying to all men living in society and because they live in society.

On the other hand there is no jural principle (*une règle de droit*), except when the very idea of this principle, when the notion of the social necessity for it, which requires conformity to it, has so deeply penetrated the conscience of those composing the social group in question that its violation of this principle entails such a profound group reaction that the principle can be socially organized. A rule which is at first simply a moral rule can become in time a rule of law, and the change is accomplished when the social reaction produced by the violation of this rule has become energetic enough and definite enough to receive from custom or from the written law a concreteness more or less complete. Moral law has not, in truth, any earthly sanction. For believers, it has merely a sanction patterned after human sanction. But that is extra-scientific. The principle of morals (*la règle morale*) can have remorse for sanction; but that is wholly individual and is in no case a social sanction. Sometimes attacks on the moral law (*la morale*) provoke disesteem for the person who is the author of them. But this sanction remains, as it were, in a diffused state and is not capable of being socially organized.

On the other hand, the moral rule (*la règle morale*) imposes certain obligations, not because of the relations existing between individuals, but because of the very character of the thing which it commands.

If a rule of morals implies a duty imposing itself on a certain will it does not imply a corresponding power resulting from it in some other will. But it is different with respect to the jural principle (*la règle de droit*) precisely because it has its origin in social intercourse, because it has for its object the regulation of the existing relations between the wills of the individuals composing a certain social group. Every jural principle (*toute règle de droit*) implies an obligation upon a certain will to will certain things; but it implies at the same time in some other will the power of willing some other thing. I wrote in 1901: "A duty of willing binds every individual will; an individual will, whatever it be, must not will a thing which would be contrary to the jural principle (*la règle de droit*), must not form a volition which would be determined by a motive not recognized by this principle. Inversely, every individual will has the power to invoke the principle, to produce an effective result thereby when such individual wills in accordance with the principle, and the effective result is binding socially on all individuals. In social groups where there is a conscious and organized force, that is, a political power in states, this result is binding on the holder of power, who will have to use the power which he wields to obtain the desired result."<sup>2</sup>

### III

We can now see clearly how the question presents itself. Is the State subject to a jural principle (*une règle de droit*)? It is not a question of determining whether or not any one of its departments is bound by law, but of ascertaining whether the State itself, whatever be the department that intervene, is limited in its action by a jural principle (*une règle de droit*) to which it is subjected, — that is, by a principle which subjects it both to positive and to negative obligations, and having a sanction capable of being socially organized. Is the State submitted to such a principle, that is to say, a principle which not only imposes on it duties socially sanctioned, but also implies at the same time in all wills the corresponding power of intervention to assure the application of this principle, the accomplishment by the State of the obligations which it imposes upon it?

One can easily understand the magnitude and importance of

<sup>2</sup> L'État, le droit objectif et la loi positive. Paris, 1901, Vol. I, pp. 143 and 144.



the problem. It is a question even going to the very basis of public law. If the State is not subject to such jural principle (*une règle de droit*), there is no longer any public municipal law (*droit public interne*) nor any international law (*droit public international*). There is no longer any limit to the material power of the State, to the *Macht* as the Germans call it. The State is *Macht* and nothing more. Individuals become the property of the State and small nations the predestined slaves of a powerful state.

I want to affirm at this point that, whatever the difficulties of the problem may be, we are under bounden duty to solve them. We must establish in a positive way the principle governing limitation of the State in accordance with right (*par le droit*). There is no social and international life possible without such a principle. Without it there can only be violence and barbarism.

What, then, are the difficulties of the problem? They are weighty, and vary according to the notion of the State that one forms. The innumerable doctrines which have been proposed concerning the origin and nature of the State grow out of two different general tendencies, and can be classed under two general categories, namely, the metaphysical and the realistic doctrines. The problem of legal limitation upon the powers of the State takes on aspects altogether different according to whether one thinks in terms of the metaphysical conception or in terms of the realistic conception of the State.

#### IV

I classify as metaphysical all doctrines which think of the State as a being gifted with a personality distinct from that of individuals who form the social grouping — the basic element of the State — as a personal being possessing a will which is by nature superior to individual wills, having no other will superior to it. This will receives ordinarily the name of sovereignty.

These are certainly doctrines of a metaphysical nature. For even though we can only prove directly the existence of persons and of individual wills, they affirm that there exists apart from individuals a being at the same time one and collective, gifted with a personality springing from conscience and will, and they even pretend to determine the very essence of this will and declare it by nature superior to individual wills.

Certain adherents of these doctrines have, moreover, attempted

to explain and to prove the actual personality of the State and the character of superior sovereignty belonging to its will. They are, to be truthful, the French representatives of the metaphysical conception of the State. The German publicists have not attempted this. Under the influence of the doctrines of the Hegelians, they have supposed the personality and the sovereign will of the State as existing *in itself* and *for itself*. They have seen in the State the synthesis of the particular and of the collective, and in this the realization of the moral idea. Without making further inquiry, they have proclaimed the conscious, willing, and sovereign personality of the State.

At any rate, these diversities which are, all in all, secondary, do not matter, at least so far as the solution of the question to be considered is concerned. The problem of the subordination of the State to law (*le droit*), so far as the metaphysical conception is concerned, is always the same. It is this: If the State is by nature a sovereign will, that is to say, a will which commands individuals and is not subordinated to any other will, how can it be in subjection to a rule binding upon it, since by definition there is no other will capable of imposing a rule upon it? If there was a superior jural principle (*une règle de droit supérieure*), imposing itself upon the State, the latter would cease to be sovereign and consequently would cease to be the State. There is absolute contradiction between the notion of the sovereign State and the notion of a jural principle (*une règle de droit*) superior to the State and limiting its action.

The German jurists have expressed this idea in the following formula: The State by definition possesses a will that never delimits itself except by itself, that determines the sphere of its own action, that has "jurisdiction of its own jurisdiction" (*la compétence de sa compétence*). The State would cease to be the self-determining sovereign will, it would cease to have the control of its own limitations (*la compétence de sa compétence*), it would cease to be the State, if its will were bound by a superior principle (*une règle supérieure*) fixing and limiting the extent of its action.

The problem is grave. To express my honest conviction it is in reality insoluble. In spite of the efforts that have been made, in spite of the miracles of subtlety which have been displayed, no satisfactory solution has ever been given. None will ever be given. The most ingenious systems have only veiled the difficulty. They



have never solved it. They arrive always at the same conclusion — the omnipotence of the State or the negation of its sovereignty — and they vacillate between the absolutism of a Jean Jacques Rousseau and of a Hegel, and the anarchism of a Stirner. This will be shown in the exposition which will follow.

## V

In the realistic conception the State is not a person distinct from individuals. If the will of the State is spoken of it is simply by way of metaphor and for convenience of expression. It is said that there is a State in human society when an individual or group of individuals have succeeded in monopolizing the power of constraint in that society and within definite boundaries; or in other words, when there is in a given society a permanent differentiation between those governing and those governed. The realistic conception discards all affirmations of a metaphysical nature. We can only testify to manifestations of individual wills. We can only speak, then, of individual wills. The existence of the single collective will of the State distinct from individual wills is a metaphysical hypothesis without any scientific value. There is no will of the State; there are only individual wills of those governing. When they act they are not the mandataries or the subordinate parts of a supposed collective person, or an assumed personality, the State, whose will they express and execute. They express and carry out their own wills; there is no other. Any other conception of the State is fantastic.

One can easily see that, taking the latter conception of the State, the problem of legal limitation upon public power assumes a different character than under the metaphysical conception. The difficulty, resulting from the supposed sovereignty of the State, although it cannot be solved, is no longer present, since this sovereignty is the will, which is superior in the nature of things to the collective person, the State, and the realistic conception by a denial of the existence of such a collective personality, denies also the existence of the sovereignty itself. The wills of those in power, being purely and simply individual wills, can, like all other individual wills, be subordinated to an imperative principle of right and law superior to themselves, the basis of which still remains to be determined. But, for the time being, let us disregard that question.

The difficulty of the problem in the realistic conception, and also for that matter in the metaphysical conception, consists especially in finding a means of sanctioning the legal obligations resting upon those who govern. It is said we can conceive of those who govern as being obliged to conform to a moral precept, to certain laws of an economic nature; but we do not think of them as being bound by a jural principle (*une règle de droit*). The latter, as we have said before, may be distinguished from the moral law in that violations of the juridical norm (*la norme juridique*) cause a social reaction of such moment that it can be socially organized. Then if by definition those who govern monopolize the force of constraint, we cannot conceive that they can organize against themselves the sanction of the jural principle. One must, therefore, come to the conclusion that there is no such jural principle binding upon those who govern, because no organized social sanction against them is possible, and that, whenever there is no possibility of organizing a social sanction, there can be no jural principle.

Here should be especially noted what M. Esmein writes in the course of a vigorous attack on all realistic doctrines: "The negation of the right of sovereignty, in my estimation, has only one very clear result, namely, to affirm the reign of force, the right of force alone to create governments, that right of force which the ancient régime had already repudiated, and which is condemned more clearly by the principle of national sovereignty. It is a question of fact instead of one of right (*du droit*)."<sup>3</sup>

Whatever be the authority of the learned and ever-lamented professor, I believe, on the contrary, that if any doctrine can establish on a sound basis juridical limitation of the powers of the State, it is a doctrine purely realistic in its nature. All the metaphysical doctrines have been confronted with the following unsolvable dilemma: either the State is sovereign (in which case, being limited only by its own will, it cannot be submitted to an imperative rule) or else it is subject to an imperative rule (in which case it ceases to be sovereign).

After an exposition of the French and German doctrines, which I shall attempt to set forth as correctly and as impartially as possible, I shall allow the reader to draw his own conclusions.

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<sup>3</sup> Esmein, *Droit constitutionnel*, sixth edition, by Joseph Barthélemy, 1914, p. 43.



## CHAPTER I

THE INDIVIDUALISTIC METAPHYSICAL DOCTRINE. — THE  
DECLARATION OF RIGHTS OF 1789

THIS doctrine is made up of two essential elements. The State is the organized nation; the nation is a person; it possesses according to Jean Jacques Rousseau, a *common ego* (*un moi commun*), a conscience, a will. It is the general will, the national will; and this will is sovereign, because it is the general will. The State is sovereign because it is the nation organized, and it is accordingly endowed with this general sovereign will. But at the same time the individual is endowed with natural rights that belong to him because he is a man, which rights the sovereign will of the State cannot infringe, or at least can only infringe within certain limits and under certain conditions. Natural individual rights come in this way to limit the power of the State.

This doctrine, the most complete and concise expression of which may be found in the Declaration of the Rights of Man and of the Citizen of 1789, is built in solid logical fashion. If we admit the premise, all the conclusions that are drawn from it follow logically. But the premise may well be contested. The foundations of the doctrine are singularly fragile; and the guarantees that it pretends to give the individual against the arbitrary acts of the State appear very precarious.

## I

The individualistic doctrine is of very ancient origin. It can be found in embryo in the writings of the Roman juriconsults, and all the law of Rome in the classical period is unquestionably an admirable individualistic construction. The idea was taken up again and developed in the sixteenth century. It was the inspiration for every idea of great moment during this period and particularly with respect to the writings of the Monarchomachs. It finds almost complete and final expression at the end of the seventeenth century in Locke's *Treatise on Civil Government*. It is the idea that took the lead as the inspiration for most of the political

writers of France in the eighteenth century. Finally, it was perpetuated in terms of rigorous precision and admirable conciseness in the Declaration of the Rights of Man and of the Citizen of 1789, and in the first title of the Constitution of 1791 called *Fundamental Provisions Guaranteed by the Constitution*.

The individualistic doctrine premises man as an individual. It affirms that man is born vested with rights that belong to him because he is man; natural rights that cannot be taken away from him because, if man were deprived of them, he would cease to be man. These rights inseparable from human nature are thus inalienable and indefeasible. They are essential attributes of human nature. He is endowed with these rights because of the nature of his personality. They are, therefore, natural powers of the human will. "The principle," writes M. Henry Michel, "rests on faith in the absolute value, in the inimitable originality, of the human will. . . . The idea of the sublime dignity of the human person is what the eighteenth century has bequeathed to us."<sup>1</sup>

The human personality has, then, an intangible power standing out against everyone, individuals as well as collectivities, so far as the exercise and development without hindrance of its physical, intellectual, and moral activity is concerned. Man is free or, expressing it more definitely and comprehensively, has an autonomous personality, an independent will. The autonomy of the human person is the fundamental affirmation of the doctrine, and in it can be found the basis of its whole development.

All men at birth have the same autonomy and accordingly they have the same rights. They can, however, be different physically, intellectually, and morally. In rights (*en droit*) they are absolutely equal. They have the same autonomy, the same independent will, the same power of freely developing as against every other person their physical, intellectual, and moral activity.

## II

To individuals equally autonomous — or what is the same thing, free and equal — the idea of the State as a sovereign personality is repugnant, whatever be, for that matter, the manner in which we explain the birth and development of this sovereign personality.

<sup>1</sup> Henry Michel, *L'idée de L'État*, 1896, pp. 60 and 644.



In 1789 in France and in America the conception of the sovereign State was generally explained by the hypothesis of the social contract, of the primitive pact, by which men voluntarily relinquished a part of their natural independence for the purpose of acquiring security in return, resulting in the formation of a collective ego (*un moi commun*) — a will at the same time one and collective, the sovereign will of the State.

This, however, is of little importance. The State exists; it is sovereign. Its purpose is the conservation of the natural and indefeasible rights of the human individual. In article two of the Declaration of Rights of 1789 we read: "The end of all political association is the conservation of the natural and indefeasible rights of man." In a draft of the constitution prepared in 1793 by the Girondist party we may find the following also: "The end of all union of men in society is the maintenance of their natural rights, civil and political, these rights being the basis of a social compact." And in the first article of the Declaration of Rights of 1793 is this: "The end of society is the common welfare. The government is founded for the purpose of guaranteeing man the enjoyment of his natural and indefeasible rights."

The autonomy of the individual, therefore, is anterior and superior to the State, which exists for no other reason than to protect and to secure this autonomy. This then is the theory of limitation upon the power of the State. The character of the limitation is truly juridical, since we maintain the existence of subjective rights belonging to the individual. It is these subjective rights of the individual which limit the action of the State.

The State is legally obliged not to do anything which would interfere with the autonomy of the individual, that is to say, with the free development of his activity. The State is obliged to do all that is necessary to guarantee, to protect this free development, and to remove all interferences which might hinder it.

At the same time, the State has the power and duty of bringing into play certain limitations with respect to the exercise of the rights of each individual, but only to the extent of such necessity in saving and assuring to all the free exercise of their rights. It can limit the activity of each to protect the freedom of all. For the same reason the State has the power and the duty to repress and to punish all infringements of individuals upon the autonomy of

others. It has the power and duty of deciding all conflicts of rights that arise between two or several of its citizens. The State can even create certain restrictions upon the rights of the individual by preventive measures to which it can give a penal sanction. It establishes, therefore, a system of police. But it can only act in this way when it is clear that the system of repressive law would certainly be powerless to protect the security of the individual.

When the State goes beyond the limit of its power so determined, it violates the juridical law which is superimposed upon it — a juridical law which is founded upon the recognition of subjective rights belonging to the individual. In the same way the State again violates the law to which it is submitted if it establishes different restrictions for different individuals or classes, because then it interferes with the fundamental law of natural equality of men. The State again violates the law to which it is subjected if it neglects to assure to each individual the guaranty of his rights, to decide all conflicts of right, and to assure even by force, if necessary, the execution of the decree.

### III

Do the positive duties of the State go further? Should the individualistic conception, to be logical with itself, recognize the legal obligation of the State to accomplish, for the profit of the individual, certain positive services?

The question has especially been asked with respect to that which has been called the right to assistance, the right to employment, the right to have instruction. Is the State obliged to furnish the means of subsistence to every individual who is absolutely unable, for any reason whatsoever, to procure such subsistence through employment; to assure to every individual who wishes and can so work, work sufficiently remunerative; to furnish gratuitously to the sick, who are without means, medical aid; and finally to secure to each individual the means of acquiring gratuitously a minimum of instruction?

Unquestionably it was admitted in 1789 that the individualistic conception neither conceded the right to employment, the right to assistance, nor the right to instruction. It seems, nevertheless, that this triple right was affirmed by the Duke of Laroche-foucauld-



Liancourt in his report read before the National Assembly, May 30, 1790, and was followed by the drawing up of a decree adopted the same day. The following is stated therein: "Society owes to all its members subsistence or work." But this double right finds its counterpart in the obligation to remain employed, which is binding on all healthy individuals. "Whoever can and refuses to work is guilty of an act against society." The law, which was enacted by the Assembly did not sanction expressly the right to assistance nor the right to have employment. Nevertheless, the enactment creates workshops, providing for "either cultivation of the land for men or manufacturing for women and children"; and it says further, "in substituting for the humiliating word 'alms' the more appropriate word 'help,' we must ennoble in this way both the nation that gives and the poor that it assists."

In the Declaration of Rights of 1789 there is not a word which alludes in any way whatsoever to recognition of the right to employment, to assistance, and to instruction. In the Constitution of 1791 we find a simple enunciative disposition stated as follows: "There will be created and organized a general bureau of public aid for the purpose of rearing abandoned children, for aiding poor cripples, and furnishing work to poor people who are able to work but cannot procure employment. There will be created and organized a system of public instruction, accessible to all citizens and free, with respect to such elements of education as are indispensable to all men. . . ." (Title I, paragraphs 7 and 8.)

The Convention, contrary to the National Assembly of 1791, seems to have recognized at a certain time such rights of employment, assistance, and instruction. In fact we may read the following in articles twenty-one and twenty-two of the Declaration of Rights of 1793: "Public aid is a sacred debt. Society owes subsistence to unfortunate citizens, even in procuring them work, or in assuring means to those who are unable to work. Every one needs education. Society must favor as much as possible the progress of the public mind, and place instruction within the reach of all its citizens."

These texts appear very formal. But drawn up under the influence of Robespierre, they certainly did not express the true thought of the majority of the Convention. One must look for it, not in the Constitution of 1793 — an act adapted to circumstances

and not applied — but in the Declaration and the Constitution of the Year III, which is, as it were, the political testament of the great assembly. We do not find there a single word referring to a right of employment, of assistance, or of instruction. Articles 196 to 300 have reference solely to the general principles on which the organization of public instruction will rest.

By the decree of February 5, 1848, the Provisional Government bound itself "to guarantee the existence of the worker through employment . . ., to guarantee work for all its citizens." The Constitutional Commission that had inscribed the right of employment in its first draft suppressed it in the final one; and the Assembly, after a long discussion, rejected the amendment of Mathieu de la Drôme, which contained this: "The Republic . . . recognizes the right of all citizens to instruction, to work, and to assistance" (meeting of September 4, 1848). It was content to pass a very vague but short formula, which certainly did not sanction these different rights. (Constitution of 1848, Preamble, article 8.)

Today M. Henry Michel and all the neo-individualists who derive their inspiration from his great work teach that the State is not only obliged not to interfere in any way with the autonomy of the individual and to protect the rights of the individual by its law, by its police, by the decisions of its tribunals, but it is under obligation to perform for individuals positive services in the form of furnishing work, assistance, and instruction under the conditions which have been previously indicated.

"Justice," writes M. Henry Michel, "lies in the will and the effort to assure to moral persons the effective enjoyment of rights which have previously been recognized for them; and it is possible to reduce these to two, namely, the right to live and the right to develop oneself through culture. A just citizen would be one who wishes to manage social and political institutions in such a way that this double right would be recognized in principle — assured in fact — to his fellow citizens. A just city is one which, composed of just citizens, is organized spontaneously, cheerfully, in such a way as to realize its ideals — all for the purpose of guaranteeing them — and assigns to the State an economic and moral function."<sup>2</sup>

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<sup>2</sup> Henry Michel, *L'idée de L'État*, 1896, p. 646.



## IV

The individualistic doctrine is completed by a theory of organization, which is necessary to give sanction to the legal obligations binding on the State. It asserts that the individual has the right to exact from the State, not only that it shall not interfere with the autonomy of the individual, not only that it fulfill all its obligations, but that it shall so organize itself as to guarantee, as far as possible, the accomplishment of the duties which are imposed upon it. That is the right which the constitutions and the declarations of the revolutionary epoch call "security," and is one of the rights of the citizen gradually becoming superposed upon the rights of man.

The State fulfills its obligation in this respect by establishing its political organization on the principle of the *separation of powers*, that is to say, in dividing its sovereignty, one and indivisible, into three parts, equally sovereign, incarnating each in a separate body, thus forming the legislative, executive, and judicial power. So we have the mystery of the political trinity, which leaves the sovereignty in its essence, one and indivisible, even though divided into three elements — into three distinct persons, equally sovereign.

The legislative power becomes incarnate either in the assembly of the people or in the assembly of their representatives. It is especially through the legislative power that the sovereignty of the state manifests itself. It is this power which enacts provisions, which become rules of positive law, binding on everyone, not only on individuals, but also on the different powers of the State — on the judicial, executive, and on legislative power itself. It can modify or abrogate the law, but so long as the law exists it is bound by it.

The legislative power, on the other hand, can make no law contrary to the obligations of the State, such as have been determined above. It can make no law which will interfere with any right whatsoever of the individual, whether these obligations of the State and those rights of the individual have been expressly recognized and sanctioned, as in France and in the United States by the constitutions and written laws, or whether they have been, as in England, recognized and sanctioned by custom — spontaneous manifestation of the collective conscience.

The Constitution of 1791 has clearly set forth this limitation

upon the legislative power in terms which must be quoted: "The legislative power cannot make any laws which shall infringe and interfere with the exercise of the natural and civil rights recorded in the present title of and guaranteed by the Constitution." (Constitution, 1791, title I, paragraph 3.)

Every law is presumably in harmony with this rule and intended to protect the rights of the individual, to reconcile them with the needs of the community. That is why every law is obligatory and is to be respected by all. That is also why every law binds the State itself. Here we reach the central point of the doctrine. The State is not only bound by the superior principle of the individual juridical autonomy, it is also bound by positive laws which it enacts itself, since these laws presumably are based upon individual rights and have for their object the protection of individuals. If the State disregards them, it would *ipso facto* be infringing on the rights of the individual. Thus, the individualistic doctrine, at least if we admit its point of departure, results in a very logical and very satisfactory solution of the problem how to explain the assertion that the State is bound by positive laws which it enacts itself.

Parliament, the holder of the legislative power, cannot make a single provision in violation of the law so long as the law exists. The executive power must conform to law, and the judicial power can only judge in conformance with the law. But what must and what can the judicial power do, if we assume that the law spoken of previously is contrary to the superior principle (*la règle supérieure*), written or not written, which in the individualistic conception is binding on the State? This question has been answered differently in France and in the United States, starting, however, from this very individualistic conception and from this same notion of separation of powers.

Thus, it is said in the United States: The legislative power ought to apply the law; but it cannot be obliged to apply a law which it believes to be contrary to the superior law (*le droit supérieur*) binding on the legislator himself. Consequently, all tribunals (*toute juridiction*) have the power and the duty of deciding whether or not the law in issue before it is in harmony with such superior principle. As this principle is usually set forth in a written constitution, they say: All tribunals have the right to pass on the constitutionality of a law and not to apply it if it is believed to be



unconstitutional. In France, on the contrary, till recent years, we have taught as a kind of dogma that the judiciary is not competent to pass on the constitutionality of laws, and must apply every law regularly voted and promulgated even when it seems to it unconstitutional; or in other words, that no question of unconstitutionality can be considered. The French tribunals have many times so decided.

The American solution is certainly much more in harmony with the principles of the individualistic doctrine than the French solution. The tribunals have, it is true, for their first duty the application of the law; but they must apply the constitutional provisions as well as the ordinary laws. Then if a conflict exists between an ordinary law and a constitutional provision, the tribunals are necessarily and logically obliged to apply the superior law, that is to say, the constitutional provision. On the other hand, the American solution creates in a singular manner a positive sanction for enforcement of the obligation resting upon the legislative, namely, to respect the superior principles of right (*le droit supérieur*) imposed upon it. It is interesting to note that in reality the French doctrine very clearly works out in the sense of the American solution.<sup>3</sup>

The executive and the judicial power are not supposed to do anything contrary to law; and, therefore, the State must create machinery for annulling any administrative or judicial act done in violation of the law; and it must recognize and sanction the personal responsibility of the agents guilty of having so violated it.

But all that, nevertheless, can be of no avail in guaranteeing the individual against the infringement of his rights. Need the principle be carried out to its logical conclusion? Must we go so far as to say that, if the State infringes upon individual rights, the individual can legitimately resist this usurpation of power by force? Is it necessary to recognize as a right of the individual what has for centuries been called resistance to oppression?

Theorists believing in individualism have not hesitated in going that far. They have affirmed as a logical consequence of the principle that the individual has the right not only to refuse to execute an authoritative order contrary to law, but even to oppose by material force the command of such authority when it interferes

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<sup>3</sup> Berthélemy and Jéze, *Revue du droit public*, 1912, pp. 365 *et seq.*

with such rights, and even to overthrow the government by force as a violator of right. According to the terminology of theologians, the theorists of the individualistic type have admitted, as legitimate, resistance to oppression, passive resistance, defensive resistance, and even aggressive resistance.

Without going further back than the seventeenth century, we can find, in Locke, the right of resistance to oppression frankly affirmed. He thus writes: "When legislators try to steal and to destroy the things which belong by right to the people or to reduce them to slavery under an arbitrary power, they place themselves in a state of war with the people. . . . It devolves, then, upon the people that have such right to regain their original liberty . . . to provide for its conservation and security."<sup>4</sup>

The French Declaration of Rights sanctions especially the right of resistance to oppression. The Declaration of 1789 places resistance to oppression among the natural and inalienable rights of man on the same footing with liberty, property, and security. But it is not confined even to these statements of it. (Article 2.) In the Declaration of 1793 there is a doctrinal explanation of resistance to oppression. Articles thirty-three to thirty-five are worth quoting at length: "Resistance to oppression is the consequence of the other rights of man. There is oppression with respect to the social body when a single one of its members is oppressed; there is oppression against each member when the social body is oppressed. When the government violates the rights of the people, insurrection is, for the people and for each portion of the people, the most sacred of rights and the most indispensable of duties."

The Convention approved even of the murder of one who had usurped power without right by violence or by trickery — of one whom the ancient theologians called a tyrant *ab initio* (*tyran d'origine*). "Let every individual that would usurp sovereignty be put to death immediately by the free men." (Declaration of Rights, 1793, article 27.)

Thus insurrection against the tyrant by practice (*le tyran d'exercice*), against the government whose power has a legitimate origin but which is being used in an oppressive manner, and against the tyrant *ab initio*, the usurper, are the ultimate and logical

<sup>4</sup> Locke, *Traité du gouvernement civil*, French edition, Amsterdam, 1691, pp. 269 and 285.



consequences of the individualistic doctrine in the domain of politics.

## V

In the domain of private right the individualistic doctrine has also constructed a strongly organized system which serves as a model for all civil codes of modern countries. The propositions of which it is comprised are logically deduced from the principle.

The State cannot infringe upon the free development and activity of the individual. Consequently it must respect and guarantee the results of this activity. The foundation of ownership may be stated in two words: individual right, natural and indefeasible, and liberty, inasmuch as there is at bottom only liberty in so far as it acts, works, and produces. All declarations of rights of the revolutionary epoch place ownership beside liberty among the natural individual rights.

On the other hand, the autonomy of the individual implies the power in him of diminishing or extending his sphere of legal activity by an act of his own will, through performing what is called a juristic act, creating determinate relations with another individual. But these legal relations between two subjects of rights imply that the one wills to increase his sphere of juristic action, and that the other wills to diminish it. Consequently, they imply an agreement of wills, which is contract. Two consequences result from it. First, a relation of right between two individuals can exist in principle only by contract and every juristic act is normally a contract. Second, the State is obliged to guarantee the contract binding two individuals, and to assure its execution, if need be, by material constraint. This obligation is the direct consequence of the obligation resting on the State to protect the autonomy of the individual.

The State is obliged also to respect and to execute the contracts to which it is party. One could say, as has in fact been said: The State is not bound by the contracts it makes because its will being sovereign it cannot be bound by the will of the other contracting party. Not at all, answer the advocates of the individualistic doctrine. The State is bound by the contracts which it makes because these contracts can arise only by means of an act of the autonomous will of those who contract with the State. The latter is obliged not only to respect this autonomous will but also, for that reason, the contract which it has willed.

Finally, the State must make reparation for all damage which it causes to an individual when it exceeds the limits of its legitimate activity, and it must compel every individual to repair whatever harm is caused to another when acting without right.

And so we find three general propositions, derived logically from individualistic principles, which alone constitute the whole basis of law as to interest of substance in the Code Napoléon: Inviolability of the right of ownership; obligatory force of contracts; reparation for all injuries caused unlawfully. Articles 544, 1134, and 1382 of the Code Napoléon, which sanction these rules, are only the application in the domain of private right of the principles of the Declaration of Rights. I have tried to show elsewhere how this purely individualistic and wholly metaphysical conception of the Code Napoléon disappeared progressively and how our civil law evolved toward a realistic and social system.<sup>5</sup>

## VI

The individualistic doctrine — thanks to the richness of its principle — could also give us a solution of one of the most difficult problems of the modern world, which will confront us with a singular intensity when the turmoil now upsetting the whole civilized world shall have come to an end. The problem of international law is found wholly in the contradiction between the notion of sovereignty and that of legal limitation of the will. If the State possesses a sovereign will, that is to say, is its own mistress, and determines itself only by itself, it cannot be bound by a superior rule — by obligations toward another State — because it would then cease to be sovereign. One could then say that there cannot exist between two or more sovereign states any relation of right, any reciprocal obligation of a legal character; that violence and force are the only laws of international relations.

We know with what impudence this proposition was affirmed at the very beginning of the war by the representatives of Germany. We shall see, moreover, that with more discretion the greatest jurisconsults of Germany have said in reality exactly the same thing.

In bringing into international relations the principle of the

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<sup>5</sup> I beg to refer the reader to my book, *Les transformations du droit privé*, 1912.



autonomy of the will, the individualistic doctrine has been able to give a satisfactory solution to the problem. Every State is an organized nation; every nation is composed of individuals, all gifted with an autonomous will; and it is the coördination and the fusion of these autonomous wills that forms the national will. The latter is autonomous like the individual wills which are its constituent parts. All nations of whatever size are equally autonomous, that is to say, have equal rights to independence and to the free development of their activity. States, which are only organized nations, being therefore free and equal, like individuals, are obliged to respect this equality of all, both as to independence and autonomy.

Since then, just as in the society of individuals there arise obligations which limit the liberty of each to the extent necessary to protect the liberty of all, so in the society of States there exist jural principles which impose certain restrictions upon the independence of each in order that the autonomy of each will be respected and protected. Several of our constitutions have very clearly formulated these principles. Under the sixth title of the Constitution of 1791 we read: "The French nation refuses to undertake any war for the purpose of making conquests, and will never employ its forces in restraint of the liberty of any people." The same idea is expressed in the Constitution of 1793: "The French nation is the friend and the natural ally of free peoples. It does not meddle with the government of other nations; it will not tolerate intermeddling by other nations with its own. It gives asylum to strangers banished from their country for the cause of liberty. It refuses such refuge to tyrants. It will not make peace with an enemy which is occupying its territory." The world knows that with respect to these matters France of 1917 is of the same faith as the France of 1793.

The constitutional law maker of 1848 wrote thus: "The French Republic respects foreign nationalities as it means to have hers respected; it undertakes no war for purposes of conquest and never uses its forces in restraint of the freedom of any people." (Preamble to the Constitution of 1848, paragraph 5.)

An exposition of the French doctrine as to the foundation of international law is not attempted in this paper. It will suffice to recall that its most eminent representatives agree to place at the very foundation of international law what they call fundamental

rights of States, the aggregate whereof make up their independence and their autonomy. <sup>6</sup>

## VII

I do not intend to enumerate all the difficulties which are raised by the individualistic doctrine, but only to indicate a few of the more important reasons that make it theoretically inadmissible, and to all intents and purposes will sooner or later completely overthrow it. It is really admirably constructed. The principle behind it once admitted, all the consequences follow in perfect logical order. This in itself is pleasing to the mind. But such principle has not been and cannot be proved. It contains an insoluble contradiction in itself, and as soon as it is impeached its whole structure breaks down.

The affirmation that man because he is man, taken isolated and by himself, separated from other men, in the state of nature, as they said in the eighteenth century, is endowed with certain rights, peculiar to his nature as man, — this affirmation is purely gratuitous; it cannot be supported by any direct proof. It is a purely metaphysical proposition with respect to the nature or, as the schoolmen used to say, the essence, of the human being. This affirmation might suffice in a period of metaphysical belief; but it is a purely verbal expression — nothing more — in a positivist and scientific epoch like ours. It can satisfy a believer, but it is void of all scientific and positive value.

The statement with respect to the natural man, isolated, free and independent, is not only an affirmation of a metaphysical nature, but, moreover, is contradicted by the ascertained facts as to the physical nature of man, which can be the object of direct observation by scientific methods. Today all biological and anthropological sciences prove that man, given his physical organs and his physiological constitution, cannot live alone, has never lived alone, can live only in society, and has never lived except in society. The whole progress of the natural sciences establishes the fact in a more and more conclusive way. One cannot consider the natural man independent and isolated; one can think of man only as a social being or rather one can conceive only of society. Man does

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<sup>6</sup> Cf. Pillet, *Les droits fondamentaux des États*, *Revue du droit international public*, V, 1898, and VI, 1899.



not exist anterior to society; he exists only in society and through society. It is not true to say that there have been, nor even that there can be, men naturally free, isolated and independent, whose coming together has formed societies. There have been societies of men since the beginning of the existence of man. To think of man isolated is to think a thing which does not exist, and which the facts prove never to have existed. Therefore the idea of the social man is the only possible starting point of juridical doctrine.

Moreover, the principle of the individualistic doctrine contradicts itself. They say that natural man, taken as such, apart from his dealings with other men, is born with rights which he brings with him in entering society, and that it is these natural rights which he can assert against society and the State, which is but society organized. Then let the innumerable dissertations which have been written on the nature of subjective right be what they may, let the proposed theories vary as they will in detail, all writers in the long run agree to recognize that subjective right essentially can be only this: the power of a will, manifesting itself by outward action, to impose certain objects of its will upon the respect of other wills. Subjective right implies three elements: A subject with a will, who expresses his will; something desired by the subject; and a person upon whom the subject whose will is manifested externally imposes the object of its will. Apart from the object desired, we must say, according to the traditional formula, that all subjective right implies an active subject and a passive subject.

Consequently, if we suppose the natural man isolated, he cannot have any rights. Man at birth cannot bring rights into the society which he enters; he can have rights only after he has entered society and because he has entered into relation with other men; Robinson on the island has no rights; he acquires them only upon meeting human beings. Man cannot bring into and maintain rights in society which he does not have, which he could not have until he entered it. He has acquired rights, if he has any, only after becoming a member of the society of which he is a part, and because he has become a part of it. Up to the time he enters into society, man certainly has faculties; but he has not, he cannot have, rights.

Thus the whole individualistic doctrine breaks down. Man cannot oppose society with natural rights which he has not; he cannot

place in opposition to it rights that he has only because he lives in society.

Nevertheless, we might still admit, strictly speaking, the individualistic doctrine and the now disproved and contradictory postulate concerning natural individual rights, if it truly and efficaciously gave us a solution of the problem of legal limitations upon the powers of the State. But upon a more careful and final consideration of the matter, it can be seen that the individualistic doctrine does not solve the problem. In reality, it supposes and opposes two contradictions, the sovereignty of the State and the autonomy of the individual.

Let us recall the terms of the problem. The State is sovereign; but such sovereignty has its limits. The foundation for and the determination of these limitations are found, according to the individualistic doctrine, in the existence of the natural rights of the individual anterior to the State, which the latter must respect and guarantee, but to which it can add limitations to the extent necessary to protect the rights of all.

This being granted, we cannot escape the following dilemma. Either the autonomy of the individual comes to limit the power of the State, to determine the extent of the restrictions which it can bring to bear upon the individual activity of each — in which case the State ceases to be sovereign, since there is a will other than its own which comes to determine the limitations upon the manifestations of its own will — and so the sovereignty of the State disappears; or else, by reason of this sovereignty, the State determines freely and without reserve the restrictions which in its sovereign discretion it thinks ought to be brought to bear upon the autonomy of the individual. In that case it is the autonomy of the individual which disappears.

The individualistic doctrine reduces itself necessarily either to the negation of political sovereignty and to anarchy, or else to the negation of individual liberty and to political absolutism — to the anarchism of a Stirner and of a Bakounine, or to the absolutism of a Rousseau and of a Hegel, or still further, to Jacobin or Caesarian despotism.

The dilemma into which the individualistic doctrine leads did not escape some of the masters of philosophy and of legal and political theory either in France or in Germany. That explains



the prodigious effort in both countries to maintain intact the sovereignty of the State and at the same time to protect the autonomy of the individual. This fruitless effort has had no result other than to strengthen the theoretical foundation of unlimited sovereignty, while creating an illusion through skillful sophistry that the autonomy of the individual is secured.

These attempts, however, have had a considerable influence in the world. They deserve to be considered. They are represented by the great names of Jean Jacques Rousseau, of Kant, and of Hegel, whose political doctrines, even though they do not in reality follow one another directly, have one thing in common, namely, that they tend to show the limitless sovereignty of the State and to reconcile it with the autonomy of the individual. Neither Rousseau, nor Kant, nor Hegel was a jurist by profession; but their doctrines have had a direct and definite influence on juridical theories in France and in Germany. Beyond the Rhine, in Jhering and Jellinek they have led to doctrines concerning the voluntary auto-limitation of the State which are both subtle and singularly dangerous for liberty; in France they have brought about the reaction to juridical realism of Royer-Collard and of a few contemporary jurists.

## CHAPTER II

JEAN JACQUES ROUSSEAU AND THE DOCTRINE OF THE  
SOCIAL CONTRACT

**S**PEAKING of the Declaration of Rights of 1789, M. Paul Janet writes: "Such an act does not come from Montesquieu, but from J. J. Rousseau."<sup>1</sup> M. Tchernoff, in an interesting study of Montesquieu and J. J. Rousseau, declares that the philosophy of the Declaration of Rights of Man comes from J. J. Rousseau.<sup>2</sup> The opinion thus expressed by these two authors is widespread but nevertheless is radically wrong. The *Contrat Social* is at the antipodes of the Declaration of the Rights of Man, full of liberal individualism, and proclaiming to the world the fundamental duties which limit the powers of the State. J. J. Rousseau is the father of Jacobin despotism, of Caesarian dictatorship, and, upon closer observation, the inspirer of the doctrines of absolutism of Kant and of Hegel. And to prove this it is only necessary to read the *Contrat Social*. But it must always be read in its entirety.

## I

That Rousseau is a convinced individualist we cannot deny. He, too, presupposes the natural man, free and independent, endowed at birth and by virtue of his nature with rights, which in the aggregate form the autonomy of the human person. But in Rousseau's theory these rights of the individual cannot place restrictions upon the sovereign power of the State which remains without limit. The originality of Rousseau, like that of Hegel some years later, consists in attempts to prove that, in spite of this power of the State, man remains free and retains the fullness of his autonomy. To prove it the philosopher of Geneva piles sophism upon sophism. But the eloquence of his style has caused illusion, and the influence of the book has been as considerable as it has been harmful.

Thus, according to Rousseau, man is born free and independent;

<sup>1</sup> Paul Janet, *Histoire des doctrines politiques*, second edition, Vol. II, p. 612.

<sup>2</sup> *Revue du droit public*, 1903, II, p. 96.



it is by an act of free will that he enters into society. By the social contract he loses a part of his natural independence, but in return he acquires the guarantee of his rights — a security. By the social contract he abandons only those of his natural rights the loss of which is necessary to the maintenance of society. The other rights he retains. But it is the sovereign who determines, with full and absolute independence, the extent of the rights taken away and those retained. And so the sovereignty of the State remains unimpaired and complete.

In spite of all this unlimited power of the State, man, according to Rousseau, remains the autonomous individual which he is by nature.

How can this miracle be accomplished? By the sophistical invention of the social contract as understood by Rousseau. By the effect of the contract, that is to say, by the effect of the tacit adherence of the individuals to the social grouping to which they belong, there is formed a common personality (*un moi commun*), which is the collective will of the group — as Rousseau expresses it, the general will. This will of the group or general will is the sovereign will of the State, and this it is which, without any reservation, can bring about all the restrictions on the free activity of the individual which it thinks expedient; on two conditions however: First, that it ordain them directly and not through representatives; second, that it ordain them in the form of a general disposition. Can the individual, whose activity is so limited and reduced by the State in its sovereign capacity, complain, and claim that by such arrangement he ceases to be free and loses his autonomy? Not at all. Since this will of the State is the general will, it is the will of all, and accordingly it is the individuals themselves who create such restrictions upon their own wills. They are not, therefore, in submission to a will superior to their own. They are in submission to a general will formed by their own wills. They thus remain perfectly free.

Let us not say that, for the expression of this general will, there is formed a majority and a minority, and that in reality it is the majority which imposes its will upon the minority; that is to say, one group of individuals imposes its will upon another group, and this majority will be naturally and unconsciously oppressive. Such objection, answers Rousseau, is unimportant. In fact, if in

the assembly of the people the majority want something contrary to the wishes of the minority, it simply goes to show that the persons making up the minority are mistaken, since the majority expresses the general will and the general will cannot err.

Thus, by this sleight-of-hand performance the sovereignty of the general will and the autonomy of the individual remain complete and are reconciled in this powerful synthesis, the State. In his philosophical rubbish Hegel does not say more.

## II

Everybody knows the celebrated opening passage of the *Contrat Social*, which begins: "Man is born free, and everywhere he is in chains. Many men believe themselves to be masters of others and are even greater slaves than they. How has this change been brought about? I do not know. What can make it legitimate? I think I can solve this question." The purpose of the work is thus clearly and distinctly formulated: to show how it is legitimate that man who is born free should everywhere be in chains; or, what is the same thing, how it happens that the limitless sovereignty of the State should be legitimate, in spite of the fact that man is naturally free. It can be thus only if we prove that this sovereign power exerted against individuals is a power which the individuals exercise against themselves. The proof is impossible; but the eloquence of Rousseau has deceived many into believing that he had proved it.

This limitless State sovereignty grows out of the social contract, the essential elements of which, according to Rousseau, are these: "If then," he writes, "we disregard in the social pact what is not of its essence, we shall find that it is reduced to the following terms: each one of us places his person and all his power in common under the supreme direction of the general will, and each of us receives in return as a member an indivisible part of the whole. Instead of a particular person, each as a contracting party, this act of association produces forthwith a moral and collective body, composed of as many members as the Assembly has voices, and which receives from this same act its unity, its common ego (*son moi commun*), its life, and its will. This public person that is thus formed by the union of all the others was formerly designated the city, but now is styled a republic or body politic, which, however, is called by its members the State when it is passive, the sovereign



when it is active, and the power when it is compared with similar bodies." <sup>3</sup>

### III

Has this sovereign State a limitless power over the individual? Or, on the contrary, is its action limited by a principle superior to itself? By such contract does the individual lose all his rights as against the sovereign? Or, on the contrary, does he retain certain of his rights, which, remaining, come to limit the action of the State?

If one were only to read chapter four of the second book of the *Contrat Social*, one might think that Rousseau, like Locke and the authors of the Declaration of Rights of 1789, admits the reservation by the individual in society of his natural and inalienable rights that come to limit the power of the State. The chapter is in fact entitled *Limitations upon the Sovereign Power*. In it we read: "It is settled that all that each individual loses by the social pact in respect to his rights or his liberty is merely that which is of importance to the community. All the services that a citizen can render to the State he owes to it as soon as the sovereign calls upon him for such services; but the sovereign, on the other hand, can burden the subjects with no restraints not useful to the community."

It is probable that writers who assert that J. J. Rousseau was the inspiration of the profoundly liberal doctrine of the Declaration of Rights confined their reading to this passage of the *Contrat Social*. If they had read what precedes and what follows, they certainly would not have formulated any such idea. Taken by itself, the passage of Rousseau previously cited is in absolute contradiction with the work as a whole. In this same chapter four Rousseau expresses himself very clearly: "It is a question," said he, "of making a clear distinction between the respective rights of the citizen and of the sovereign, that is, of the duties which the former must perform in the capacity of subjects, and of the natural right which they must enjoy in the capacity of men." Therefore, if the individual retains certain rights in society, he does so in his capacity as a man. As citizen he is bound by the omnipotence of the State. Rousseau says this also in so many words. But if the citizen is bound by the omnipotence of the State in the capacity of citizen, we can hardly see how the permanence of his natural rights as man can

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<sup>3</sup> *Contrat social*, Bk. I, chap. VI.

limit this unlimited power. Does not Rousseau make this distinction for that matter, and assert that the human personality in its entirety is completely swallowed up by the collective person, the State?

{In chapter six of the first book of the *Contrat Social* is the following: "These clauses [of the social pact] can be reduced to a single proposition: the total alienation by each associate of all his rights to the whole community. . . . Furthermore, the alienation being made without reservation results in a union as perfect as is possible; and no associate has anything left to which he can lay claim, because, if there remained some rights in the individuals — since there would be no common superior to pronounce between them and the public, each one being in certain respects his own judge — he would soon pretend to be his own judge in everything; a state of nature would result; and the association would become necessarily tyrannical or vain."

That is not all. In the seventh chapter of the first book entitled *The Sovereign* we read: "We must remark furthermore that the deliberate acts of the State, which can place all the subjects under obligation to the sovereign on account of the two different aspects from which each may be considered, cannot for that reason place the sovereign under obligation to itself, and that consequently it is contrary to the nature of the body politic that the sovereign should impose a law on itself which it could not violate. As it can only be considered from a single point of view, it is then in the position of an individual contracting with himself; according to which we see that there is and can be no kind of law fundamentally obligatory upon the body politic — not even the social contract."

Let us compare this proposition with paragraph three of title one of the Constitution of 1791: "The legislative power shall not enact any laws which shall infringe upon or be a hindrance to the exercise of the natural and civil rights herein contained and guaranteed by the Constitution." Let us now ask the authors previously mentioned whether or not they persist in thinking that the Declaration of Rights of 1789 and the guarantee of such rights in the Constitution of 1791, which is only a development of the former, have been taken from the *Contrat Social*.

To conclude, if the absolutism of Rousseau need be proved, it would be sufficient in doing so to quote again the passage in which



the philosopher, having said that "each one loses, by the social pact . . . only that part of his freedom the use of which is of importance to the community . . .," hastens to add: "We must agree also that the sovereign is the judge of this important matter."

Let us also quote the passage relative to the religion of the State: "There is, then," writes Rousseau, "a purely civil profession of faith, the principles of which are to be determined by the sovereign, not precisely as a dogma of religion, but as sentiments of sociability, without which it is impossible to be either a good citizen or a faithful subject. Without being able to compel anyone to believe them, the sovereign can banish from the State unbelievers. It may not banish such a person as impious but as being unsociable, as being incapable of seriously cherishing laws and justice, and of immolating himself if need be to duty. But if anybody, after having publicly recognized these very dogmas, conducts himself as if he did not believe them, let him be punished by death; he has committed the greatest of crimes; he has lied before the laws." Here is certainly the language of a true liberalist; and perceive how truly he has given inspiration to the Declaration of Rights of 1789, in which it is written that "nobody should be interfered with in respect of his opinions, even his religious belief!"

Rousseau does not content himself for that matter with affirmations in respect to the existence of this civil religion which each one must believe and practice under penalty of death. He formulates its dogmas. "The dogmas of civil religion," says he, "must be simple, few, expressed with precision, without any explanation or commentary. The existence of a powerful, intelligent, beneficent, foreseeing, and provident Divinity, the life to come, the happiness of the upright, the punishment of the wicked, the sanctity of the social contract and of the laws; these are the positive dogmas. As to the negative dogmas, they may be limited to one only — intolerance. It is one of the creeds which we have excluded."

We should be much mistaken if we were to believe that Rousseau, in formulating as a dogma the exclusion of intolerance, meant to leave to citizens their free belief and the free practice of their religion. The intolerance which he intends to exclude from the State is simply Catholicism. Let us quote here the end of the chapter: "Now that there no longer is nor can any longer be any exclusive national religion, we must tolerate all religions which

tolerate all others, in so far as their dogmas have nothing in contravention of the duties of a citizen. But whoever dares to say that, outside the church there is no salvation, must be banished from the State. . . . The reason for which, it is said, Henry IV embraced the Roman religion should be sufficient to make every honest man leave it, especially any prince who has any reasoning power." To tolerate the different religions, but to banish Catholics; that is the last word of J. J. Rousseau in matters of religious liberty.

#### IV

Does this limitless sovereignty of the State leave intact the autonomy of the individual? Yes, answers the philosopher; and it is the principal purpose of his theory to prove it. By such theory he clears the way for the philosophers and jurists of modern Germany who, following him, will come to assert that the individual can find the fullness of his being only in the State; and that the latter can be all powerful without lessening the autonomy of the individual. Rousseau says nothing more than to maintain that by the operation of the social contract, which creates the social will, the individuals, in obeying this collective will, will be obeying only themselves. The more powerful the collective will, the more powerful will become the individuals themselves since the collective will is composed only of individual wills. Thus, to affirm the limitless sovereignty of the collective will of the State is to affirm the unrestricted autonomy of the individual. The individual autonomy springs from the sovereignty of the State; and it is in direct ratio to this sovereignty.

This sophistry is found on every page of the *Contrat Social*; it is as it were its *Leit-motiv*. In chapter six of the first book Rousseau states the problem thus: "To find a form of association which will defend and protect, with the combined strength of all, the persons and the goods of each associate, by which each one in combination with all the others will nevertheless be obeying only himself and will remain just as free as before." The social contract furnishes the solution. "Such is," according to the philosopher, "the fundamental problem, the solution of which is found in the social contract."

How can that be? The answer is: "The sovereign, being created only by the individuals that go to make it up, does not have nor can it have any interest contrary to theirs; consequently, the



sovereign power needs no guarantee towards its subjects, because it is impossible for the body to desire to injure all its members; and we shall see hereafter that it can do harm to none in particular. The sovereign from its very nature is always what it should be."

An objection comes to mind naturally. The expression of this collective will implies the formation of a majority and a minority. In fact it is not the collective will which is imposed on the individual will, it is the will of a group having a majority which assumes the right to impose itself upon the minority; and by that very situation the whole argument breaks down. This does not embarrass our philosopher. He answers the objection by a pure sophism. Let the reader judge for himself. "Each individual," he writes, "can in the capacity of man have an individual will contrary or dissimilar to the general will which he has as citizen; his private interest can prompt him quite differently from the common interest. . . . In order, then, that the social pact may not be a vain formulary, it tacitly contains this agreement which alone can give strength to the others, that whoever shall refuse to obey the general will shall be constrained by the whole body; signifying nothing more than that he will be forced to be free."

We have here the gist of the theory, and at the same time, the inspiration for the despotic doctrines of Hegel and of contemporary German jurists. Man, according to this conception, is truly free only if he obeys the State passively. If he refuses to do so, he refuses to be free; and the commanding and constraining power of the State is without limit because it has no other object and no other effect than to constrain man to continue to be free. The greater the power of the State, the freer the individual. The idea occurs frequently in numerous other passages of the *Contrat Social*. The third chapter of the second book is entitled: *Whether the General Will can Err*, and begins with this sentence: "It follows from what precedes that the general will is always right and always tends toward public utility."

In the fourth chapter of the second book we read: "What is, properly speaking, an act of sovereignty? It is not an agreement of the superior with the inferior, but an agreement of the body with each one of its members. . . . So long as the subjects are bound only to such agreements they obey nobody other than their own will."

The second chapter of the fourth book has probably the most characteristic passage: "Apart from the primitive contract, the voice of the greatest number always binds all others; it is a consequence of the contract itself. But, it is asked, how a man can be free and under obligation to conform to wills which are not his own? How are opponents free and yet bound by laws to which they have not consented? I answer that the question is badly phrased. The citizen consents to all the laws, even to those that are passed in spite of him, and even to those that punish him when he dares to transgress them. The unvarying will of all the members of the State is the general will; it is by means thereof that they are citizens and are free. When a law is proposed in the assembly of the people, what is asked of them is not precisely whether or not they approve the proposition or whether they reject it, but whether it be in conformity with the general will, which really is theirs. Each one in voting expresses his opinion on the matter, and by the counting of the votes declaration of the general will is obtained. When therefore an opinion contrary to my own prevails it proves nothing more than that I must have been mistaken and that what I supposed to be the general will was not. If my particular viewpoint had prevailed, I should have done something else than what I really willed; and in that case I should not have been free."

Man is free, then, only when he is passively in submission to the orders of the general will. According to Rousseau the all-powerful State creates the liberty of the individual. It will be found that Hegel, in another way, says nothing different.

## V

It is important, nevertheless, to notice that, according to Rousseau, the act of sovereignty of itself is binding upon all individual wills without limitation. The act of sovereignty is the law. But when is it law? Rousseau explains that very clearly.

"When all the people," he writes, "decree concerning all the people, they consider only themselves. And if a relation is then created, it is between the whole from one standpoint and the whole from another, indivisible, however, at all times. Then the matter concerning which they decree is general, like the will that decrees. Such an act I call a law."<sup>4</sup>

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<sup>4</sup> *Contrat social*, Bk. II, chap. VI.



And a little further on he writes: "When I say that the object of laws is always general, I mean that the law considers subjects collectively and actions as abstract; never a man as an individual, nor an action as particular. . . . According to this idea we should not ask any longer who may enact laws, inasmuch as they are acts of the general will; nor whether the prince is above the laws, inasmuch as he is a member of the State; nor whether the law can be unjust, inasmuch as no one is unjust with respect to himself; nor how one can be free and still bound by laws, inasmuch as they are only registrations of our wills. Furthermore, we see that the law unites the universality of the will to that of the object; and what a man, whoever he may be, orders in his own right, is not a law; neither is what the sovereign himself orders about a particular object a law but a decree; not an act of sovereignty, but of magistracy."<sup>5</sup>

This constitutes, we must admit, a certain limitation upon the power of the State. The sovereign can impose commands and restrictions without limit on individuals; but he can do so only on condition that these commands and restrictions be the same for everybody; because if he imposed them on some and not on others, the decree so made would not be a decision through a general medium, but one through individual channels, thereby ceasing to be an act of sovereignty.

Hence Rousseau writes very logically as follows: "We can see by this that the sovereign power, wholly absolute, wholly sacred, wholly inviolable as it is, does not exceed and cannot exceed the limits of general covenants, and that every man can fully dispose of that which has been left to him of his goods and of his liberty by these covenants; so that the sovereign is never in a position to impose more on one subject than on another, because when the transaction becomes particular his power is no longer competent."<sup>6</sup>

Finally, according to Rousseau, the State is omnipotent. It can do anything by means of a general enactment voted by the assembly of the people, expressing the general will — the will of the State. This will cannot make a mistake. It creates law because it so wills; and man remains free, whatever be the restrictions that the general will imposes upon him acting through a general medium. Rousseau himself summarized his doctrines in this way: "In every political

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<sup>5</sup> *Contrat social*, Bk. II, chap. VI.

<sup>6</sup> *Contrat social*, Bk. II, chap. IV.

state there must be a supreme power, a central organization to which everything will be referred, a principle from which everything shall be derived, a sovereign who shall be all powerful . . . ; it is of the essence of sovereign power that it be unlimited; it must be of unlimited power to be of any value."<sup>7</sup>

The formula for that matter was not new. It had been promulgated in almost the same terms in the seventeenth century by the Protestant pastor, Jurieu, one of the forerunners of Rousseau, who, by mental aberrations which I do not understand, has been sometimes presented as a liberal.<sup>8</sup> The celebrated pastor wrote: "There must be in societies a certain authority which need not be consonant with reason in order to give validity to its acts; now this authority is vested only in the people."<sup>9</sup>

Rousseau's doctrine was also only a new principle applied to the conception of freedom in the ancient city, a conception which Fustel de Coulanges and Hermann have made so clear. The former says: "It is a singular error among all human errors to believe that in the ancient cities man enjoyed liberty. He did not think that there could exist rights as against the city and as against his gods. To have political rights to vote . . . that is what they called liberty. But man was none the less enslaved to the State."<sup>10</sup> And Hermann writes: "As against the State the freedom of a Greek in reality consists simply in knowing that he is dependent on no power since each of his fellow citizens is on equality with him by the power of the law."<sup>11</sup> Is not this exactly the doctrine of J. J. Rousseau?

## VI

And nevertheless, due to the prestige of style and the privileges of eloquence, the doctrine of the *Contrat Social* has spread broadcast in the world and has exercised a profound influence on political ideas. It is to the honor of France not to have applied it except for a very brief moment of its history. It is to the credit of French jurists always to have repudiated, by a very large majority, the absolutist conclusions formulated by J. J. Rousseau. Undoubtedly,

<sup>7</sup> Lettres écrites de la montagne, pt. II, letter VII.

<sup>8</sup> As to Jurieu, see Lureau, Les doctrines politiques de Jurieu, 1914.

<sup>9</sup> Jurieu, XVIII<sup>e</sup> lettre pastorale, Rotterdam, 1688, p. 418.

<sup>10</sup> Fustel de Coulanges, La cité antique, new edition, p. 267.

<sup>11</sup> Hermann, Lehrbuch der griechischen Rechtsalterthümer, Thalheim's edition, 1884, p. 28.



we have often invoked the authority of the citizen of Geneva, but in attributing to him doctrines which were not his. We placed under his authority the conception of natural individual rights protected by the social man and thereby limiting the powers of the State. We have seen that such was never his belief. But in attributing it to him we did so in good faith.

In fact, Rousseau's theories of absolutism have always been energetically repudiated in France, as well by the partisans of the metaphysical conception of the State as by those who uphold the realistic conceptions. The latter conceptions, as we shall see later, owe their origin in France above all to the difficulty that, do what we might, we could never, under the metaphysical conception of the State, construct a solid foundation for the juridical limitation of political powers. It goes without saying, then, that the realistic jurists have energetically repudiated the doctrines of the *Contrat Social*.

But the partisans of the metaphysical conception of the State have equally repudiated these doctrines of absolutism. I desire to quote at this point a great professor, who up to his recent death, was the most representative authority in France as to the metaphysical conception of the State. I mean Esmein, the illustrious and the lamented Esmein. In the last edition of his *Précis de droit constitutionnel* he writes: "It really seems as if sovereignty must necessarily be unlimited, and that consequently the right of the State should also be unlimited. [Esmein quotes in a footnote the passage, before mentioned, from the *Lettres de la montagne* in which J. J. Rousseau affirms this omnipotence of the sovereign.] Such was incontestably the conception of the ancient Greek with respect to the sovereign. It is on the contrary one of the best established and the most prolific of ideas of modern times that the individual has rights anterior and superior to those of the State, which consequently must be respected by the State. . . . Once this principle is admitted, it forms with all its consequences an essential element of constitutional law. In fact, it determines more narrowly than any other the limits upon the exercise of sovereignty, because it forbids the sovereign to make laws which interfere with individual rights, and commands it to promulgate those necessary to assure the efficacious enjoyment of these rights."<sup>12</sup>

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<sup>12</sup> Esmein, *Droit constitutionnel*, Barthélemy's edition, 1915, pp. 29 and 30.

In Germany, on the contrary, the pure theory of Rousseau has been the direct inspiration of all the systems elaborated for the purpose of establishing the unlimited power of the State while preserving the appearance of protecting and guaranteeing the autonomy of the individual. The central idea of the *Contrat Social*, according to which man is only free because of being a member of the all-powerful State, is that he is all the freer the more energetically the omnipotence of the State exerts itself; that the man whose acts of individual will are forbidden and condemned by the general will does not cease being free because, on the contrary, the general will does nothing more than to *compel him to be free*. This idea is found again, as such, in the doctrines of Kant and of Hegel. In their philosophical jargon they say nothing which the philosopher of Geneva had not clearly stated. Without doubt on many points of detail Kant and Hegel diverge from the *Contrat Social*; but the fundamental idea is exactly the same: Man is free only by means of and as part of the State, and the omnipotence of the latter not only allows the autonomy of the individual to subsist intact but alone assures its reality.

The *Contrat Social* along with the civil religion already announces the deification of the State. Kant will teach the mystery of the political trinity patterned after the Christian mystery of the divine Trinity. Hegel will proclaim solemnly and without circumlocution the divinity of the State, which is thus the incarnation of good in itself. And so for him as for Rousseau, it is only through the State that the individual finds a full realization of his moral being; the power of the State is unlimited, and this omnipotence alone assures and guarantees the autonomy of the individual.

Kant and Hegel were not jurists by profession; but their theories of right have directly inspired all the professional jurists of contemporary Germany.



## CHAPTER III

## KANT'S POLITICAL AND JURIDICAL DOCTRINE

KANT'S political and legal philosophy, which is allied with his philosophical system as a whole, has been set forth particularly well in a book entitled *Éléments métaphisiques de la doctrine du droit*.<sup>1</sup> In the two works entitled *Critique de la raison pratique* and *Fondements de la métaphysique des mœurs* Kant wished to establish as the fundamental principle of all morality, the law of duty — the categorical imperative — this principle being determined by a method of pure reason. Kant desired thereafter to develop the rational consequences of the principle stated; and that is what he calls the metaphysic of morals, of which the book previously mentioned, namely, *La doctrine du droit*, forms the first part.<sup>2</sup>

Now what is it exactly that Kant means by metaphysic of morals?

## I

By metaphysics Kant means a theory of knowledge *a priori*, based on simple concepts. And so all moral rules must be derived logically from a principle; they are essentially *a priori* and are only moral laws as such.

The metaphysic of morals, according to the philosopher, is comprised of two parts. One, the philosophy of law, which treats of such duties as can be made subject to actual legislative control and called by Kant, for this reason, legal duties. The other, the doctrine of virtue, consisting of those duties which cannot be subjected to legislation, and which, depending only on one's state of mind, are thus purely duties imposed by the conscience. To these two parts of the metaphysic of morals or the general theory of duties Kant has devoted a special treatise.<sup>3</sup>

<sup>1</sup> *Éléments métaphisiques de la doctrine du droit* (Part I of *La métaphysique des mœurs*), J. Barni's translation, Paris, 1853. [There is an English translation, entitled "Kant's Philosophy of Law," by Hastie, 1887. — Translator.]

<sup>2</sup> Barni, Introduction to the translation of *Éléments métaphisiques de la doctrine du droit*, p. 22.

<sup>3</sup> Barni, *l. c.* p. 22.

Thus the philosophy of law (*la doctrine du droit*) includes such outward manifestations as can be the object of actual legislative control, not depending only on conscience, as, for example, the obligation of keeping one's engagements. These duties are not conscientious scruples, but legal duties, the theory under which they are expounded being a theory of right.

The following question then arises: What are the immutable principles which are to serve as a foundation for all regulations of such outward action, or in other words what are the principles of natural law (*du droit naturel*)? Above and superior to all codes there are rules which, far from deriving their value from a piece of legislation, furnish to each enactment its type and its criterion. They are the laws which emanate from reason itself.

Kant writes: "What is the universal criterion by means of which we can recognize in general the just from the unjust? That is what the jurist cannot determine, unless he disregards, for a time, these empirical principles, and if (while using these laws as a conducting current) he does not seek the source of his judgments in pure reason, as that through which alone the foundation of all positive legislation is possible. A philosophy of law purely empirical may be (like the wooden head in the fable of Phaedra) a very beautiful head, but alas without brains."<sup>4</sup>

Then if we consider the conception of law from this point of view, and if we look at it in connection with the obligation to which it corresponds, it assumes the following form: First, right applies only to the external relations of men among one another; right only appears in connection with the relations of individuals with one another; the idea of right is therefore that of a relation between persons. Second, this relation is not founded on pure desire or on simple need; it is a relation between the liberty of each person and that of all others. Third, in this reciprocal relation we should not consider the particular end which each person can propose for himself as to the use which he is to make of his liberty. The question is to know whether such use has in it anything contrary to liberty itself, of such a nature that it is regulated by a general law (*loi*) which consists essentially in the concurrence of the liberty of each with the liberty of all.

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<sup>4</sup> Kant, *Doctrine du droit*, Barni's translation, pp. 42 and 43.



Kant thus concludes: "Right is therefore the sum of the conditions by means of which the will of one can be in harmony with that of others according to a general rule (*loi*) of liberty. All action is in conformance with right or justice, which permits the free will of each to be in agreement with the liberty of all according to a general rule (*loi*)."<sup>5</sup>

Right thus understood implies the faculty of constraining. In fact as soon as a certain freedom of action has conformed to the principle of general liberty, it is just. All that is contrary to it is, by that very fact, contrary to this principle and consequently unjust. Resistance to anything preventing such harmony is then in conformance with the principle of general liberty and therefore is just. "Consequently," says Kant, "right implies, according to the principle of contradiction, the faculty of constraining one who infringes it."<sup>6</sup>

Right is thus finally a moral faculty of obliging others and of obliging them under the sanction of constraint. "It is a legitimate faculty in regard to them."<sup>7</sup> Thus understood right divides itself into *innate right* and *acquired right*.

Innate right (*le droit inné*) is nothing more or less than natural liberty, the endowment of each human being, just because he is human. This liberty is inviolable in each person, at least to the extent that it can remain in harmony with the liberty of others. "This unique and native right, which each possesses simply because he is a human being, is liberty — independence from all constraint imposed by the will of anybody else — inasmuch as it is in agreement according to such general principle with the liberty of every one."<sup>8</sup>

All men, having the same innate right, the same liberty, the same autonomy, are naturally equal among themselves; they are naturally free and equal, and this equal liberty of all is, Kant reiterates, "the independence which does not allow us to be forced by others into doing anything more than that to which we can oblige them in turn. . . . It is this characteristic of being his own master which man possesses."<sup>9</sup>

As to *acquired rights*, they are those which man acquires in

<sup>5</sup> Kant, *l. c.* pp. 43 and 44.

<sup>7</sup> *l. c.* pp. 54 and 55.

<sup>9</sup> *l. c.* p. 55.

<sup>6</sup> *l. c.* p. 45.

<sup>8</sup> *l. c.* p. 55.

organized society or in the State, and this definition brings forward, precisely, the problem of the State.

## II

Kant's philosophy of law, up to this point, singularly resembles that which is contained in the Declaration of Rights of 1789. It is, we may say, the classical individualistic doctrine. But, taking into consideration the State, what is to become in the Kantian system of this autonomy of the individual so energetically affirmed by the philosopher of Königsberg? What is the State? What is the extent of its power? How can the sovereignty of the State and the autonomy of the individual be reconciled with each other?

The autonomy of the individual, which we have just defined, is that of man in the state of nature. But it is important to note that in the Kantian doctrine the state of nature is not, as in the conception of most of the French philosophers of the eighteenth century and of J. J. Rousseau, that of man living alone and without association with other men. The state of nature is not the opposite of the social state, because even in the state of nature there is nevertheless a society, be it only that of the family. The state of nature for Kant is simply the opposite of the civil state; *i. e.* the opposite of that in which what belongs to me and what belongs to you is guaranteed by positive laws and protected by public powers.

When a society is constituted in such a way that what is yours and what is mine are guaranteed to us by positive laws and by public powers, it is a constituted State; there exists a State.

It is, for that matter, an innate duty for individuals to organize themselves into a State. For "if we imagine men as good and as friendly to right as we should desire, this duty results *a priori* from the rational idea of a state which is not juridical before the establishment of a legal and public state; the individuals, the peoples, and the States, as regards one another, could have no guarantees with respect to one another against violence. . . . Consequently, the first thing we must admit, if we do not wish to renounce all idea of right, is this principle: that it is necessary to emerge from the state of nature where each one acts in his own way, and to unite with each and every one in common submission



to an exterior legal and public constraint . . . ; that is to say, we must first of all become associated in a civil state.”<sup>10</sup>

Man enters voluntarily into such relation as a result of a contract. A capital passage from Kant which was directly inspired by J. J. Rousseau should be quoted here: “The act by which the people organize themselves into a State, or rather the simple idea of this act which alone permits conceiving of its legitimacy, is the *original contract*, by virtue of which all the people set aside their freedom of action to resume it immediately thereafter as members of a commonwealth, that is, to receive back their liberty from the people, as a State. And we cannot say that the State, or that men in the State, have sacrificed for a certain end to be attained a part of their innate liberty of conduct. But each one has renounced entirely savage and unregulated liberty, in order to find his general liberty once more intact in a legal dependence, that is to say, in a juridical state, since this dependence results from his own legislative will.”<sup>11</sup>

Is not the influence of Rousseau evident? Let us re-read chapter six of the first book of the *Contrat Social* entitled *Concerning the Social Pact*, particularly this sentence: “To find a form of association which will defend and protect the person and the goods of each associate by the combined strength of all and by which each one, uniting himself with all, need nevertheless obey only himself, thus remaining as free as before. Such is the fundamental problem the solution of which is found in the social contract. . . . If, then, we discard from the social pact what is not essential to it, we shall find that it reduces itself to the following terms: each one submits in common with the others all his power to the absolute control of the general will, and receives back again as an individual an indivisible part of the whole.”

### III

It is not only in expounding the theory of the formation of the State by the social contract that Kant appears as the disciple of Rousseau, but also in asserting the unlimited power of the State and in declaring that this omnipotence of the State does not exclude that which is quite contrary to it, namely, the liberty of the individual. In this respect he even goes further than the master

<sup>10</sup> Kant, *l. c.* p. 167.

<sup>11</sup> *l. c.* p. 172.

of Geneva, and he differs from the latter markedly in the application of the principle.

The passage which has been mentioned above shows Kant affirming like Rousseau that the individual, while being in submission to the all-powerful State born of the social contract, nevertheless keeps his general liberty intact, since this dependence results from his own legislative will. Rousseau had said: "The individual obeys no one, since in obeying the law he obeys only himself." More obscurely Kant says the same thing. And he does not even stop there.

Rousseau stated very clearly and very forcefully that the commanding power of the State was limitless, only on condition that it manifested itself by an act of sovereignty, properly so called, that is, by decision of the general will expressed directly by the assembly of the people and carried out by way of general provision. Rousseau maintained at the same time the unity and the indivisibility of sovereignty in its nature and in its exercise. He had even criticised with a biting irony, unquestionably directed toward Montesquieu, those who pretended to divide sovereignty while at the same time maintaining its existence intact as an indivisible unit. He compared them to "those Japanese jugglers who dismember a child, so they claim, before the eyes of the spectators, then by throwing all the members into the air — one after the other — cause the child to come down once more a living and complete whole."<sup>12</sup>

Kant would perform the trick of the Japanese jugglers. To use Rousseau's formula,<sup>13</sup> "after having dismembered the social body by a trick worthy of performance at a fair, he puts the pieces together again without our knowing how." The illusion is complete through the intervention of mystery and divinity. But the practical consequence is the reinforcement of the omnipotence of the State; the individual is no longer in the presence of a single sovereignty but of three. It is the political trinity patterned after the divine Trinity.

The State, says Kant, is one, but it is at the same time threefold. It is made up of three elements; of three elements which manifest their will separately. Each one of these elements is sovereign; each one of the manifestations of their will is sovereign;

<sup>12</sup> Contrat social, Bk. II, chap. II.

<sup>13</sup> Contrat social, *ibid.*



and, nevertheless, there is only one State, only one sovereign, one and indivisible in its essence. There is only one God; there are three divine persons, each having a divine will; and nevertheless, there is only one divine will, one and indivisible.

Kant writes in fact thus: "Every State contains within itself three powers, that is to say, the unity of the general will may be decomposed into three persons, *Trias Politica*; the sovereign power (*Herrschergewalt*), which is found in the person of the legislator; the executive power (*Vollziehendegewalt*), in the person who controls the enforcement of law, and the judicial power (*Rechtsprechendegewalt*), in the person of the judge, who renders unto each that which belongs to him according to law. It is like the three propositions of a practical syllogism: the major, which contains the law of a will; the minor, the command to act according to law, that is to say, the principle of *subsumption* of action according to law; and finally the conclusion, the judgment, which decides what is right in the case in question." <sup>14</sup>

There are, then, three distinct powers in the State, three powers, which we shall see later, in spite of their different names, are equally sovereign and omnipotent. But there is also a unity and logical indivisibility of the State, which in its essence is at the same time one and threefold. It is indeed the mystery of the political trinity patterned after the mystery of the divine Trinity, as the omnipotence of the State is patterned after the divine omnipotence.

#### IV

In Kant's doctrine, as in that of Rousseau, the sovereignty of the State manifests itself through the law. But for Kant it is the legislative power alone that requires charter of sovereignty; and the legislative power is the very will of the State in its very essence, that is, proceeding from no other, in the same way that the divine will is the will of God, the Father, which does not proceed from any other. "The State," says Kant, "is the union of a certain number of men under juridical laws." <sup>15</sup> Whence it follows that "the legislative power can belong only to the collective will of the people." <sup>16</sup>

<sup>14</sup> Kant, *Doctrine du droit*, Barni's translation, pp. 168 and 169.

<sup>15</sup> Kant, *l. c.* p. 166.

<sup>16</sup> Kant, *ibid.*

This power is limitless. But in nearly the same terms as Rousseau, Kant asserts that, in spite of this omnipotence of the legislative power, the autonomy of the individual remains entire because the legislative decision, emanating from the general will, can never do injury to the individuals who form this general will. The individuals having to obey only themselves are in subservience to nobody. This same fallacy is ever present.

"The legislative power," writes Kant, "can only belong to the collective will of the people. For as all right ought to proceed from this power it can do no wrong to any one through its laws. Now when some one individual decides something with reference to another, it is always possible that he perpetrate some injustice. But injustice is impossible in what he determines for himself. Hence it is only the united and consenting will of all, in so far as each decides the same thing for every one and every one for each — it is only, I say, the collective will of all the people that can be legislative."<sup>17</sup>

Kant adds a few pages further on: "We cannot say that . . . man in the State sacrifices a part of his inborn external freedom for a particular purpose. But he has renounced entirely his savage and unregulated liberty to find again all his general freedom intact in a legal dependence, that is, in a juridical State, since this dependence results from his own legislative will. . . . We may say that the will of the legislator, relatively speaking, in respect to what belongs to you and me, is irreproachable."

The German word used by Kant is *untadelig*, and the philosopher adds himself, in parenthesis, the French word *irrépréhensible*.<sup>18</sup> Under cover of this wise philosophical terminology, it is still simply the sophism of Rousseau: the legislative omnipotence of the State allows the liberty of the individual to subsist intact, for the legislative will of the State is the will of the generality of individuals forming the nation, and subsequently these are only in submission to their own will.

We must add that Kant, remaining in the realm of pure rationalism, considers the general will in itself, without taking his stand in realities, where this general will is only, to speak truthfully, the will of the majority. Criticisms of Kant have not failed to call attention to this, and to work out from it an objection to his doc-

<sup>17</sup> Kant, *l. c.* p. 169.

<sup>18</sup> Kant, *l. c.* p. 173.



trine.<sup>19</sup> The philosopher would certainly have answered like J. J. Rousseau that the question should not be asked or is poorly phrased; that the question is only to learn when there is a general will, and that there is certainly a general will when the majority of the people has pronounced on one side. Like Rousseau he would have added that, if I am of the minority, that proves very simply that what I thought was the general will was not, and that in compelling me to obey the majority they merely compel me to accept my freedom.

## V

But Kant does not stop here. We perceive, in fact, in his philosophy the first elements of the Hegelian philosophy of the divine character of the State, which is to be an important factor in the formation of contemporary German theories of absolutism and the mainspring of the imperialistic and pan-Germanist policy of the inseparable German government and German people.

Rousseau, while constructing his theory on the basis of the metaphysical and *a priori* statement that the social contract creates a common ego (*un moi commun*), which is the foundation of the indivisible and sovereign will of the State, at the same time one and collective, still remained in the domain of terrestrial affairs. Rousseau's State is a purely human creation; its power has nothing divine about it. With Kant it is not so; the power of the State is truly divine, and it is as such that it commands the respect and the veneration of men.

The power of the State is divine in its essence. Like the God of the Christians, it is, as we have seen, one and threefold. The political hypotheses resemble the theological hypotheses; and we have a dogma of the political trinity similar to the dogma of the divine Trinity. The power of the State is divine, because it is irreproachable, that is to say, infallible, and because of the fact that the people cannot inquire into its origin.

The people must always obey it, and, by virtue of that fact, must always be in obedience to the men who in fact hold the reins of authority. There has never been and will never be a legitimate revolution. The people must always obey; they must always obey

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<sup>19</sup> See especially Barni's Introduction to the French translation of the *Doctrine du droit*, p. 174.

even those who have taken possession of the government by force and who, consequently, hold it only by means of force.

In verity, I must smile when I hear some of my junior colleagues <sup>20</sup> say: Modern Germany of absolutism and imperialism is no longer the Germany of Kant, the philosopher who built upon indestructible foundations the autonomy of the human person — the indefeasible right of the individual against the omnipotence of the State; it is the Germany of Hegel and of Jhering. No, let them not oppose Kant and Hegel. Both have worked out the same thing; like Hegel, Kant, in spite of his categorical imperative, in spite of his dream of perpetual peace, has been one of the greatest artisans of conceptions of imperialism and absolutism in the Germany of today.

I must quote at length the passages from his *Philosophy of Law* in which the ideas just summarized have been most clearly expressed.

"The origin of the supreme power," writes Kant, "from a practical point of view is inscrutable by the people who are under its authority. In other words, the subject should not reason too curiously as to its origin, as if the right of obedience due to it were to be doubted (*ius controversum*)."<sup>21</sup> What, then, is this intangible autonomy of the human person which Kant would defend, and which does not permit the individual to scrutinize the legitimacy of the authority of those who claim the right to issue commands to him?

Nor is the philosopher of Königsberg content to stop here. He continues: "For as the people, in order to be able to adjudicate with a title of right regarding the supreme power in the State must be regarded as already united under one common legislative will, it cannot judge otherwise than as the present supreme head of the State wills."<sup>22</sup> An attempt at demonstration follows: "Has

<sup>20</sup> See especially M. Ripert's article in which it is said: "Of all names [Goethe and Kant] are sacred . . . ; but it is not through Goethe and Kant that intellectual Germany can redeem itself today." (*Le droit en Allemagne et la guerre actuelle*, *Revue internationale de l'enseignement*, numbers published on May 15 and June 15, 1915.) As to Goethe's Germanism and imperialism, see a remarkable article by M. Louis Bertrand, *Revue des deux mondes*, the number published on April 15, 1915.

<sup>21</sup> Kant, *Doctrine du droit*, Barni's translation, p. 177. [I have translated here from the original (Kant, *Metaphysische Anfangsgründe der Rechtslehre*, 2 ed., 203). See Hastie, *Kant's Philosophy of Law*, 174. — Translator.]

<sup>22</sup> Kant, *ibid.* [I have followed Hastie's version, *Kant's Philosophy of Law*, 174. — Translator.]



a real contract of subjection in fact originally preceded; or, on the contrary, is it not the power which has first appeared, the law following afterwards? And can it be otherwise? These are entirely idle questions for the people who are now in submission to civil law; and at the same time they are dangerous questions with respect to the existence of the State. If, after having looked into the original creation, a subject wished to resist the actual reigning authority, such authority, by its laws, could rightfully punish him, could put him to death or banish him as being without the operation of the law.”<sup>23</sup>

So we find that the sovereign law of the State is so sacred that it is a crime, punishable by death or banishment, not only to disobey it, but even to doubt its legitimacy and to resist it passively. This law is therefore divine because the characteristic of the divinity is precisely that of compelling obedience to it, as such, and of making sacrilegious those who deny, resist, or contest its divinity.

Yes, says Kant, this sovereign law of the State is divine. “A law which is so holy and inviolable that it is *practically* a crime even to cast doubt upon it, or to suspend its operation even for a moment, is represented of itself as necessarily derived from some Supreme, unblameable lawgiver. And this is the meaning of the maxim, ‘All authority is from God’; which proposition does not express the *historical foundation* of the civil constitution, but an ideal principle of the practical reason. It may be otherwise rendered thus, ‘It is a duty to obey the law of the existing legislative power, be its origin what it may.’ Hence it follows that the supreme power in the State has only rights, and no (compulsory) duties toward the subject.”<sup>24</sup>

The ruler of the State is thus truly divine, because God alone has rights without corresponding duties. Let them not talk to us any more about the liberalism of Kant; let them not tell us again that he has solemnly maintained the existence of the intangible liberty of the human person in his relation to the State; let them not oppose Kant to Hegel. Both have made the State divine, affirmed its omnipotence, proclaimed that the ruler of the State has only rights and no duties, and created the monstrous mentality of modern Germany.

<sup>23</sup> Kant, *Doctrine du droit*, Barni's translation, p. 178.

<sup>24</sup> *Ibid.* [I have used Hastie's translation (pp. 174-175) here. — Translator.]

## VI

Kant is not content with declaring that the legislative power is omnipotent; he also affirms the unlimited power of the *regent*, that is, of the man or group of men who are in control of the executive power.

Rousseau in speaking of the omnipotence of the sovereign had in mind only the general will directly expressed by the people. According to the philosopher of Geneva the government is the executive agent of the sovereign and no more. His acts only have validity and obedience is due them only in so far as they are in conformity with the general will, according to which such acts can be only acts of an executive nature. Rousseau, we have said, does not admit of the separation of powers. Sovereignty is one and indivisible; it is vested wholly in the general will of the people the decisions of which the government is charged to see executed.<sup>25</sup>

According to Kant, on the contrary, the *regent*, the prince, the government (all these synonymous expressions designating the man or group of men which to him meant the same thing as monarch — the incarnation of the executive power) is also vested, just as the legislator is, with an unlimited power without recourse. There is, therefore, not only an absolutism of the legislator, according to the philosophy of Rousseau, but also an absolutism of the monarch vested with executive power.

This is, for that matter, the logical consequence of the threefold conception of the political power. As God, the Son, is begotten by God, the Father, and as divine as He, so the executive power is begotten by the legislative power and is as sovereign as the latter. Sovereignty is one and indivisible; it is, nevertheless, in the unity of its essence composed of three elements, each one personified and all equally sovereign, as each one of the divine attributes is a divine person, as we have said before. The legislative power is *irreproachable*. "The executive function of the supreme ruler," says Kant, "is to be regarded as *irresistible*."<sup>26</sup>

Kant explains, it is true, that the orders which the holder of executive power gives to his ministers, to the magistrates, or to the people, are ordinances and not laws because they are particular

<sup>25</sup> *Contrat social*, Bk. III, chap. I.

<sup>26</sup> Kant, *l. c.* p. 173. [I have used Hastie's translation, p. 170. — Translator.]



decrees. "A government," he writes, "acting as an executive and at the same time laying down the law as the legislative power, would be a despotic government."<sup>27</sup>

But what guarantees are vested in the people against the ever possible despotism of the regent and of his government? That none exists is the answer of the philosopher. There can exist none, simply because the executive power, which is inherent in the ruler, is *irresistible* by definition. There does not exist, there cannot exist, there must not exist any guarantee against governmental despotism. The people can never refuse to obey the regent, that is, the monarch, and the representatives of the people can neither limit nor control governmental power. All limited monarchy is an absurdity.

Here must be inserted a paragraph which can leave no doubt as to Kant's belief: "Further, if the ruler or regent, as the organ of the supreme power, proceeds in violation of the laws, as in imposing taxes, recruiting soldiers and so on, contrary to the law of equality in the distribution of political burdens, the subject can interpose complaints and objections (*gravamina*) to this injustice, but not active resistance."<sup>28</sup> The logical conclusion is that the executive power is *irresistible* by definition.

The people cannot revolt against the legislative power nor can they revolt against the monarch. Moreover, he says: "And least of all when the supreme power is embodied in an individual monarch is there any justification for seizing his person or taking away his life. The slightest attempt of this kind is high treason; and a traitor of this sort who aims at the overthrow of his country may be punished, as a political parricide, even with death."<sup>29</sup>

I admit that Kant condemns a tyrannicide, and I approve. I believe also that he condemns insurrection; but in such disapproval we find ourselves at the culminating point of his philosophy, namely, the affirmation of personal power, without limit and without check as regards the monarch — a teaching which made way for the German doctrine of the *Herrscher*.<sup>30</sup> The passages in which Kant formulates this proposition are worth quoting at length:

"There cannot even be an article contained in the political

<sup>27</sup> Kant, *l. c.* p. 174. [Hastie, p. 171. — Translator.]

<sup>28</sup> *l. c.* p. 178. [Hastie, 175. — Translator.]

<sup>29</sup> *l. c.* p. 180. [Hastie, 176-177. — Translator.]

<sup>30</sup> See *infra*, Chap. VIII, sections III and following.

constitution that would make it possible for a power in the State, in case of the transgression of the constitutional laws by the supreme authority, to resist or even to restrict it in so doing. For whoever would restrict the supreme power of the State must have more, or at least equal, power as compared with the power that is so restricted; and if competent to command the subjects to resist, such a one would also have to be able to protect them, and if he is to be considered capable of judging what is right in every case, he may also publicly order resistance. But such a one and not the actual authority would then be the supreme power; which is contradictory. The supreme sovereign power, then, in proceeding by a minister who is at the same time the ruler of the State, consequently becomes despotic; and the expedient of giving the people to imagine — when they have properly only legislative influence — that they act by their deputies by way of limiting the sovereign authority, cannot so mask and disguise the actual despotism of such a government that it will not appear in the measures and means adopted by the minister to carry out his function. The people, while represented by their deputies in parliament, under such conditions, may have in these warrantors of their freedom and rights, persons who are keenly interested on their own account and their families, and who look to such a minister for the benefit of his influence in the army, navy, and public offices. And hence, instead of offering resistance to the undue pretensions of the government — whose public declarations ought to carry a prior accord on the part of the people, which, however, cannot be allowed in peace — they are rather always ready to play into the hands of the government. Hence the so-called limited political constitution, as a constitution of the internal rights of the state, is an unreality; and instead of being consistent with right, it is only a principle of expediency. And its aim is not so much to throw all possible obstacles in the way of a powerful violator of popular rights by his arbitrary influence upon the government, as rather to cloak it over under the illusion of a right of opposition conceded to the people.”<sup>31</sup>

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<sup>31</sup> Kant, *Philosophy of Law*, Barni's translation, pp. 179 and 180. [Hastie, pp. 175-176. — Translator.]



## VII

If no power can limit the authority of the regent — *irresistible* by definition — no more can there be any legitimate revolution against him, however tyrannical his authority may be. There may be occasion to change a constitution, when it is vicious in its provisions or in its operation. But this change can only be realized by the sovereign itself, by means of reformation, not by the people by means of revolution. "In the State," says Kant, "whose constitution is such that the people can legally oppose, by their representatives, the executive authority and its representatives (what is called a limited constitution), there can be no active resistance, but only one negative in its nature, that is to say, a refusal to act by the people represented by the parliament."<sup>32</sup> Even though revolution be illegitimate, a revolution can come to pass in a country; and, as a matter of fact, there have been numerous revolutions which have by violence overthrown the established government and have instituted a new régime. When the sovereign shall have ratified this revolution and shall have given a legal character to this new government, obedience is unquestionably due it. But before such ratification is obedience due a government born in fact of a revolution?

It seems that if Kant had been consistent with himself, he should have answered no. Every revolution being declared illegitimate, every government instituted by a revolution must be illegitimate; and no obedience can be due it. Nevertheless, so great is the superstitious respect of the philosopher for every established governmental power, whatever be its origin, that Kant affirms clearly that obedience is due every government sprung in fact from a revolution, because, although born of a revolution, it realizes the idea of government.

"For that matter," writes the philosopher, "when a revolution has once taken place and a new constitution is set up, the illegality of its origin and of its foundation could not relieve the subjects from the obligation of submitting themselves, as good citizens, to the new order of things; and they could not honestly refuse to obey the authority which actually has possession of the reins of government."<sup>33</sup> It is the necessary and logical consequence of this idea

<sup>32</sup> Kant, *l. c.* p. 183.

<sup>33</sup> Kant, *l. c.* p. 183.

that all authoritative power is sacred — is divine — and that it is never within the people's rights to ask for an account of its origin.

Even in Kant's time, nevertheless, this doctrine was sharply criticized, notably in an article published in the *Göttingen Journal* on the eighteenth of February, 1797. Kant thought that he ought to answer it with explanatory remarks.<sup>34</sup> He says: "While this view [which teaches the beauty of obeying the established power, whatever be its origin] is admitted to be paradoxical, I hope when it is more closely considered it will not at least be convicted of heterodoxy. . . . Now, it is asserted that obedience must be given to whoever is in possession of the supreme authoritative and legislative power over a people; and this must be done so unconditionally by right, that it would even be penal to inquire publicly into the title of a power thus held, with the view of calling it in doubt, or opposing it in consequence of its being found defective. Accordingly it is maintained, that '*Obey the authority which has power over you*' (in everything which is not opposed to morality), is a categorical imperative. This is the objectionable proposition which is called in question; and it is not merely this principle which founds a right upon the fact of occupation as its condition, but it is even the very idea of a sovereignty over a people obliging me as belonging to it, to obey the presumptive right of its power, without previous inquiry, that appears to arouse the reason of the reviewer." <sup>35</sup>

This, then, is the disputed doctrine very clearly stated. What is Kant's answer to the objection? In truth, he gives us nothing which refutes it, but only a new assertion as to the authority attendant upon the idea of power, and of the sanctity of the power of the State, even of that established by force. The following passage is worth quoting.

"The *idea* of a political constitution in general, involves at the same time an absolute command of a practical reason that judges according to conceptions of right, and is valid for every people, and as such it is holy and irresistible. And although the organization of a state were defective in itself, yet no subordinate power in the state is entitled to oppose active resistance to its legislative

<sup>34</sup> Remarques explicatives, published after La doctrine du droit, Barni's translation, p. 261.

<sup>35</sup> *Ibid.*, pp. 261 and 262. [Hastie, p. 256. — Translator.]



head. Any defects attaching to it ought to be gradually removed by reforms carried out on itself." <sup>36</sup>

Not only must we obey a State whose constitution is bad but we still must obey even when the power is in the hands of an usurper, because the power of the State is always sacred by virtue of its existence, whatever may be its origin. Kant adds: "The will of a people is naturally un-unified and consequently it is lawless; and its unconditional subjection under a sovereign will, uniting all particular wills by one law, is a fact which can only originate in the institution of a supreme power, and thus is public right and law founded." <sup>37</sup>

All established power then has its origin, as a fact, in violence; and it is violence, force, which is the foundation of public law. What, therefore, does it matter whether such and such a political power has sprung from a revolution. It is not because the power is legitimate that obedience is due it. We must obey it because it realizes a holy and divine idea.

"To permit," says Kant again, "a resistance to this supreme power, a resistance which limits such power, is a contradiction; for this power, then, which one might resist, would no longer be the supreme legislative power which determines what shall be or shall not be publicly right." <sup>38</sup>

This last passage summarizes very well the whole of Kant's political doctrine. It has been said that Kant's philosophy was that of the members of the Constituent Assembly of 1789 and 1791. What a mistake! To measure the whole distance which separates the philosopher of Königsberg from the framers of the Declaration of Rights of 1789, it is sufficient merely to recall article two: "The end of all political association is the conservation of the natural and inalienable rights of man. These rights are liberty, ownership, guarantee, and *resistance to oppression*."

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<sup>36</sup> Remarques explicatives, published after La doctrine du droit, Barni's translation, p. 263. [Hastie, p. 257. — Translator.]

<sup>37</sup> *Ibid.*, p. 263. [Hastie, p. 258. — Translator.]

<sup>38</sup> *Ibid.*, pp. 263 and 264.

## CHAPTER IV

## HEGEL'S JURIDICAL DOCTRINE

IN his excellent book, *Germany since Leibniz* (1890), M. Lévy-Bruhl, speaking of Hegel's philosophical system, wrote: "Few systems have left so profound a mark on the ideas, the customs, and even the history of a nation. If Hegelianism has not been able to subsist as a body of principles — being untenable, in fact, from the speculative point of view — its influence, nevertheless, can be seen everywhere in the domain of action, but diffused, and making itself felt through statesmen, publicists, and especially through historians as intermediaries. Many who are themselves impregnated with it, ignore or deny it. Judging the transformations of Germany in the nineteenth century from afar and as a whole, the rôle of Hegelian influence becomes, so to speak, detached from itself."<sup>1</sup>

What M. Lévy-Bruhl wrote in 1890 has received abundant proof in the actual event. The Hegelian doctrine can be found everywhere — in the politics of German statesmen, in the doctrines of the pan-Germanists, in the teachings of the Treitschkes and the Bernhardis, and in the systems of the professional jurists. It will here be traced, especially, through the teachings of the professional jurists.

## I

To understand Hegel's philosophy of right and of the State,<sup>2</sup> it is necessary to understand the fundamental principles of his

<sup>1</sup> Lévy-Bruhl, *L'Allemagne depuis Leibniz*, 1890, p. 389.

<sup>2</sup> This doctrine was first outlined in an article published in 1801 after the peace of Lunéville and entitled, *Considérations sur l'état de l'Allemagne*. The doctrine is tersely stated in a work entitled *Encyclopädie der philosophischen Wissenschaften im Grundrisse*, which appeared in 1817, and which has been translated into French by Vera. The theory received development in full in the work entitled *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft* (1821), which is the eighth volume of Hegel's complete works, published by his students from 1832 to 1887. [Translated by Dyde under the title, *Hegel's Philosophy of Right*, 1896. — Translator.] This work has not been translated into French. On Hegel, see especially Schérer, *Hegel et l'hegelianisme in Mélanges d'histoire religieuse* (1864); Noël, *La logique de Hegel* (1897); Archambault, *Hegel* (1912).



philosophical system as a whole, to which it is closely related. It is not a simple matter to explain it, inasmuch as it is singularly obscure. M. Lévy-Bruhl characterizes it correctly when he thus writes: "A powerful philosophy but difficult to understand, consciously containing contradictions within itself, and flattering itself that it has solved problems by transcending them."<sup>3</sup>

All historians of philosophy agree in believing that what especially characterizes Hegel's philosophy is the absolute identification of the intelligible and of the real, of logic and of metaphysics, of the forms of thought and of the laws of nature. "What is rational is real; what is real is rational."

In developing the necessary course of its ideas the mind reproduces also the necessary evolution of things. Logic, that is to say, the logical deduction of ideas, and evolution, that is to say, transformation — the continual unfolding of things — are but two sides of the same reality. "Thought (*la pensée*) is the real and universal principle of nature and of the mind (*l'esprit*)."<sup>4</sup>

But it is not thought in the ordinary sense of the word, that is to say, consciousness (*la conscience*). Consciousness is only a moment in the evolution of the idea (*l'idée*), peculiar to man, which exists only for itself and knows itself in me. Thought in the Hegelian conception — thought which is at the basis of everything — is the intelligible itself. But it is an immanent intelligible, inherent in things and not transcendent. It is neither object nor subject, but a superior term in which the object thought and the thinking subject become identical.

Hegel himself writes: "Thought produces itself as identical with itself, but which is at the same time like an opposing activity, existing for itself, and which does not separate itself from itself in this opposition. Science divides itself thus into three parts: First, logic, the science of the idea in itself and for itself; second, the philosophy of nature or the science of the idea as to its external existence; third, the philosophy of mind, as an idea which reverts unto itself from its exterior existence."<sup>5</sup>

The celebrated doctrine of Hegelian logic is especially known

<sup>3</sup> Lévy-Bruhl, *L'Allemagne depuis Leibniz*, 1890, p. 391. In this sketch of Hegelian philosophy I have followed M. Archambault's book previously mentioned.

<sup>4</sup> Archambault, *l. c.* p. 15.

<sup>5</sup> Archambault, *l. c.* p. 16.

to us, that is, the identity of opposites and the development of logic by thesis, antithesis, and synthesis. To understand this doctrine, which at first appears singularly paradoxical, we must take into account the fact that it is directly and logically connected with the principle of relativity, understood not only as relating everything to the mind, but as creating a reciprocal relation of all things among themselves.

In his book on the logic of Hegel, M. Noël, wishing to explain the doctrine of the identity of opposites, writes: "If everything is relative, no single reality has any truth except in its relation with all the others; that is, each one, taken in itself, isolated from its relations, is contradictory and false. All effort to bring it back to itself and to see it in its absolute independence has the effect of suppressing it, of destroying it. In short, its exclusive affirmation has the effect of negating it immediately. It is also true that in negating itself, in the process of opposing to itself its opposite, it suppresses itself only in appearance; rather it affirms itself and is realized through its negation in a superior unity of which itself and its opposite are only stages."<sup>6</sup>

To understand Hegel, let us take the simplest and most abstract idea — the idea of pure and indeterminate being, apart from all quality. Such an idea is just as much that of non-being as of being, because being, so conceived, is only everything because it is only nothing. To affirm being, so conceived, is to affirm at the same time non-being. The absolute opposition of being and of non-being does not then exist in reality. We cannot, in fact, separate them without either one or the other disappearing, and logical thought is not satisfied by an identification of them. The reality of being, as of non-being, is found only in their synthesis, which makes their unity, that is to say, in becoming — the synthesis of these two contraries.

"So it is in all the steps of logic and of evolution. Every idea — accordingly everything taken in itself — implies its own negation. Its truth and its intelligibility are found again only in a new category, which contains at one and the same time the affirmation and the negation of the thing in question, and realizes their immediate unity. But this unity cannot be itself, conceived of or considered in an isolated state. It will be necessary to act in respect to it

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<sup>6</sup> Noël, *La logique de Hegel*, 1897, pp. 7 and 8.



as in the case of the first term, and, from unity to unity, reascend in this way from a superior affirmation to a still more superior affirmation, until the absolute idea is arrived at, in a category where all the oppositions shall have been reconciled — resulting in the unity of all the anterior categories.”<sup>7</sup>

“Reason always proceeds in this way to the absolute idea; presenting, opposing, conciliating. Everything exists under three successive forms: in itself, it is the thesis; in opposition with itself, for itself, it is the antithesis; in itself and for itself, it is the synthesis. Such is the eternal rhythm of the evolution of thought and of the world.”<sup>8</sup>

So, as we have said before, being is the thesis; non-being, the antithesis; coming into being, becoming, is the synthesis. Being and non-being do not exist; they destroy each other. Reality is simply a coming into being. The general is the thesis; the particular, the antithesis. The general and the particular negate each other reciprocally. They realize themselves in the synthesis, which is the individual. In the philosophy of nature, the structure is the thesis; the dynamism, the antithesis. They rest upon a conception, one and synthetic: the theological conception. In the philosophy of mind the thesis and the antithesis are the body and the soul, which are unified in the human synthesis: the mind. Finally, when we consider the human being, the individual is the thesis whose antithesis is civil society. A civil society and the individual are inconsistent with each other. In considering the individual, we negate civil society; in considering the civil society, we deny the existence of the individual. But the two opposites are unified and harmonized in that powerful synthesis, the State. And in this we discover the basis of Hegel's philosophy of right and of the State. To say that the individual and society are direct opposites, negating each other reciprocally, but that they are unified, are realized in synthesising themselves in the State, is to say that the human individuality is only a reality in and through the State. If this is so, the omnipotence of the State cannot infringe the right of the individual any more than it can interfere with civil society because the reality of the individual and of civil society will be all the greater the more powerful the State becomes. It is expressing, in terminology properly Hegelian, an idea identical

<sup>7</sup> Archambault, Hegel, 1912, p. 18.

<sup>8</sup> Archambault, *ibid.*

with that which we have already found in the doctrines of J. J. Rousseau and of Kant.

## II

From logic Hegel passes to nature. "If the idea is put as nature, it is by virtue of the same general law which governs each phase of the idea itself. It maintains with nature a relation very similar to that which each category maintains in itself with reference to the category following it. Nature is thought externalizing itself, mediatizing itself. But such a state could never be definitive. Through its necessary dispersion and dissemination, nature tends to come back to unity, which is equally necessary, and this unity is subjectivity. And its evolution seems to Hegel to be like a progressive concentration at a center, where it becomes subjective and idealizes itself — just another stage in its ascension toward absolute mind (*l'esprit*). These evolutionary stages are intimately allied with one another. But their succession is not a true genesis, such as materialism imagines, or at least it is in the idea that the generating principle exists. It is through the idea alone that there is progress. . . . The movement of nature toward absolute mind is made up of three phases: mechanical, physical, and organic. Everything happens, as in logic, by thesis, antithesis, and synthesis."<sup>9</sup>

The philosophy of nature brings up the problem of death. For Hegel, death is the disappearance of the individual; it is the progression of the species. Now as the species is the general, the idea, thought which is universal being, conscious of itself and eternal, progresses with the species. The end of nature is to destroy itself as an assemblage of human individuals, to lift itself above immediate and sensible existence, to burn itself up like the phoenix, and be born again radiant as a spirit. Mind is not a product of nature; it is the metaphysical principle of its development. The history of the world is the history of the enfranchisement of the mind and of the world in the mind. The mind, which is conscious of itself, wants to give itself conscious expression through nature, and to return unto itself. This reconciliation of the mind with nature is its only true deliverance and its only redemption. This deliverance of mind from the encumbrance of matter, and of its

<sup>9</sup> Archambault, Hegel, 1912, pp. 24 and 25.



necessity, is the idea behind the philosophy of nature. "The end of these teachings," writes Hegel, "was to give an idea of nature and to force this Proteus to reveal himself in his true form, to find in the whole world the image of ourselves, to have seen in nature the true reflection of mind — in short, to recognize God, not in the innermost contemplation of the mind, but in its immediate and sensible existence."<sup>10</sup>

We can comprehend by this statement the transition from the philosophy of nature to the philosophy of spirit. "Spirit is the notion (*la pensée*) returning unto itself, after having denied the existence of itself and externalized itself in matter, in order to find once more with consciousness of itself, the liberty essential to its nature. But no more for spirit than for anything else could there be a possibility of immediate total realization. It succeeds in determining itself freely only at the close of a long development during which it was dreaming these three successive thoughts: subjective spirit (*l'esprit subjectif*) under the form of a relation with itself, where the ideal totality of the idea realizes itself only for itself; objective spirit (*l'esprit objectif*) under the form of reality, inasmuch as it ought to produce, and that it has produced; absolute spirit (*l'esprit absolu*), unity in itself and for itself, unity of the subject and of the object."<sup>11</sup>

Subjective spirit obeying the universal law realizes itself in itself under an immediate form; it is then the soul (*l'âme*) — a soul which is without doubt immaterial, but is still connected with the earthly substance. Through sensation (*le sentiment*) the soul individualizes itself and in distinguishing itself from particular sensations (*les sentiments*), at the same time from its body, it becomes real. Subjective spirit by virtue of that act assumes the character of its very self, under mediate form; this is consciousness (*la conscience*). Consciousness, therefore, evolves itself. It develops itself in consciousness within itself, and finally this develops into reason — a faculty through which the mind recognizes itself as substance and absolute truth.

Subjective spirit exists then in itself, and is object for itself, as spirit properly so called. This is the subject matter of psychology.

<sup>10</sup> Archambault, p. 27.

<sup>11</sup> Archambault, pp. 27 and 28. [In translating these terms as "objective spirit" and "subjective spirit," I have followed Baillie's translation of Hegel's *Philosophy of Mind*, II, 420. — Translator.]

according to which the mind is considered as theoretic, then as practical, and finally as free.

Free will is the unity of the theoretic and practical mind, of thought and of free will. The mind is free when it recognizes that it creates everything and wills everything that it creates. Free will is a moment of liberty, but it is not entire liberty. "I am free when I will what is rational, and when I act, not according to my individuality, but according to the notion (*la notion*) of morality and of reason. There is only contradiction between liberty and necessity from the abstract point of view of understanding: liberty and necessity confound each other in the concrete affirmation of the mind." <sup>12</sup>

### III

Objective spirit (*l'esprit objectif*) manifests itself under the form of right, which is liberty guaranteed to all. From what precedes we have come to see the place the Hegelian doctrine of right occupies in the whole system of his philosophy. That is why the explanation that has just been given was necessary.

"The territory of right," writes Hegel, "is in general the spiritual, and its more definite place and origin is the will which is free. Thus freedom constitutes the substance and essential character of the will, and the system of right is the kingdom of actualized freedom. It is the world of spirit produced out of itself as a second nature." <sup>13</sup>

We have seen before, in fact, that in the Hegelian scheme nature is only the externalizing of mind. Then mind, in so far as it is free will externalizing itself, is right and law (*le droit*).

Following the passage which has just been quoted, Hegel gives an extensive analysis of will, which need not be summarized here. But it is important to note that he affirms over and over again, in divers ways, that the very essence of right is free will. Here is a literal translation of a passage which seems in that respect the most characteristic: "Right is essentially the essence of free will. It is thus, above all, liberty as idea. . . . Right in general is something sacred, and this only because it is the essence of the absolute notion of liberty, conscious of itself." <sup>14</sup>

<sup>12</sup> Archambault, pp. 28 and 29.

<sup>13</sup> Hegel, *Grundlinien der Philosophie des Rechts*, Vol. VIII, German edition of his complete works, 1833, p. 34. [I have used Dyde's translation, *Hegel's Philosophy of Right*, p. 10. — Translator.]

<sup>14</sup> Hegel, *l. c.* pp. 63 and 64. [The original reads: "Diess, das ein Daseyn überhaupt,



Hegel criticizes even the generally admitted Kantian definition of right according to which "the principal element of right is found in the limitation upon my liberty, upon my free action (*Willkür*) of such a nature that it can co-ordinate itself with the liberty of all in accordance with a general law." This definition, says Hegel, contains, on one hand, only a negative determination, that of limitation; and on the other hand, the positive element of this definition, namely, the conciliation of the will of one individual with that of others, ends in formal recognized identity and in the principle of contradiction. Hegel adds that this conception of right, which is at least incomplete, is due to the influence of J. J. Rousseau.<sup>15</sup>

Will, the essential element of right, like all the elements of material nature, exists under three successive forms. (1) Will in itself; the general and abstract will, that is determined abstractly by the ends which a definite subject pursues. (2) Will for itself; that is to say, a particular will manifesting itself in the pursuit of a particular end. Will in itself is the thesis. Will for itself is the antithesis. (3) The synthesis is found in the will in itself and the will for itself, which is the will of a determinate individual. "Will," writes Hegel, "becomes through this the individual will — the person."<sup>16</sup>

Here should be stated just how Hegel arrives at the notion of person, that is to say, at the notion of a free will existing in an individual. "In personality," says he, "there is what I am, as such, bounded and determined completely and on all sides, and at the same time in a relation simply with myself; and in my finitude, I know myself as infinite, universal and free."<sup>17</sup>

Personality essentially includes juridical capacity (*Rechtsfähigkeit*) and "forms the notion and the abstract basis even of abstract right, and consequently of formal right. The fundamental precept of right, therefore, is this: Be a person and respect others as such."<sup>18</sup>

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Daseyn des freien Willens ist, ist das Recht. Es ist somit überhaupt die Freiheit als Idee. . . . Das Recht ist etwas Heiliges überhaupt allein weil es das Daseyn des absoluten Begriffes, des selbstbewussten Freiheit ist." Grundlinien, 2 ed., 62-63. — Translator.]

<sup>15</sup> Hegel, *l. c.* p. 64.

<sup>16</sup> Hegel, *l. c.* p. 73.

<sup>17</sup> *Ibid.*

<sup>18</sup> *l. c.* p. 75.

## IV

This free will of a person asserting itself, as such, produces, according to Hegel, three results: First, possession, which is ownership. The liberty here is that of the abstract will. That is to say, the will of a person does not enter here into relation with that of another person, but only into relation with itself.

Second, contract: the person detaches himself from himself and enters into relation with another person; and certainly, such two persons are just like owners with regard to each other. Their identity, existing in itself, becomes realized through a transfer of property from one to the other, by the will common to both, and resulting in the conservation of their rights.

Third, non-right (*Unrecht*) and transgression.<sup>19</sup> They appear when thought manifests itself in its relations with itself, not distinct and apart from another person, but distinct from itself; when thought manifests itself as a particular will distinct and separate from itself, inasmuch as it is will in itself and for itself. In other words, transgression, non-right, is the will of the person revolting against itself to the extent that it is will in itself and for itself.<sup>20</sup>

These three elements constitute abstract right to which Hegel opposes subjective right, which corresponds to what is called in current terminology, morality.

Subjective right or morality (*Moralität*) is opposed to abstract right, inasmuch as the internal state of the subject and the intention — which in abstract right do not intervene or intervene only secondarily — are here wholly of the first importance.

Subjectivity appears when we consider the individual and the efforts which he makes in order that this particular will — which is the will of itself — may coincide with the general will — the will in itself — so that an individual will may be formed which is will both in and for itself. For Hegel, in fact, moral good is the identification of particular wills with the general will. This identification appears as a duty, because it is not produced spontaneously and immediately; and is constantly opposed by tendencies, passions of man, and all other disturbing causes.

If good is the identification of particular wills with the general

<sup>19</sup> [*Verbrechen*. Dyde (p. 47) translates it "crime." — Translator.]

<sup>20</sup> Hegel, *l. c.* p. 76.



will, evil is the conflict of these particular wills with the general will; and the duty always exists of avoiding this conflict and of striving for this identification.

How does this synthesis of the general will and of particular wills realize itself? The answer is by diverse institutions which are in their order of development the family, civil society, and the State. This realization of the moral idea in action (*dans les faits*) is what Hegel calls *Sittlichkeit*, practical morality, morality realized or on the way toward realization.

The philosopher develops this conception on page 207 of his *Philosophy of Right* (*La Philosophie du droit*, volume eight of his complete works) in language singularly obscure and almost impossible to translate into French, the conclusion of which, however, must be quoted in full: "And so," writes Hegel, "the concrete identity of the good and of subjective will, the truth of this identity — this is morality realized (*Sittlichkeit*).” Let us not forget this formula because his whole theory of the State grows out of it.

The philosopher's idea is given precisely in the following passage: "In this identity of the general will and of the particular will right and duty coincide; and man has through morality realized (*durch das Sittliche*) rights so far as he has duties, and duties so far as he has rights. In abstract right I have the right and another has the corresponding duty; in abstract morality (*im Moralischen*) the right of my own knowing and willing, as well as of my welfare, must be objective and unified with the duties.”<sup>21</sup>

## V

How is the moral idea or subjective right realized? By the following three elements which overlap each other in a progressive order: the family, civil society, and the State.

The State is the superior realization of the moral idea. This is the way Hegel explains the family, civil society, and the State as modes of realization of the moral idea:

"Customary morality (*Sittliche*), so far as it is coextensive with the true notion, — individual conscience existing for itself, — is the real mind or spirit (*der wirkliche Geist*) of a family and of a people. What is moral (*das Sittliche*) is not abstract, as the good,

<sup>21</sup> Hegel, *l. c.* p. 220.

but real in an intensive sense. The spirit or mind (*l'esprit*) has reality, and individuals are the accidents of it. Concerning the moral (*beim Sittlichen*) there are always only two points of view possible: either we start from substantiality, or we proceed atomically, beginning with individuality as the basis. The latter point of view excludes the spirit (*ist Geistlos*), because it leads only to a synthesis; spirit is nothing individual, but the union of the individual and of the general. The notion of this idea, to the extent that it is spirit (or mind), knowing itself and real, is a progression by means of its elements, but only when it is the objectivation of itself. It is thus at first the moral spirit (*sittliche*) immediate and natural: the family. This substantiality loses its unity, breaks up, and assumes a state of relativity known as civil society — a union of the members of so many autonomous individuals thus formed into a generality in accordance with their needs and by means of the juridical constitution, as means of security of the person and of property, and by an internal regulation of their general and particular interests. This external state outwardly shows concentration toward morality and a substantial generality as ends, as well as toward public life, which is consecrated to it, in the constitution of the State.”<sup>22</sup>

Hegel devotes many pages to the development of his ideas concerning the family.<sup>23</sup> To understand them, one must always go back to the conception of the identity of opposites, which is the key to Hegelian philosophy. The two opposites are the individual and the group. The individual, in relation to the group, exists in himself. The group, in relation to the individual, exists for itself. The immediate and natural synthesis of the individual and of the group is the family, which exists in itself and for itself. It is immediate, because this synthesis forms itself simply and naturally — because it is love, the result of the natural attraction of human beings.

In the family the individual has the sentiment (*le sentiment*) that he is not a person for himself, but that he is part of a group of which he is a member, that he is co-operating in something which exists in and for itself. The family, founded on love, is therefore the natural synthesis of the individual and of the group.

“Love,” says Hegel, “is the sentiment of my union with an-

<sup>22</sup> Hegel, *l. c.* pp. 220 and 221.

<sup>23</sup> Hegel, *l. c.* pp. 221 to 246.



other, the realization that I am not isolated but that I acquire my consciousness only through renunciation of my will to exist for myself. Looking upon myself in this way, I understand my union with another and the union of another with me. The first element of love is that I do not will to be an autonomous person existing for myself; and that if I were, I should have a sense of incompleteness, of imperfection. The second element of love is that I ennoble myself in another person; that I gain through that person, and that, in return, the other person so gains through me. Love is, accordingly, this strange contradiction which intelligence cannot solve; but, knowing that there is nothing stronger than this punctiliousness (*Punktualität*) of the consciousness itself, even though denied, I must therefore accept it as affirmative (*affirmativ*). Love solves the contradiction; so far as it solves it, there is moral unity."<sup>24</sup>

If an understanding of this curious passage is possible, it may be summarized thus: Love is the perception of my intimate union with another — a profound contradiction since through love the individual denies himself. But love itself solves the contradiction which it creates; it solves it because it founds the family, the natural group, the principle of practical morality (*Sittlichkeit*).

In the family, therefore, the individual conserves rights. But these rights do not appear in the unity of the family; they manifest themselves only when the family is dissolved: rights over the patrimony, rights to sustenance, rights to education. As to the rights of the family, they consist in the maintenance of its *substantiality*, that is to say, the maintenance of its unity against all causes which might destroy and compromise it, and against the subjective sentiment — let us say egoistical sentiment — which rises against love, that is, against the principle of the unity of the family.

"A right belongs to the individual on the basis of the family. What this right is, what the right of the individual is in this unity of the family, appears only after the family has just been dissolved and when those who must be members of it appear as autonomous persons. The right of the family consists essentially in that its *substantiality* must subsist; it is thus a right against externality, against the breaking of the unity. . . . Against love there is

<sup>24</sup> Hegel, *l. c.* p. 222.

a sentiment, a subjective one, but one which cannot exist before such unity.”<sup>25</sup>

The family receives its complete development by means of three elements, namely: First, the form of its immediate notion as marriage; second, the external essence — property — the welfare of the family and its management; third, the education of the children and the dissolution of the family.<sup>26</sup>

It is impossible for us to follow the philosopher in his extensive treatment devoted to these different points. Let us only note that in regard to marriage Hegel declares that it does not simply rest on the will and the sentiment of those who enter into the contract. It must have for its basis reason; for its end, the child; and, beyond that, the furtherance of the ends of the State. These circumstances distinguish it from concubinage. Hegel declares himself also as firmly opposed to divorce. This is logical, since the family is an element in the realization of morality, and its right tends to set aside all causes likely to bring about its dissolution and compromise its unity. Divorce must be possible only in wholly exceptional cases and by sufferance merely.

## VI

In discussing civil society, Hegel has in view especially human societies in their modern form in the countries called civilized, that is in modern nations.

A people, a nation, is either a family enlarged, and then it has a natural origin, or else it is the union of family communities, which, having lived apart and independent up to a certain time, have been united either by a power of domination or through themselves voluntarily, and determined by the desire of assuring the realization of their respective action and of their needs.

The concrete person is the principle of civil society; it is the individual, concretely, who is a particular end for himself, who is a collection of needs, who is a combination of necessity and of liberty. But it is the concrete person, so far as he is in relation with other particular persons. It is then that the principle of community appears which is realized and satisfied in the formation of civil society.

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<sup>25</sup> Hegel, *l. c.* p. 222.

<sup>26</sup> Hegel, *l. c.* p. 223.



But let us understand that in the philosophy of Hegel, civil society is not yet the State. It is simply a grouping of individuals that has been formed for the satisfaction of particular needs and the protection of particular interests. Let us not believe, moreover, that Hegel thought that the State had superposed itself on civil society. Civil society is the difference between the family and the State. The formation of civil society is brought about more slowly than that of the State. In that it is a realm of difference it implies the State which it ought to have as a proper element beforehand in order to exist. It is by way of abstraction that we must represent civil society as distinct from the State. When we represent the State simply as a unity of different persons, as a unity which is only an aggregate, we have then the determination of civil society.

In civil society each is an end in himself. Every other end is nil so far as he is concerned. But without his relation with others each cannot attain the aggregate of his ends. Hence for each individual, others are the means of attaining his ends. The end of each thus being conditioned in its realization by the community founds a system of reciprocal dependencies in such a way that the subsistence and the purposes of the individual and the end and the right of others are interrelated — are founded on this interdependence, and are real and guaranteed only through this interdependence.

We may consider this system as being the external State, the State of need and of intelligence (*Noth- und Verstandes-Staat*).<sup>27</sup>

Civil society is made up of the following three elements:

First, the realization of need and the satisfaction of the individual through his work and through the work and satisfaction of the needs of all the others. This is the system of needs.

Second, the realization of the general element of freedom contained therein, the protection of property by the administration of right.

Third, provision against the risk persisting in this system, and the carrying out of the particular interest as being a common interest, by means of government (*la police*) and the corporate body.<sup>28</sup>

In civil society right (*droit*) appears to be confounded with rule

<sup>27</sup> Hegel, *l. c.* p. 247.

<sup>28</sup> Hegel, *l. c.* p. 254.

of law (*loi*), that is, with positive law (*droit*), whether this law (*droit*) is written or whether it is simply customary. All beings and all things are in submission to laws (*lois*); but man only is conscious of it. In human societies these laws (*lois*) are founded upon the three elements of which societies are composed and they govern these elements, that is, the system of needs, the administration of right (*droit*), and government (*la police*).

In Hegel's doctrine the system of needs is something wholly similar to the social solidarity or social interdependence of contemporary sociologists. But the idea which the latter express in very simple and clear language is set forth by Hegel in terms singularly obscure. This can be seen by glancing at the beginning of the chapter entitled *The Theory of Needs*: "The particular, in so far as it is the determinate opposite of the general will, is a subjective need, which obtains its objectivity, that is, its satisfaction, first, by means of exterior things, which are now also the property and the product of other needs and wills; and second by activity and work, in so far as the element producing the two things is realized. While its end is the satisfaction of the subjective particularity — the generality being realized through relations with the needs and the free will of others — the appearance of *rationality* is, within this finite sphere of intelligence, the element by which it enters into consideration, and which even effects the conciliation within this sphere." In simple language does this amount to saying more than that individuals have needs and that they realize that they can obtain satisfaction of them only through social life and through the exchange of services due to work and to the activity of each? It is not at all for that matter unlike what Hegel expresses again in the following passage:

"Animals have a limited circle of needs, with means equally limited for the satisfaction of them. Man shows in this dependence the possibility of surpassing them in his generality (whatever of the general there may be in him), first by the complexity of his needs and of the means of satisfying them and then by the classification and the distinguishing of concrete needs in their various parts and individual elements, which become thereby particularized needs and consequently more abstract."<sup>29</sup>

The work of all produces the common patrimony; but each has

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<sup>29</sup> Hegel, *l. c.* p. 256.



his part of this common patrimony, since the activity of each contributes to create it. The egoism of the individual turns to the collective profit; in return, the individual profits from the collective work. The sociological conception of social solidarity is what the philosopher is continually expressing, but it is more clearly set forth in the following passage than the two previously quoted: "In this dependence and in the reciprocity both in regard to work and the satisfaction of needs, subjective egoism turns to the satisfaction of the needs of all the others, to the realization of the particular by the general as a logical progression, so well that, while each acquires for himself — creates and profits thereby — he also produces and acquires for the benefit of all. This necessity, which resides in the complex interlacing and interdependence of all, is for each the general patrimony, the permanent patrimony, which, by its formation and by its end, contains the possibility for each of taking part therein, so as to be sure of his subsistence in the same way that this acquisition, realized by his effort, maintains and increases the general patrimony." <sup>30</sup>

## VII

This theory of needs, which is, as it were, the constitutive element of civil society, is the foundation upon which rests the positive right (*droit*) of such society; and it is this right (*droit*) which at the same time secures to each individual the guarantee of his participation in the common patrimony. Each one works for the collectivity; each one can legitimately profit from the product created by the collective effort; and it is the positive right (*droit*) of society that effectually guarantees to each person such participation. Hegel expresses this idea well when he writes: "The principle of this system of needs has, like the particularity of knowing and of willing, generality existing in itself and for itself — the generality of liberty; but only abstractly, and thus only as a right to property in itself, which here is no longer in itself, but in its reality holds good as protection of property by the administration of right." <sup>31</sup>

The reciprocal relation of needs and of effort is a relative element; but it is reflected first in itself — principally in indefinite per-

<sup>30</sup> Hegel, *l. c.* p. 262.

<sup>31</sup> Hegel, *l. c.* p. 270.

sonality, in abstract right. "It is this sphere of the relative taking shape, so to speak, which gives to right the character by which it may be recognized, conceived and willed as general and permits it, being so conceived and willed, to have a value and an objective reality." <sup>32</sup>

Hegel defines this objective reality of right in these terms: "The objective reality of right consists not only of what it is — especially of what it becomes — conceived by the mind, but also consists both of the capability of being realized and of having value. Accordingly it comes, by virtue of this, to be conceived as having general value." <sup>33</sup>

From this notion of right we naturally and logically pass to the notion of rule of law (*loi*), which is the very foundation of positive right (*du droit positif*): "What is right and law (*le droit*) in itself is established in its objective essence, that is to say, determined by thought for consciousness, and conceived as being that which is and has value as right. Such is the law (*la loi*); and by this determination right (*le droit*) specially is positive right." <sup>34</sup>

The rule of law (*loi*) then does not create right (*droit*); but it gives it its generality and its true character: "In order to understand what it is to legislate, one must have before oneself not only this element by which the rule of conduct is expressed, and which is valid for all, but especially this internal element, equally essential, namely: the knowledge of its content in its determinate generality." <sup>35</sup>

This leads the philosopher to determine what is custom and the difference between written law and common law. "Only men," says he, "have customary laws — for animals have no law other than their instinct — which contain this element of being, and of becoming, conceived as thought. They differ from the written laws in that they become conceived in a subjective and contingent manner; they are consequently more indeterminate as regards themselves, and more obscure because of their generality of thought. Besides, knowledge of right (*du droit*) in both senses is chiefly a contingent possession, is a lesser thing." <sup>36</sup>

Let us not say that customary laws tend more to be violated than written laws, since in practice laws in a nation do not cease

<sup>32</sup> Hegel, *l. c.* p. 170.

<sup>33</sup> *Ibid.*

<sup>34</sup> Hegel, *l. c.* p. 271.

<sup>35</sup> *Ibid.*

<sup>36</sup> Hegel, *l. c.* p. 272.



to be customary laws from the fact that they are written and compiled. Let us not pretend, moreover, to refuse to modern peoples the vocation of legislating. This would be a jest — a grave error. Such refusal would deny to individuals the aptitude of grouping in a logical synthesis the mass of existing laws, when, on the contrary, the spirit of systematizing is characteristic of the modern epoch.

But what element is it which gives to law its obligatory force? It is the identity of that which is in itself (*Ansichsein*) and that which is law (*Gesetzsein*). "Through this identity of the abstract or implicit with what is actually constituted," says Hegel, "only that right is binding which has become law. But since to constitute a thing is to give it outer reality, there may creep into the process a contingency due to self-will and other elements of particularity. Hence the actual law may be different from what is in itself right."<sup>37</sup>

When right appears in the form of law, it appears according to its content as applying itself to the substance of relations, individualizing itself and developing infinitely in civil society in the forms of property and contract, and also as applying itself to relations resting upon sentiment, love and trust, but only in so far as these relations contain the elements of abstract right. The moral elements and the moral limitations which concern the will in its most intimate subjectivity and particularity cannot be the object of positive legislation.

Besides this application to particulars, right (*droit*) formulated into law (*loi*) applies to individual cases in themselves. It is in this extension of the general, not only to the particular, but also to the individual — that is to say, in its immediate application — that the positive element of the law specially consists.

That is not all. Another transformation takes place in civil society. Just the same, in fact, as in civil society right (*droit*) in itself becomes law (*loi*), so the immediate and abstract existence of my individual right becomes recognized as an element of the general will and of the general conscience. Acquisitions and acts in respect to property ought to take place in the form which gives them this character. Property rests now on contract and on forms

<sup>37</sup> Hegel, *l. c.* pp. 274 and 275. [I have used Dyde's translation here, p. 209. — Translator.]

which render it susceptible of being proved and of giving it legal efficacy.

And so personality and property come to have a legal value in civil society. At the same time, transgression ceases to be the wrong of an indeterminate subjective; it becomes the wrong of the general body which possesses in itself a firm and well-established existence. This shows the danger to society in transgression. If the internal gravity of such violations increases, then the power of the social group becomes surer of itself; the external gravity of the wrong diminishes, and there appears a greater leniency in its repression.<sup>38</sup>

Hegel is thus brought to determine the rôle which public power plays when it intervenes as judge, or in other words, the juridical character of the act of the tribunal. It may thus be stated in a few words: "Right (*droit*) appearing to be such in the form of law (*loi*) is right (*droit*) for itself (*Fürsich*); it is opposed in itself to the particular will and to the individual idea of right (*droit*). It is general. The recognition of this, and this development of right (*droit*) in the particular case, without having the objective sentiment of particular interest intervene, becomes part of the duties of the public power — the administration of justice (*la jurisdiction*)."<sup>39</sup>

The philosopher might have said so in simpler and clearer terms as follows: The rôle of the judge consists in applying to particular cases the general rule as formulated in the law, and this is done by making an abstraction of the particular interest.

All the members of civil society have the right of going before the tribunals to have such tribunals adjudicate the application of the law to the particular cases which interest them. In the same way, all the members of civil society are in duty bound to go before the tribunals, and if a contest arises in regard to their rights, they must accept as their rights what is laid down by the tribunals. In civil society — and that is its peculiar characteristic — no one can take the law into his own hands.

If there is an infraction of the law, the injured party has no right to vengeance. "The right against infraction of the law in the form of vengeance is only right in itself (*Recht ansich*) not juridical in form (*Nicht in der form Rechts*), that is to say, not juridical

<sup>38</sup> Hegel, *l. c.* pp. 283 and 284.

<sup>39</sup> Hegel, *l. c.* p. 285.



with respect to its existence. In place of the injured party the element of injury to the group intervenes, becoming real through the tribunals, which undertake the pursuit and punishment of the wrongdoer for the breach. The punishment ceases thereby to be a subjective and contingent vengeance, and by the precise coincidence of right with itself, becomes a penalty." <sup>40</sup>

Thus through right (*droit*), civil society appears to us as the synthesis of the general and the particular which is realized in the individual. "By administration of justice civil society, in which the idea is lost in particularity and is decomposed in the separation of the internal and the external, brings itself back to its notion, that is to the unity of the intrinsic universal with the subjective particularity; the one in the individual case and the other in the signification of abstract right." <sup>41</sup>

Two other elements of civil society are present to perfect the realization of this synthesis: they are government (*la police*) and the corporate body. "The realization of this relative unity over the whole range of particularity is the function of government (*la police*), and within a limited but concrete totality constitutes the corporate body." <sup>42</sup>

Government (*la police*) and the corporate body come into civil society to complete the rôle of the administration of justice. They protect the personality and the property of the individual against accidents, which are always possible. The idea in itself has nothing original in it; but it is expressed by Hegel in phraseology worth quoting, which is in accord with the dominant conception in his philosophy — the synthesis of the particular and of the general realized by civil society.

He writes: "In the system of needs the subsistence and happiness of every individual is a possibility, whose realization is conditioned by the objective system of needs. But the right which is actualized in the individual contains the two following factors. It asks first that his person and property should be secured by the removal of all fortuitous hindrances, and second that the security of the individual's subsistence and happiness, his particular well-being, should be regarded and actualized as right." <sup>43</sup>

<sup>40</sup> Hegel, *l. c.* pp. 285 and 286.

<sup>41</sup> Hegel, *l. c.* p. 292.

<sup>42</sup> Hegel, *l. c.* p. 293. [I have used Dyde's translation here, p. 224. — Translator.]

<sup>43</sup> Hegel, *l. c.* pp. 294 and 295. [I have used Dyde, p. 225. — Translator.]

This synthesis of the particular and of the general, realized through government (*la police*) in civil society, appears again in the passage in which Hegel thus sums up the rôle of government: "The universal which is contained in the particularity of civil society is realized and preserved by the external system of governmental administration, whose purpose is simply to protect and to secure the multitude of private ends and interests subsisting within it. It has also the higher function of caring for the interests which lead out beyond civil society." <sup>44</sup>

Finally, we have seen that civil society is one of the modes of realization of morality, just as the family and the State, though in a lesser degree. It is by means of the corporate body that morality realized appears in civil society, — by means of the corporate body, that is to say, of the grouping of individuals according to their rôle in society, of the formation of social classes which take the middle ground between the family and civil society. "The middle or commercial class (*Stand des Gewerbes*)," says Hegel, "is essentially engaged with the particular, and hence its peculiar province is the corporate body." <sup>45</sup>

It is through the corporate body that morality realized finds its place in civil society and it does so in this way: "In accordance with the idea, particularity itself makes the universal, which exists in its special interests, the end and object of its will and endeavor. Morality realized (*Sittlichkeit*) thus comes back as a constituent element of civil society. This is the corporate body." <sup>46</sup>

The corporate body forms with the family in civil society the very foundation of the State. The State, that powerful and complete synthesis of the general and of the particular, realizes in its fulness the moral and divine on earth.

<sup>44</sup> Hegel, *l. c.* pp. 306 and 307. [I have used Dyde, p. 235. — Translator.]

<sup>45</sup> Hegel, *l. c.* p. 307. [Dyde, p. 235. — Translator.]

<sup>46</sup> Hegel, *l. c.* p. 307. [Dyde, p. 235. — Translator.]



## CHAPTER V

## HEGEL'S POLITICAL PHILOSOPHY — THE STATE

IN Hegel's *Philosophy of Mind* may be found the following: "The essence of the State is the universal, self-originated and self-developed, — the reasonable spirit of will; but, as self-knowing and self-actualizing, sheer subjectivity, and — as an actuality — one individual. Its work generally — in relation to the extreme of individuality as the multitude of individuals — consists in a double function. First it maintains them as persons, thus making right a necessary actuality, then it promotes their welfare, which each originally takes care of for himself, but which has a thoroughly general side; it protects the family and guides civil society. Secondly, it carries back both, and the whole disposition and action of the individual — whose tendency is to become a center of his own — into the life of the universal substance; and, in this direction, as a free power it interferes with those subordinate spheres and retains them in substantial immanence."<sup>1</sup>

A résumé of Hegel's whole doctrine concerning the State is found in these few lines.

## I

The State brings the family and civil society as well as the will and the activity of the individual again into substantial existence and thus, by its unrestricted power, breaks up the subordinate spheres in order to keep them in inherent and substantial unity. The synthesis of the general and the particular, then, the fusion of the particular in the one and general substance, is precisely the realization of morality. Accordingly, the State by its very definition is the reality of the moral idea. "*Der Staat ist die Wirklichkeit der sittlichen Idee.*"<sup>2</sup>

Hegel, taking up and developing the idea expressed in the passage in the *Philosophy of Mind* previously quoted, and summarized in

<sup>1</sup> Hegel, *Philosophie de l'esprit*. Vera's translation, II, p. 379. [I have used Wallace's translation, *Hegel's Philosophy of Mind*, p. 263. — Translator.]

<sup>2</sup> Hegel, *Grundlinien der philosophie des Recht*, Vol. VIII of the complete works of 1883, p. 312.

the proposition just cited, writes also as follows: "The State is the moral spirit (*sittlichen Geist*) as the will which manifests itself, makes itself clear and visible, substantiates itself. It is the will which thinks and knows itself and carries out what it knows and in so far as it knows. The State finds in ethical custom its direct and unreflected existence, and its indirect and reflected existence in the self-consciousness of the individual and in his knowledge and activity."<sup>3</sup>

Thus, by means of the State, the moral idea finds its complete realization. The State exists immediately in itself. Mediatly, it exists through individuals, but the individuals have their substantial liberty only through the State. The individual is free only in the State because it is only by the State and only in the State that his will is fused with the general will.

This is the fundamental notion underlying the Hegelian doctrine of the State, the notion which is the upshot of his philosophical system and is the starting point of his political doctrine. For the latter is no more than the development of the former. Let us not think, however, that this conception of Hegel's is entirely new. It was already expressed in Rousseau's *Contrat Social* in less abstract and less philosophical but certainly clearer terms. Rousseau had said in fact: "In order that the social pact shall not be a vain formulary, it tacitly contains this agreement which alone can give force to the others, — that whoever shall refuse to obey the general will shall be constrained to it by the whole body: which means nothing else, except that he will be forced to be free."<sup>4</sup> Hegel talks of the rational in itself and for itself, of the realization of morality by the State. The idea is really the same. The end is also the same, namely, to deceive him into believing he is free when in fact he is subservient to the omnipotence of the State, and to make him even believe that the more powerful the State the freer he is.

## II

If the State is the realization of the moral idea, it is at the same time the rational in itself and for itself, "inasmuch as it is the

<sup>3</sup> Hegel, *Grundlinien der philosophie des Recht*, Vol. VIII of the complete works of 1883, p. 312. [I have followed Dyde, p. 240. — Translator.]

<sup>4</sup> *Contrat social*, bk. I, chap. VII.



realized substantive will, having its reality in the particular self-consciousness raised to the plane of the universal.”<sup>5</sup>

The State being thus understood, the question of the powers of the State in regard to the individual need not be asked, because it is within and by means of the State that the individual obtains the greatest amount of liberty. Hegel in fact writes thus: “This substantial unity of the State is its own motive and absolute end. In this end freedom reaches its highest right just as this ultimate end has a superior right over the individuals, whose first duty it is to be members of the State.”<sup>6</sup>

This passage appears to be the best for an understanding of Hegel's theory. The State being the superior synthesis of the particular and of the general, it and it only can secure for the individual the realization of his rights. But at the same time such supreme right belongs to the State as against the individual because the supreme duty of the individual is the duty to be a member of the State.

Hegel does not wish any doubt whatever to arise about the meaning and import of his doctrine. He expressly rejects the French individualistic doctrine, formulated in the *Declaration of Rights* of 1789, and according to which the sole end of the State is to protect the liberty and the property of the individual, to assure the individual the guarantee of his natural rights in such a way that he will become a member of the State only voluntarily. Not at all, says Hegel. “The State is in a wholly different relation with the individual. As the State is the objective spirit (*l'esprit*)<sup>7</sup> the individual has his objectivity, his truth and his morality only because he is a member of the State.”<sup>8</sup>

Wishing to express his thoughts in even more forceful language Hegel adds: “This idea is the eternal and necessary being of spirit, in and for itself.”<sup>9</sup>

After such an affirmation is there reason for seeking the origin of the State and determining its legitimacy? Not at all. Since it is the eternal and necessary being of spirit, its existence is its

<sup>5</sup> Hegel, *l. c.* p. 313. [Dyde, p. 240. — Translator.]

<sup>6</sup> *Ibid.*

<sup>7</sup> Cf. *supra*, chap. IV, section III, as to Hegel's “Objective Spirit.”

<sup>8</sup> Hegel, *l. c.* p. 313.

<sup>9</sup> Hegel, *l. c.* p. 314. [See Dyde, p. 241, Hegel, *Grundlinien*, 2 ed., p. 307. — Translator.]

own justification; and by the very fact that it exists, it is all that it should be. If the State is the realization of the moral idea, it is legitimate simply because it exists.

"What is the origin of the State," writes Hegel, "or rather of a determinate State, of its rights, and of its determinations? Has it had for its origin patriarchal relations, violence, or contract? Does it flow from a corporate body? Have its rights been established in consciousness by custom, by positive or divine law, or by contract? That has nothing to do with the idea of the State. When we are dealing with the science of the State these things are mere appearances and belong to history. . . . Philosophical doctrine considers only what is within, that is to say, ideas."<sup>10</sup>

Hegel does not ignore, however, the doctrine of Jean Jacques Rousseau. There is, says he, in this doctrine a great deal of truth, but it is incomplete and it has not got to the bottom of things. "Jean Jacques Rousseau," writes Hegel, "has the merit of having expressly made the will the fundamental principle of the State, a principle which is not only formal like the social instinct or divine authority, but is also in its content thought, indeed is thought itself. But Jean Jacques Rousseau placed will, as Fichte does later, in a determinate form of individual willing, and considered the general will, not as the rational part of the willing in itself and for itself, but only as the collective will derived from the individual will through the union of individuals in the State and thereby becoming a contract which has for its conscious basis their free will and their voluntary concurrence."<sup>11</sup>

This idea of a contractual union of individuals, a conscious and desired union, Hegel rejects vigorously. "There result from it, in fact," says he, "consequences which destroy the divine, existing in itself and for itself, and its absolute authority and its majesty."<sup>12</sup>

Hegel also rejects another mode of approach which is opposed to the rational conception of the State, namely, that which consists in considering the externality of phenomena, the contingency of wants, the intervention of force for protection, not as a moment in the historical development of a determinate State, but as the very substance of the State. For this reason our philosopher criticizes severely the work which the German publicist Haller had just

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> Hegel, *l. c.* p. 315.



written under the title *Restauration der Staatswissenschaft*, in which he had attempted a truly realistic study of the State.

### III

Let us thus put aside all the contingent elements of the State, let us disregard the different forms which the State in fact presents, let us reject all the doctrines which attempt to take into account these contingencies and these facts. They are without value. Let us consider the State in its intimate essence in the light of reason. Then alone can we understand its true nature, can we grasp its substantial reality, as in the following: "The State in itself and for itself is the moral whole (*Das sittliche Ganz*), the realization of liberty; and it is the absolute end of reason that freedom should be real. The State is the mind or spirit (*l'esprit*) which exists and is realized in the world as endowed with consciousness, while it is realized in nature only as the other of itself (*das andere seiner*), without consciousness, as sleeping spirit."<sup>13</sup>

If the State is the spirit (*l'esprit*), which in the world is conscious of itself, the State realizes becoming on earth, that is, the divine. There is thus in the State something divine; and this divine element is the very foundation of its unlimited power over individuals, who themselves find the realization of their moral being only in the politically divine (*divin étatique*).

Indeed, our philosopher expresses himself thus: "It is only in so far as it exists in consciousness, in so far as it is perceived as an existing object, that the spirit (*l'esprit*) is the State. For liberty we must not start from the individuality, nor from the individual consciousness, but only from the essence of consciousness; for whether man knows it or not, this essence is realized as an autonomous power, in which individuals are only moments. The State is the march of God in the world (*es ist der Gang Gottes in der Welt dass der Staat ist*). Its foundation is the power of reason, realized as will. To form an idea of the State, we must not have in mind particular States, or institutions, but consider thoroughly the Idea (*l'idée*), this real God."<sup>14</sup>

This divine character belongs to every State. We can find a good or a bad State, badly organized or well organized. Little

<sup>13</sup> Hegel, *l. c.* p. 319.

<sup>14</sup> Hegel, *l. c.* p. 320.

does it matter. If there be a State, there is always something divine about it. "Every State," writes Hegel, "which according to such principles as we have can be considered as bad, and in which we can recognize such and such faults, has always in itself — particularly when it is one of the States formed in our epoch — the essential elements of its activity in itself. Because it is easier to find a defect than to grasp the *affirmative*, we easily fall into this error of forgetting, with respect to certain particular ends, the immutable organism of the State. The State is not a work of art; it exists in the world; it is consequently in the sphere of free will, of contingency, and of error; bad enterprises can disfigure it in many ways. The most cowardly man, the criminal, the sick, the infirm, is nevertheless ever a living man; the *affirmative* is that life exists in spite of faults, and it is this *affirmative* which concerns us here." <sup>15</sup>

Consequently, the State can be bad, corrupt; it exists; it is subject to contingencies. But however bad, however corrupt it may be, it always retains the positive element of its being; it is always the realization of the moral idea; it is ever divine.

It goes without saying that with such a conception of the State there can be no question as to any limitation with reference to it. But at the same time the individual has nothing to fear from this unlimited power, because it is only through the State that he can realize the fullness of his moral being.

Hegel, for that matter, does not stop there. He proceeds to analyze the different elements contained in the idea of the State. They are three in number:

First, the idea of the State has an immediate reality, and the particular State, inasmuch as it is an organism, is in relation with itself. It is the constitution of the State, the internal public law (*le droit public interne*) or the internal law (*le droit interne*) of the State.

Second, the idea of the State is lost in the relation of the particular State with other States. It is the public external law (*le droit public externe*), the external law of the State.

Third and finally, the idea of the State is the general idea as species and absolute power in relation to individual States. It is the spirit (*l'esprit*) that finds its reality in the progress of the world's history.<sup>16</sup>

<sup>15</sup> *Ibid.*

<sup>16</sup> Hegel, *I. c.* pp. 320 and 321.



We must follow Hegel in his analysis of these three elements of the idea of the State.

#### IV

The philosopher first formulates this proposition: "The State is the realization of concrete liberty."<sup>17</sup> This means that the individual is free because he lives as a member of the State, and that he is free only because he is a member of the State. The internal organization of the State tends to realize this concrete liberty of the individual.

But what is this concrete liberty? Hegel defines it thus: "Concrete liberty consists in this: that therein personal individuality and its particular interests, as found in the family and civil society, have their complete development. In this concrete liberty, too, the rights of personal individuality receive adequate recognition. These interests and rights pass partly of their own accord into the interest of the universal. Partly also do the individuals recognize by their own knowledge and will, the universal as their own substantive spirit and work for it as their own end. Hence neither is the universal completed without the assistance of the particular interest, knowledge and will, nor, on the other hand, do individuals, or private persons, live merely for their own special concern. They regard the general end, and are in all their activities conscious of this end."<sup>18</sup>

Hegel says further: "The State as *moral*, as penetration of the substantive and of the particular, implies that my obligation to the substantive reality is at the same time the realization of my particular liberty; that is to say, that in it (the State) right and duty are united in a single relation."<sup>19</sup>

The philosopher expresses the same idea in still different terms: "The union of right and of duty has this double result that what the State requires as duty directly becomes also the right of the individual, since it is nothing more than the organization of the idea (*la notion*) of liberty. The determinations of the individual will receive from the State an objective existence and by such means arrive at their truth and at their realization. The State

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<sup>17</sup> Hegel, *l. c.* p. 321.

<sup>18</sup> Hegel, *l. c.* pp. 321, 322. [I have used Dyde, p. 248. — Translator.]

<sup>19</sup> Hegel, *l. c.* p. 323. [Dyde, p. 250. — Translator.]

is the unique means (indispensable) of attaining the particular end and welfare." <sup>20</sup>

These abstract and obscure formulas leave, however, no doubt as to Hegel's thought. To him only the State can realize the concrete liberty of man, because individuals do not have their complete personality without the State. Undoubtedly it is through individuals that the collectivity has consciousness and will. But, on the other hand, individuals are only really free when they recognize and desire the general interest as being their own substantial mind, and act for this interest as being their ultimate purpose.

Such is the State in its essence. Hegel thinks, however, that the modern State has most completely realized the synthesis of the particular and of the general, and consequently has come nearest to complete realization of the concrete liberty of man.

"The principle of the modern State," writes Hegel, "has this extraordinary strength and depth that it allows the principle of subjectivity to complete itself to an extreme of personal particularity and yet at the same time brings back into it substantial unity, which is thus maintained in itself. . . . The characteristic idea of the State in the modern epoch is that the State is the realization of liberty, not according to subjective liking, but according to the notion of willing, that is to say, its divinity." <sup>21</sup>

For the philosopher, therefore, the modern State has secured in the highest degree the liberty of the individual, because it has restored and maintained it in substantial unity, because it has founded it on the notion of the will, taken in its universality and its divinity. All this amounts to saying that the modern State has carried individual liberty to its highest point, because it has completely absorbed in itself the personality of the individual.

What is this modern State, then, which Hegel has particularly in mind? M. Lévy-Bruhl does not hesitate to answer that it is the Prussian State. He has us justly observe that Hegel passed the last thirteen years of his life in Berlin, admired and surrounded by his many disciples. "Hegel had found there," says M. Lévy-Bruhl, "the political atmosphere which suited him. In the opening lecture of his course, he stated that his text would be: Elective affinity, the original relationship of the Prussian State and of

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<sup>20</sup> Hegel, *l. c.* pp. 326 and 327.

<sup>21</sup> Hegel, *l. c.* p. 322.



Hegelian philosophy. Hegel demonstrated it *a priori* and added to such demonstration an enthusiastic eulogy of Prussia and of the war against Napoleon." <sup>22</sup>

M. Lévy-Bruhl writes very aptly: "In Hegelianism, nothing conforms more to the Prussian tradition than the idea of the all-powerful State, anterior and superior to every particular interest and subordinating to itself the will and the personality of the subjects. It is one of the salient traits of the history of Prussia. . . . For a long time Prussia did not exist as a nation; it existed however as a State. . . . What bond united the subjects of the Prussian king? The State, that sovereign majesty and ultimate power on earth." <sup>23</sup>

It is, in fact, the Prussian State which Hegel had in mind in his analysis of the internal constitution of a particular State.

The institutions of a State form its constitution. "They form in a particular state a developed and realized rationality and are by virtue thereof the steadfast basis of the State — determining the temper of individuals toward the State and their confidence in it. They are also the foundation stones of general liberty, since in them particular liberty becomes realized in a rational form; and reasonably so, inasmuch as the union of liberty and of necessity exist therein." <sup>24</sup> Here again we find the ever recurring identity of opposites. We have in it the identity of liberty and of necessity, the synthesis of which is realized in the institutions of the State.

## V

What institutions best secure concrete liberty in realizing equally the synthesis of liberty and of necessity?

To answer the question, it is necessary to know that the political institutions must make an organism of the State, that is to say, must realize the development of the idea in its divers elements, and give to each an objective reality. This organism is the political constitution. It always grows out of the constitution of the State as it is maintained thereby.

The different elements of such organism are the different powers (*Gewalten*), both their acts and their activity, "by which the uni-

<sup>22</sup> Lévy-Bruhl, *L'Allemagne depuis Leibniz*, p. 393.

<sup>23</sup> Lévy-Bruhl, *l. c.* pp. 415 and 416.

<sup>24</sup> Hegel, *l. c.* p. 328. [Dyde, p. 254; Hegel, *Grundlinien*, 2 ed., p. 321. — Translator.]

versal is uninterruptedly realized by a necessary process, since these various powers proceed from the nature of the conception. The universal is, however, none the less self-contained, since it is already presupposed in its own productive process.”<sup>25</sup>

Two powers appear first. The one which manifests itself in the organic relations of the State with itself, and the other by which the State enters into relation with other States. The first of these powers is the civil power; the second, the military power.

The internal organism of the State comprises several elements which may be distinguished by a rational analysis. These different elements are of rational order; they form distinct powers; but each one of these powers, nevertheless, contains in itself the whole State; and their reunion forms the individuality — one and indivisible — of the State. There are several powers of the State, each having omnipotence; but there is, however, only one State, one and indivisible. The mystery of plurality in unity, and of unity in plurality, is analogous, as we have seen, to the doctrine of Kant.<sup>26</sup>

The principal passage in which Hegel formulates this idea is as follows: “The constitution will be rational in so far as the State divides and determines its reality according to the nature of the idea (*la notion*) in itself, and in such a way that each one of the powers in itself may be the totality by virtue of the fact that it has and conserves in itself the other elements, and that, because they express a division of the idea (*la notion*), they remain in its ideality and form, therefore, only an individual whole.”<sup>27</sup>

We must not regard, then, these different powers as interfering with one another, as antagonizing one another, as limiting one another. Such would be a grave error; it would be opposed to the substantial unity of the State. The error is dangerous and fatal. Hegel adds, and justly, that the French revolution committed this error several times to the detriment of stable government. In reality, declares the philosopher, the powers neither resist nor actively oppose one another; they form the substantial unity of the State.

Upon such a supposition the State is composed of the following substantial elements:

<sup>25</sup> Hegel, *l. c.* p. 331. [Dyde, pp. 256-7. — Translator.]

<sup>26</sup> Cf. *supra*, chap. III, section III.

<sup>27</sup> Hegel, *l. c.* p. 351.



First, the power of determining the universal and of establishing it. This is the legislative power.

Second, the power of *subsumption* of particular spheres and of individual cases under the universal. This is the governmental power.

We must not fail to observe that Hegel has expressed in complicated and obscure language a singularly simple idea which is this: the legislative power enacts dispositions by way of general provision; the governmental power renders individual and concrete decisions in conformity to the general rule formulated by the legislative power.

Third, the power of subjectivity. It is the power of supreme voluntary decree, the power of the prince. In the power of the prince (*le pouvoir princier*) are found reunited the other powers in an individual unity; it is thus the zenith and the culminating point of everything pertaining to the State.

The fundamental conception of Hegelian philosophy is ever reappearing. The general and the particular oppose each other; they fuse and synthesize each other in the individual. The legislative power is the general; the governmental power is the particular. They combine with each other in the individual unity which is the power of the prince. It is that which gives obligatory force to the enactments of the legislator and decrees of the government. It is the culmination and the acme of all.

This power of the prince is the power of the constitutional monarch in the modern State.<sup>28</sup>

Besides, for Hegel, it is not a question really to determine which is the best sort of constitution. It is not a question of discussing whether the modern State should be monarchical, aristocratic, or democratic. These three forms which have existed distinct in the past are now only the composite elements of the modern State. They are embodied today in a superior form which is more complex, namely, the constitutional monarchy, in which the monarch is the capital and sovereign element — synthesis of the legislative, which is the general and of the governmental, which is the particular.

Another idle question is also that of trying to determine who makes the constitution. This question implies that at a certain moment there is no constitution and consequently no State. There is always a pre-existing constitution. There cannot be any question

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<sup>28</sup> Hegel, *l. c.* p. 355.

then of making a constitution, but only the question of modifying the existing one. The constitution itself is not the work of men. To say that would be to say that the State is a creation of individual wills. The constitution of the State is not the conscious work of men; it proceeds from the very life of the idea realized in the State.

Hegel insists on this idea, namely, that the constitutions of States are not works created by human art but are of natural formation; the spontaneous product of the march of the spirit in the world which naturally creates the State.

"Spirit," says he, "is real only in what it knows itself to be. The State, which is the nation's spirit, is the law which permeates all its relations, ethical observances, and the consciousness of its individuals. Hence the constitution of a people depends mainly on the kind and character of its self-consciousness. In it are found both its subjective freedom and the actuality of the constitution."<sup>29</sup>

## VI

In the natural development of the understanding, modern peoples have arrived at the constitutional monarchy as the superior form of State, in which as we have already said, according to Hegel, the prince synthesizes, in his sovereign person, the power of decreeing through a general medium known as the legislative power, and the power of particular decision known as the governmental power.

It is reiterated by Hegel in the following passage, which is particularly significant: "In the constitutional monarchy the power of the prince contains within itself three elements of totality: the generality of the constitution and of the law, the council which maintains the relation of the particular to the general, and the element of supreme decision so far as it is self-determinate which is the epitome of all the rest, and in which everything has its beginning and realization. This absolute self-determination is the decisive principle of the princely power as such."<sup>30</sup>

We therefore find ourselves in a superior stage of absolutism. It is not only the State as such which, being the realization of the moral idea, is of absolute power. It is really the prince, the monarch. Among the superior peoples of the modern epoch, Prussia included, the State has assumed the form of a constitutional monarchy,

<sup>29</sup> Hegel, *l.c.* p. 360. [I have used Dyde, p. 282.—Translator.]

<sup>30</sup> Hegel, *l.c.* p. 361.



which is the form *par excellence* of the State. Substantial unity is found in such a state through the sovereign; it is he who reunites, within himself, the three elements of political totality. Everything comes from him; everything goes to him; he is the beginning and the end. He possesses supreme self-determination.

This doctrine of Hegel's imposes itself on men's minds with all the more force because it is presented as an absolute truth revealed by reason and realized in the progress of the State, not as a contingent solution, ever debatable, and varying according to time and country.

The omnipotence of the State, the beginning and the end of which is found in the person of the monarch, is called sovereignty. Hegel finds in it two characteristics, namely: first, that the particular acts and powers of the State are neither for itself, nor autonomous, established in the particular wills of individuals; secondly, that their very origin is found in the unity of the State as in their simple self — which is internal sovereignty.<sup>31</sup> (There is another side to sovereignty, namely, external sovereignty about which we shall speak later.)

Hegel, however, would not have us confound sovereignty and despotism: "It is an error," says he, "to confound sovereignty with the arbitrary and the despotic. Sovereignty is the ideality of every particular power. . . . Despotism connotes lawlessness — where the particular will is equivalent to law, or rather takes the place of law, be it that of the monarch or of the people; while, on the contrary, sovereignty — more precisely the legal, constitutional State — brings about ideality of the various spheres of interest and of particular acts, so that these spheres and acts may not be independent, that is to say, autonomous in their end and effects, thereby destroying themselves in one another; but, on the contrary, their ends and modes of action may be determined by the end of the whole, and be thereby dependent upon it."<sup>32</sup>

In simpler terms it is sovereignty which makes particular activities coincide with the general activity, particular ends with universal ends. It is sovereignty which, residing in the individual person of the prince, realizes in the individual the fusion of the particular and of the universal.

Hegel does not stop there. He proceeds to analyze more closely the nature of sovereignty. It is, according to him, a will having

<sup>31</sup> Hegel, *l. c.* p. 363.

<sup>32</sup> Hegel, *l. c.* p. 364.

the power of rendering final decrees. The sovereignty, having a will, is a personality, a subjectivity. Sovereignty is also individual. But it is more than that, because it is incarnate in an individual. This individual is the monarch.

Here should be given a literal translation of the very text of Hegel, in which in spite of the extreme abstraction of its terms, the thought is apparent. "Sovereignty, considered first from the general point of view of ideality, exists only as the ideality of its own definite subjectivity and as the abstract of its own self-determinate will, acting in this without a determinant motive, and being absolute in its decree. This is the individual element of the State as such, which, by virtue of this element, can be only one and indivisible. But it finds its subjectivity in fact only in itself as subject; personality only in itself as person; and in the constitution developed to the point of real rationality each one of the three elements of the notion is really formed specially for itself. This composite whole, decreeing in this absolute way, is consequently not individuality, but an individual, the monarch."<sup>33</sup>

A few pages further on Hegel returns again to the same idea, expressing it in more precise language. After having shown that the State, taken in itself must be considered a person, he concludes with this statement: "The personality of the State is singularly like a person; the monarch is really a person. Personality explains the idea as such; the idea of person is, through the monarch, given reality; and it is only by this means that the notion is an idea, that is to say, truth. . . . The dignity of the monarch is represented as something derivative in its nature, not only as to the form, but also as to its determination; its notion is rather not a derivative, but beginning simply to come unto itself. Accordingly, the conception which represents the right of the monarch as founded upon divine authority is wholly exact, because in such notion is contained the unconditioned part of the monarch's right. But we recognize what errors have grown out of this conception, and therefore the problem for philosophy is to determine that part which is truly divine in the monarch."<sup>34</sup>

In this doctrine of Hegel's, the personality of the State is found in the person of the monarch, whose native and unconditioned power is the synthesis of all the power of the State. One can easily

<sup>33</sup> Hegel, *l. c.* p. 365.

<sup>34</sup> Hegel, *l. c.* pp. 366 and 367.



see in this the germ of all the doctrines of public law formulated by contemporary German jurists, — the Gerbers, the Labands, the Jellineks, who turn such public power into a subjective right of the State, and who see the monarch as a direct and all-powerful organ of the State. In a word, this is the germ of the subjectivist and organicist doctrines of public law which the German publicists have made special effort to construct for the purpose of giving a juridical appearance to the omnipotence of princes in general, and of the emperor in particular.

This sovereignty of the monarch being thus affirmed, what becomes of the sovereignty of the people in Hegel's philosophy? The question, which could not escape the attention of the philosopher, he attempts to answer at great length.

In speaking, says he, of the sovereignty of the people, we can only mean that a nation is outwardly autonomous, and forms a regular State like the people of Great Britain, for example. But the people of England, of Scotland, of Venice, of Genoa, are no longer sovereign peoples, since they have ceased having regular princes or supreme governments. We can also say this of internal sovereignty, that it resides in the people "when we speak merely of the whole," even though it has been shown that sovereignty belongs not to the people but to the State.

"In its customary meaning," adds the philosopher, "in the modern epoch when we think of the sovereignty of the people, we contradistinguish it from sovereignty existing in the person of the monarch. Taken in this directly opposite meaning, the sovereignty of the people has a connotation of lawlessness (*wüste*)"<sup>35</sup> — the basis of which can be traced to that deplorable institution, popular representation. "The people, taken without its monarch and without the organization of the whole, which is the necessary and immediate consequence of it, is a shapeless mass, which is no longer a State, no longer having such decisions as can be found only in the organized whole in itself, that is to say, in sovereignty, in government, in tribunals, in a supreme council, in States. It is only when these elements are related to the organization, to the life of the State appearing in the people, that what

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<sup>35</sup> The word, *wüste*, which Hegel uses to mean national sovereignty as distinguished from the sovereignty of the monarch, is a word connoting exceeding contempt in the German.

is called in a general way, the people, ceases to be an indeterminate abstraction."<sup>36</sup>

Finally, according to Hegel, if we understand by sovereignty of the people the republican political form of government, or more precisely democracy, we must remember that the modern State has gone beyond such phase of democracy and of republicanism, and has arrived at a superior form, the stage of constitutional monarchy.<sup>37</sup>

## VII

Hegel's doctrine with reference to government presents nothing particularly interesting. To him government is the executor of princely decisions. It is comprised of the police (*la police*) and the tribunals; it decrees with respect to particular cases in conformance with the general ends in view. The power of the government is exercised by its ministers, by the different functionaries, by the different tribunals, all of which are merely the agents of the monarch for such purposes.

These very simple ideas Hegel expresses in abstract terminology peculiar to him, an example of which is the following: "The governmental authority executes and applies the prince's decrees; it executes and enforces what has been decided, namely, existing laws, institutions, ordinances, and all with an eye toward general ends. The power of government in itself is found in this very act of *subsumption*, it is made up of the police power and the power of the tribunals, powers that refer to the particulars of civil society and have the general interest as their end."<sup>38</sup>

As for the legislative power it has to do with laws as such, in so far as they need a more complete expression; and with internal affairs, wholly general in character, according to their content.

But, insists Hegel, we should form a false idea of the legislative power if we thought it was a matter exclusively for parliament; and if we wished to give to the parliament, inasmuch as it is the legislative power, an existence absolutely independent of the other powers. "The conception of independence of powers," writes the philosopher, "contains within itself that fundamental error that independent powers must, nevertheless, delimit one another. By

<sup>36</sup> Hegel, *l. c.* p. 368.

<sup>37</sup> Cf. *supra*, chap. V, sections V and VI.

<sup>38</sup> Hegel, *l. c.* p. 280.



virtue of such independence, the unity of the State finds itself suppressed — a unity which must, above all, be realized.”<sup>39</sup>

Consequently, in the Hegelian doctrine, the three elements corresponding to the three powers must co-operate in the execution of laws. Above all, the monarch, vested with the power of supreme decision, must alone see to it that the law becomes an obligatory rule binding on and requiring the obedience of all. The theory underlying this idea will be taken up again for the purpose of showing its development by the greatest contemporary theorist on imperial omnipotence, namely, the publicist, Laband.<sup>40</sup>

The government participates also in the making of laws. It alone in fact has the actual knowledge and is competent to oversee the whole in its complexity; it alone can grasp the essential principles which have been proclaimed as regards this whole; it alone understands the needs attendant upon the power of the State. The government will therefore intervene by such agencies as the councils of the crown, which must take their place beside the sovereign in all organized states.

Finally, parliament participates also in the making of law, and Hegel reduces to a minimum its part in collaborating in legislative work. He also calls parliament a body representing class interests (*das standische Element*).<sup>41</sup> He speaks of it with evident disdain. “We often imagine,” says he, “that the representatives of the people or the people themselves can discern much better than anyone else what is good for them, and are best able to bring it about. This is a great mistake. If by people we mean that which is neither the sovereign nor its officers, we must admit that the people are wholly unable to determine what are the real interests of the State. The people are that part of the State that know not their own wants. The higher officers are very much better posted as to the needs of the State, and can very much better see to them than parliament — even without the aid of parliament.”<sup>42</sup>

What is then, according to Hegel, the part that parliament plays? He recognizes that it guarantees the general good and liberty. Thus, on the one hand, parliament gives advice that can be useful

<sup>39</sup> Hegel, *l. c.* p. 392.

<sup>40</sup> Laband, *Droit public de l'empire allemand*, French translation, 1901, II, p. 260 and following.

<sup>41</sup> Hegel, *l. c.* p. 392.

<sup>42</sup> Hegel, *l. c.* p. 393.

to the government. The debates of parliament, on the other hand, give publicity to matters, and exert a control that can only react efficaciously and usefully upon those in the power.

But that is not to Hegel the more cogent explanation for the existence of parliaments. They are also a logical deduction from the idea; and therein lies the philosophical and consequently the true reason for their existence. There is undoubted progress when a State in which the monarch exercises unlimited power sets up a parliament. There exists then, in fact, one degree higher as to organization. Without a parliament the popular mass remains inorganic, atomic. With the parliament, it becomes organized. Popular opinion comes into being in a legal and regular form. Violence and conflicts in interests are avoided. The popular mass takes part to the extent of its capabilities in the life of the State.<sup>43</sup>

But in no case does Hegel admit that the parliament should be elected by universal suffrage. "That all," says he, "considered individually, must take part in the deliberations and decisions with respect to matters affecting the general interests of the State because all are members of the State and because the affairs of the State are the affairs of all, are false declamations. The State, being essentially an organization of its members, forms spheres of action; and, therefore, within the State no element should appear as an inorganic mass."<sup>44</sup>

Hegel also rejects representation, as we habitually understand it, that is to say, representation of individuals. In reality, it is not individuals who are represented, but the important social interests: agriculture, commerce, industry. Elections are wholly secondary. The philosopher, ever having the Prussian State in mind, naturally believes there should be two assemblies: An assembly of lords representing the landowners, hereditary in character, and having as its members only persons possessing entailed estates; and an assembly representing a less permanent element — those interests less permanent in character. It is well known that such is still in the main the organization of the Prussian Parliament.<sup>45</sup>

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<sup>43</sup> Hegel, *l. c.* pp. 393 and following.

<sup>44</sup> Hegel, *l. c.* p. 397.

<sup>45</sup> Cf. as to this part of Hegel's political philosophy, Lévy-Bruhl's *L'Allemagne depuis Leibniz*, pp. 404 and 405.



It is important to repeat that in the Hegelian doctrine the parliament in truth does not make the law. It expresses current opinions. Through the publicity given to its deliberations, it can, however, enlighten public opinion. But in reality it plays only the part of a board of consultation. The king and the ministers merely take the advice of the two assemblies for enlightenment; they are not bound to follow such advice. The king alone has the power of giving a final decision. It is the monarch alone who formulates the final decrees of law. It has been mentioned previously that this conception of Hegel's was the inspiration for the theory of law formulated by Laband, the great publicist of the German empire.<sup>46</sup>

### VIII

We have previously seen that Hegel distinguished between internal law (*le droit interne*) of the state and external law (*le droit externe*) of the State. Thus we read according to his formula: "The idea of the State passes into the relation of the particular State with other States; this is external public law (*le droit public externe*), the external right of the State." It is what is usually termed international law. The philosopher devotes much less time to its development than to internal law. The most salient feature of Hegel's doctrine on this point is his apology for war.

The sovereignty of the State, considered externally, is its personal individuality in its relations with the personal individuality of other States. Hegel explains this quite clearly: "Such individuality, existing exclusively for itself, appears in its relations with other States, each one of which is autonomous with regard to the others. Since it is in this autonomy that the 'for-itself' (*pour soi*) of the real spirit of the State has its existence, this autonomy is the first freedom and highest dignity of a people."<sup>47</sup>

Hegel says again: "The State acts externally as an individual subject, but (as we have seen above) this subjective individuality of the State is incarnate in an individual, namely, the sovereign monarch. Consequently, it logically and naturally devolves upon the monarch to direct, in essential matters, the external activity of the State, or which is the same thing, the external sovereignty.

<sup>46</sup> Laband, *Le droit public de l'empire allemand*, French translation 1901, Vol. II, pp. 260 and following.

<sup>47</sup> Hegel, *l. c.* p. 416. [Dyde, p. 329. — Translator.]

... To look after the relations of a State with other States, therefore, is within the princely power, and it has for its primary duty the commanding of the armed force, the entertainment of relations with other States through ambassadors, the declaring of war, the making of treaties of peace as well as other treaties.”<sup>48</sup>

This expresses Hegel's idea very clearly. The external rights of the State, then, prove the existence of its subjective individuality with respect to other States. This subjective individuality of the State is incarnate in the person of the monarch, and the latter therefore should have all the powers which have to do with international relations. He has thus, in its plenitude, external sovereignty just as he has internal sovereignty.

But this statement is not a solution, so far as knowing the foundation of international law is concerned. The problem, however, appears very clear in the mind of the philosopher. Internal sovereignty binds the subjects of the State because it is such sovereignty; that which it wishes and commands is the jural principle (*la règle de droit*) and obedience is therefore owed to it. But in international relations the State is in reaction with other sovereign States like itself. How can such States, without ceasing to be States, be subordinated to a superior principle (*une règle supérieure*) binding upon them? Hegel unquestionably foresees the difficulty but he offers no solution. Let us judge for ourselves. He thus writes: “Since there exists no power that can decide against the State what is right in itself, and which can assure the realization of such decision, we must as regards these relations always fall back on the moral duty (*soll*). The relations of States among themselves is the relation of autonomous beings which stipulate among themselves, relying at the same time upon these stipulations.”<sup>49</sup>

At this point Hegel's ideas are clear. For him, there is in verity no international law; because there is no human power superior to the States which can formulate the jural principle (*la règle de droit*) applying to them and enforce their obedience to such principle. Only moral duties exist as between States. On the other hand, covenants can intervene between them, and these covenants will momentarily rule their relations.

The ideas of the philosopher in this respect are again precisely stated in the following passage: “The foundation of international

<sup>48</sup> Hegel, *l. c.* p. 423.

<sup>49</sup> Hegel, *l. c.* p. 425.



law as general law could be valid in itself and for itself between States in contradistinction to particular pre-existing treaties, on the theory that the treaties, so far as they impose obligations upon States as among themselves, should (*sollen*) be respected.”<sup>50</sup>

And so international law does not exist and cannot exist outside of international covenants. The concrete obligations of international law are those of treaties; but there is a general and superior principle over and above them, namely, the principle that international treaties must be respected.

If States are obliged to respect treaties which they have signed, what becomes then of the sovereignty of the State? What becomes of this divine and limitless power of the State — the reality of the moral idea? Hegel cannot abandon it. Since, therefore, the principle as to inviolability of treaties is logically irreconcilable with it, it is this principle in the last analysis which is sacrificed — thereby reducing international law to nothingness.

Let us judge for ourselves from the following passage, which I translate literally: “Because in regard to the relation of States among themselves, their sovereignty is the basic principle: *they are in that respect in the state of nature in regard to one another, and their rights are not realized in a general will so constituted as to have power over them; but their rights are realized only through their particular wills.* This situation, so determined, subsists, however, alongside the duty (*soll*) to respect treaties. There is in fact a succession of relations created by the signing and abrogation of treaties.”<sup>51</sup>

One might just as well say that the State being sovereign is bound by treaties only so long as it so desires, and that the State can always withdraw from them when its interest demands it. This is the true belief of the philosopher, and we shall find it adhered to without reserve and without shame by the greatest jurisconsults of contemporary Germany.

Since States can always withdraw from the obligations contracted by them in their treaties whenever their interests demand it, there can be no solution other than war in respect to conflicts between them.<sup>52</sup> But we must not fear war. We cannot even make the attempt to imagine, like Kant, projects of perpetual peace. They are chimeras. War is good; war is excellent; war is fecund; war is holy. Hegel does not come far from saying, as did Joseph de

<sup>50</sup> Hegel, *l. c.* p. 426.

<sup>51</sup> Hegel, *l. c.* p. 427.

<sup>52</sup> Hegel, *l. c.* p. 427.

Maistre, that war is divine, and he certainly thinks so. The two philosophers can shake hands with respect to the ignominy of such a doctrine.<sup>53</sup>

War is indispensable, according to Hegel, as regards the moral vigor of peoples. It is war which makes us truly understand the fragility of human goods and of human things. Without war these words mean nothing. War is "the moment when ideality of the particular obtains its right and becomes reality." War is of superior importance in founding the morality of peoples, in securing them against indifference in regard to the inevitable arrival of final certitude "in the same way that the movement of the winds guarantees to the seas a security from corruption which would come upon them in their calm."<sup>54</sup>

## IX

We have finally reached the third element of the idea of the State. Let us recall, however, that according to Hegel's idea of the State it is comprised of three elements: First, the internal right (*le droit interne*) of the State; Second, the external right (*le droit externe*) of the State; Third, the State as the general idea, as the absolute genus and the absolute power, as contradistinguished from individual States — that which is mind or spirit (*l'esprit*) gaining its reality in the progress of the history of the world.<sup>55</sup>

It is fitting here to translate literally a few pages in which the philosopher, wishing to show how spirit or the idea is realized in the history of the world, formulates his general conclusions with respect to the State. He writes: "In the relations of States with one another, since they are in this respect, particular and autonomous elements, there appears the very best example of the internal particularity of passions, of interests, of ends, of talents, and of virtues, of power, of non-right, and of crimes, like external accidents with the greatest extent of phenomenon, showing that even the moral whole — the autonomy of the State — is exposed to

<sup>53</sup> Joseph de Maistre wrote thus: "War is divine in itself because it is the law of the world. War is made divine through the consequences it brings about. . . . War is divine on account of the mysterious glory which surrounds it. . . . War is divine by virtue of its mode of inception. . . . War is divine as regards its results." (*Les soirées de St. Pétersbourg*, seventh edition, the Parisian edition, 1872, Vol. II, pp. 33 and following.)

<sup>54</sup> Hegel, *l. c.* p. 418.

<sup>55</sup> Cf. *supra*, chap. V, section II.



contingency. The underlying principles of the minds of peoples, due to their particularity in which in their character of existing individuals, they have their objective reality and their own consciousness — these principles are especially limited; and their ends and their acts in their relations between themselves are the dialectic of the finality of minds, according to which the general spirit, the spirit of the world, proceeds, inasmuch as it is non-limited, and as such (*i. e.*, the spirit of the world) exercises its right. Its right is the highest of all. It exercises its right over them in the history of the world as before the tribunal of the world.”<sup>56</sup>

This last sentence which is often quoted separately from what precedes and follows it may be translated thus: “The history of the world is the tribunal of the world.” This translation does not follow the text closely, and, moreover, does not betray the ideas of the philosopher. We shall see this a little further on.

Hegel thus continues: “The living element of the general spirit, which in art is vision and imagination, in religion, sentiment and representation, in philosophy, pure and free thought, is in the history of the world spiritual reality in its entire sphere of interiority and exteriority. The history of the world is a tribunal because in its generality existing in itself and for itself, the individuals, the penates (the family), civil society, and the minds of the people with their heterogeneous realities, are only as ideals; and the progress of the mind is to represent the spirit in this living element.”

“Moreover, the history of the world is not the simple tribunal of such power, that is to say, the abstract and irrational necessity of a blind destiny; but because this destiny is reason in itself and for itself, and because its existence for itself is understood by the mind, the history of the world is the necessary development of the elements of reason, starting from the mere notion of its liberty, and passing from that to the notion of its consciousness and of its liberty, and then to an extension and development of the general spirit.”<sup>57</sup>

There is no doubt that these formulas, in which abstraction is carried to its very limits, are somewhat obscure. Here may be given what I believe, as does M. Lévy-Bruhl, the epitome of the philosopher's ideas and the conclusion of his doctrine in respect of the State.<sup>58</sup>

<sup>56</sup> Hegel, *l. c.* p. 430.

<sup>57</sup> Hegel, *l. c.* p. 431.

<sup>58</sup> Cf. Lévy-Bruhl, *L'Allemagne depuis Leibniz*, pp. 410 and 411.

The development of the idea realized by the State is accomplished in the world through the struggles, the foundations, and the fall of empires — the triumphs and the disasters of nations. War, violence, oppression, are the necessary factors of such developments, and "the history of the world is the tribunal of the world." We must not translate this sentence as is often done by the celebrated formula: "Force comes before right." Such is not Hegel's belief. What he means is that wars, violence, force, give birth to right; the progress of the spirit of the world develops through violence of all kinds and in spite of this violence. It develops in the peoples and by the peoples that triumph in these struggles, in such wars, in violence of all kinds. But that triumph is not due to pure hazard. These peoples triumph by their work, by their strength, by their courage, by their spirit of sacrifice and of perseverance. They deserve to triumph; their victory is a proof of it; and the history of the world, which is the tribunal of the world, so decides.

About the beginning of the war, Max Harden wrote in his review, *Die Zukunft*: "It is not against our will that we are thrown into this gigantic adventure. It has not been imposed upon us by surprise. We have wanted it: we must have wanted it. We do not appear before the tribunal of Europe; we do not recognize similar tribunals. Our strength will create a new law in Europe. It is Germany who knocks. When it shall have conquered new domains for its genius, then the priests of all the gods will boast of the blessedness of the war. . . . Germany is not waging this war in order to punish the guilty or to liberate oppressed peoples and afterwards to sit back with full consciousness of its disinterested magnanimity. It has waged it because it has immutable conviction that its deeds have given it a right to a more significant position in the world and a right to greater outlets for its activity."<sup>59</sup>

Harden, speaking in this way, shows himself to be a faithful interpreter of the master's ideas. Marshal Von der Goltz was acting the pure Hegelian, probably without being aware of it, when he answered the Bishop of Liège, Monseigneur Rutter, who at the time was complaining about the excesses of the German soldiers:

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<sup>59</sup> *Die Zukunft*, August, 1914; cited from a pamphlet entitled *Paroles allemandes*, published by Berger Levrault, with a preface by the Reverend M. Wetterle.



"We will conquer, Monseigneur, and the glory will eradicate all." <sup>60</sup>

Hegel's ideas can again be seen very clearly in his division of the history of the world into four great periods. In the necessary and rational progress, which is the development of the idea, the people who represent any given period of this development have an absolute right against all other peoples, and the latter are devoid of right against such a nation. The peoples whose epoch has passed do not count in the history of the world any more than do political forms when their time among the forms of the State has passed. The history of peoples is divided into four great periods: the Oriental period, the Greek period, the Latin period, and the Germanic period. <sup>61</sup>

The Oriental, Greek, and Latin periods have passed and will never appear again. We are now in the Germanic period, that is, in the period in which the Germanic elements have everywhere preponderance, and by virtue of which they realize right, since the history of the world is the tribunal of the world. The modern world realizes through Germanic genius the triumph of science and of liberty, and by virtue thereof at the same time the union of divinity and of humanity.

But, nevertheless, Germanic genius itself has not taken the last step in this divine and eternal progress which is the history of the world. This last stage is attained only beyond political and social life where the idea is conceived in an even higher and superior form, namely, the absolute spirit, God, unity in itself and for itself, unity of the object and of the subject, the third part of the philosophy of the mind. <sup>62</sup>

We have in this, then, the whole political philosophy of Hegel and some idea of the manner in which it takes form in infinite variety in his whole philosophical system. His influence upon the doctrines of German publicists and upon the formation of the abominable mentality of contemporary Germany has been prodigious. In the remainder of this paper, the effect of Hegel's philosophy on the theories of public law formulated in our epoch by professional German jurists will be clearly seen.

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<sup>60</sup> See the *Journal le Tyd*, April 22, 1916.

<sup>61</sup> Hegel, *l. c.* p. 436.

<sup>62</sup> Cf. Archambault's Hegel, p. 27 *et seq.*

## CHAPTER VI

METAPHYSICAL AND INDIVIDUALISTIC DOCTRINES IN  
FRANCE SINCE THE REVOLUTION

FROM the preceding chapters it may be seen that in the first quarter of the nineteenth century all metaphysical conceptions of the State agree on this point, namely, that the State is a sovereign personality, that is to say, a personality distinct from individuals and invested with an independent will, having no superior above it on earth. We also agree on this point, that the individual has a free and autonomous will.

But, on the other hand, in the Declaration of Rights of 1789, it is affirmed that the natural rights of the individual subsist intact and inviolable in society organized as a State; that the autonomy of the individual is opposed to the power of the State and limits it; that the State, even through the law, can do nothing which may be an infringement of this autonomy; that it can limit the liberty of each only to the extent necessary to protect the liberty of all; and that it can do this only by a law, that is to say, by means of a disposition by way of general provision, voted on by the people or by their representatives.

With Jean Jacques Rousseau, Kant, or Hegel, on the other hand, we would proceed in this manner: Undoubtedly the person of the individual is autonomous; the individual possesses a personality endowed with a free will. The individual as such has rights, but these rights of the individual exist only in the State, and through the State; the autonomy of the human person is not in truth realized except through the State. The formulas of Jean Jacques Rousseau, of Kant, and of Hegel are different; but the idea is ever the same. When speaking for them no mention can be made of limitations upon the power of the State, brought about for the interest of the individual, since the individual is really free only through the sovereignty of the State; to affirm that the liberty of the individual comes to limit the sovereignty of the State is to deny this sovereignty.



The latter tendency is associated with most of the German doctrines which admit the metaphysical conception of the State. From the first tendency, on the contrary, most of the French doctrines draw their inspirations.

## I

We can qualify as French classical doctrine that which was formulated in the Declaration of Rights in 1789, as discussed previously in Chapter I. It was the inspiration for all our constitutions and all our codes; up to within the last few years it has been taught dogmatically by all law faculties and can be found in all treatises on public law and administrative law.

We must admit, however, that with respect to certain points of application fundamental differences separate the various representatives of the doctrines, even though they may be in accord as to the foregoing principle.

If at the outset we agree in believing that a negative limitation is imposed upon the State, it is not the same as believing that positive obligations also are imposed on it. The State cannot juridically do certain things; but is there juridical constraint upon it to prevent it from so doing? Some say yes; others say no.

A divergence also appears as to what is regarded as the sanction of the obligations binding on the State. All agree in teaching that the State must become so organized that the danger of violations of law will be reduced to the minimum. But if in spite of this organization the State makes laws contrary to right, or orders things to be done in violation of it, do the individuals owe obedience? It is the extremely old and ever pressing question in another form, namely, resistance to oppression. May the individual refuse to obey oppressive law, that is, law contrary to the higher law (*au droit supérieur*), which is binding on the State? May he by force offer resistance to such acts of constraint as are contrary to right? If this oppression persists, may he even revolt against the oppressing rulers who wield such power?

The Declaration of Rights of 1789 and of 1793 place resistance to oppression among the natural and indefeasible rights of man. No mention is made of it in the Declaration of Rights of the Year III. The French classical doctrine has always been divided on this point, and as we shall see in the rest of the chapter, although

celebrated jurisconsults affirm that obedience is always due the law — the expression of the general will — and that every contrary doctrine must be rejected as anarchical, publicists of great authority and of great renown teach that nobody owes obedience to law when it is contrary to right, and that every revolution which tends to overthrow an oppressive government is legitimate.

I do not intend to analyze the writings of all the French publicists and jurists who, from the Revolution to the present, have at the same time accepted the metaphysical conception of the State and founded the limitation of its powers upon the recognition of the natural and indefeasible rights of the individual. This is, in fact, the almost unanimous opinion of French jurists and publicists. I shall speak only of those who appear to be the best representatives of the doctrine, and I believe that there are none superior to Benjamin Constant in the first half of the nineteenth century and Esmein in our own time. I have a purpose in bringing together a political theorist and a jurist. Such a comparison with the contrasts resulting therefrom will perhaps show better than in any other way the impotence of the individualistic doctrine in creating juridical limitations upon the powers of the State, when declaring the State to be sovereign — in short, its impotence to solve the irremissible contradiction that exists between the sovereignty of the State and the autonomy of the individual.

## II

We know that Benjamin Constant, one of the most vigorous and brilliant minds of the first thirty years of the nineteenth century (Benjamin Constant died in 1831) has written numerous articles and pamphlets on questions of constitutional law collected and published in his lifetime, entitled *Constitutional Politics*.<sup>1</sup>

The idea of a recognized and guaranteed juridical limitation upon the sovereignty of the State appears dominant throughout his whole work. He rightly believed that the very principle of juridical limitation upon the powers of the State clashes fatally with the principle of national sovereignty; he feared especially the general-will conception, as Jean Jacques Rousseau develops it,

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<sup>1</sup> Benjamin Constant, *Cours de politique constitutionnelle*, four volumes, Paris, 1819.



according to which it is said that the general will cannot err, that it is always imposed on individuals, that in constraining individuals in spite of their resistance "it simply forces them to be free," that it is the only criterion without reserve or appeal of the limitations to be placed on the liberty of individuals. Benjamin Constant attempts above everything else to guard the citizen against the dangers of such a doctrine.

He thus writes especially: "In a society founded on the sovereignty of the people, it is certain that no individual or class has the right to place the others in submission to its particular will. But it is a mistake to say that all society possesses a limitless sovereignty over its members. . . . Sovereignty exists only in a limited and relative manner. At the point where the independence of individual existence begins, the jurisdiction of this sovereignty ends. If society goes beyond this line, it is as guilty as the despot who only has for title the exterminating sword. Society cannot go beyond its competency without being a usurper; nor can the majority without being rebellious."<sup>2</sup>

Benjamin Constant especially denounces and combats the sophism of the omnipotence of the majority. Rousseau had said: "When an opinion contrary to mine succeeds, that proves very clearly that I was wrong and that what I believed was the general will was not; in forcing me to obey the majority, I am only forced to be free."<sup>3</sup> Benjamin Constant thus rightly answers: "The assent of the majority is not sufficient in all cases to make such authoritative acts legitimate. There are some things that nothing can sanction. When any authority whatever commits such acts, the source from which such authority emanates matters little; whether it is called individual or a nation is of no consequence; even though it emanates from the whole nation, minus the citizen that is oppressed thereby, it cannot be any more legitimate. Rousseau failed to recognize this truth, and his error has made the *Contrat Social*, so often invoked in favor of liberty, the most vicious auxiliary to every kind of despotism."<sup>4</sup>

It could not have been stated better; and had Benjamin Constant lived sixty years later, he would have seen his prediction confirmed

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<sup>2</sup> Benjamin Constant, *l. c.* I, p. 177.

<sup>3</sup> Jean Jacques Rousseau, *Contrat social*, Bk. I, chap. VII, and Bk. IV, chap. II.

<sup>4</sup> Benjamin Constant, *l. c.* I, pp. 178 and 179.

by all the German absolutist doctrines of which Rousseau was the true inspiration through the intermediary of Kant and of Hegel.

Benjamin Constant moreover ruthlessly criticises the *Contrat Social*; he does not leave a single principle of the system unassailed. One passage deserves being quoted at length: "Jean Jacques Rousseau defines the contract entered into by society and its members as a complete alienation, without reserve, by each individual of all his rights to the community. To reassure us as to the consequences of such an absolute abandonment with respect to all phases of our existence for the benefit of an abstract being, he tells us that the sovereign, that is to say, the social body, cannot do injury either to its members collectively, or to any one of them in particular, . . . ; that each one by giving himself up for all gives himself up in reality. . . . But he forgets that all these preservative attributes which he confers upon the abstract being called the sovereign result in this, that this being is made up of all individuals without any exceptions. As soon, then, as the sovereign is compelled to make use of the power which he possesses, that is to say, as soon as he finds it necessary to proceed to a practical organization of authority, since the sovereign cannot exercise it single handed, he delegates it, with the result that all these attributes disappear. Acts done in the name of all, whether one will or not, being necessarily in the control of only one person or of a few, it eventuates that in giving one's self to all it does not follow that one gives one's self to none; one gives one's self on the contrary to those who act in the name of all. . . . As soon as the general will becomes all powerful the representatives of this general will become all the more formidable in that they call themselves only docile instruments of this pretended will and because they have in hand the means of force or of solicitation necessary to secure the manifestation of it in the way which suits them best. What no tyrant would dare to do in his own name, they legitimize through this limitless social authority. . . . The people conceived as all powerful are, as such, as dangerous as a tyrant; or rather it is certain that tyranny will avail itself of the right granted to the people. It will need only to proclaim the omnipotence of such people when menacing it; and to speak in its name when imposing silence upon it."<sup>5</sup>

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<sup>5</sup> Benjamin Constant, *l. c.* I, pp. 179 to 183.



## III

Benjamin Constant points out with exceeding skill and clearness that it is not only such and such organ of the State that has limited power, but that the very sovereignty of the State must also be limited, whatever organ of the State may exercise it. Many people following the constituents of 1791 believe in fact that they have placed the liberty of the individual on indestructible foundation in formulating the dogma of the separation of powers and in making the rules of political organization conform to it by declaring that each power should be narrowly limited to the sphere of action which devolved upon it by the constitution. Benjamin Constant shows truly enough that this is but a snare.

"Divide power as you will," says he, "if the sum of the powers is unlimited the different powers have only to form a coalition to have a irremediable despotism result. What matters for me is not that my rights can not be infringed by such a power without the approbation of another, but that such infringement be forbidden as regards all the powers. . . . Little does it matter that the executive power has not the right to act without the co-existence of a law, unless limits are placed upon such concurrence, unless we declare that there are matters concerning which the legislator has no right to legislate, or in other words, that the sovereignty is limited and that there are wills (*des volontés*) that neither the people, nor its delegates, have the right to have. That is what must be set forth; that is the important truth—the eternal principle which must be established. No authority on earth is unlimited; neither that of the people, nor that of men who call themselves its representatives, nor that of kings under whatever title they reign, nor that of the law which, being only the expression of the will of the people or of the prince according to the forms of government, must be circumscribed by the same limits as the authority from which it springs."<sup>6</sup>

These things which must be constantly repeated to peoples, to parliaments, to the heads of States, have never been enunciated more forcibly or more authoritatively.

Benjamin Constant could not stop there. He had to point out, in fact, the source of this principle and the measure of its limitations

<sup>6</sup> Benjamin Constant, *Cours de politique constitutionnelle*, I, pp. 187 and 188.

upon sovereignty. Thus he goes on to say: this principle and its magnitude are found in the limits "which are defined by justice and by the rights of individuals."<sup>7</sup> The idea of justice brings forth limitations of a moral character upon the power of the State. The recognition of natural and individual rights gives rise to a limitation in its nature juridical.

Benjamin Constant energetically vouches for the existence of these natural and indefeasible rights of the individual which juridically come to limit the power of the State. He defends them against the opposite negation of Bentham, who taught that the foundation of all law and all morality was utility. "Right," according to Benjamin Constant, "is a principle; utility is only a result. Right is a cause; utility is only an effect. Desire to subordinate right to utility is like wishing to place the eternal rules of arithmetic in submission to our daily interests."<sup>8</sup>

It is thus necessary to maintain energetically the affirmation that man is possessed of natural, inalienable, and indefeasible rights. "I maintain" says the publicist, "that individuals have rights and that these rights are independent of social authority, which cannot curtail them without becoming guilty of usurpation."<sup>9</sup>

But what is the sanction of this rule of limitation which is found to be binding on the State? Benjamin Constant does not ignore the difficulty of the question but admits that this is a possible objection to the doctrine of juridical limitation on the power of the State. But he is not overcome by such objection. "Undoubtedly," says he, "the abstract limitation of sovereignty does not suffice. It is necessary to find an origin of political institutions which will combine the interests of these different repositories of power in such a way that their most manifest, most desirable, most assured advantage must be that all remain within the limits of their respective provinces."<sup>10</sup>

But it is, moreover, necessary, whatever happens, to affirm solemnly and energetically that the powers of the State are limited by the rights of the individual; for, "without wishing, as philosophers have too often done, to exaggerate the influence of truth, one can assert that, when certain principles are fully and clearly set forth, they serve in one way or other as a guarantee of their own

<sup>7</sup> Benjamin Constant, *l. c.* I, p. 188.

<sup>9</sup> Benjamin Constant, *l. c.* I, p. 306.

<sup>8</sup> Benjamin Constant, *l. c.* I, p. 302.

<sup>10</sup> Benjamin Constant, *l. c.* I, p. 189.



existence. With regard to the evidence there is formed a universal opinion which soon becomes victorious. If limitations upon sovereignty are recognized, that is to say, if it is recognized that there exists on earth no unlimited power, no one at any time will dare to lay claim to a similar power. The very expression proves it at once. . . . Sovereign limitation is thus true and possible. It is to be guaranteed first by that force which guarantees all truths recognized by public opinion. Afterward it will be recognized more precisely in the distribution and balance of powers. But let us first recognize this salutary limitation. Without such preliminary caution, all will be naught. If the sovereignty of the people is held within its just bounds, there is nothing more to fear; despotism, either that of individuals or of assemblies, is bereft of its sanction, which is apparently derived from an assent that it commands, inasmuch as this assent, were it real, is proved to have no power of sanctioning anything.”<sup>11</sup>

#### IV

But finally what will happen, if, in spite of the internal force of the principle of limitation, in spite of the organization established to protect the individual against despotism, the legislator, nevertheless, makes laws contrary to the rights of the individual — oppressive laws? In such a case must we obey the law? Benjamin Constant puts this question very neatly, and he shows with great clearness its gravity and difficulties.

“Nevertheless,” says he, “when authority is abused, what must be done? We thus come to the question of obedience to law, one of the most difficult which can attract the attention of men. Whatever decision one ventures on this matter, one is exposed to unknown difficulties. Shall we say that we must obey laws only in so far as they are just? If so, we shall find ourselves authorizing resistance to law in cases most worthy of punishment; anarchy will be found everywhere. Or shall we admit that we must obey the law, because it is law, without regard to its content or its source? If so, we shall be condemning ourselves to obey most atrocious decrees and most illegal authorities.”<sup>12</sup>

The problem cannot be put in a better way. In spite of very

<sup>11</sup> Benjamin Constant, *l. c.* I, pp. 189 and 190.

<sup>12</sup> Benjamin Constant, *l. c.* I, pp. 306 and 307.

grave objections, in spite of the contrary authority of great minds like Pascal and Bacon, Benjamin Constant goes the whole way in respect of the logical consequences of his principle. If the legislator has only limited powers according to a superior principle of right, obedience cannot be due to laws which exceed this limitation and violate this principle. By rejecting this consequence we abandon the whole system. The affirmation of a juridical limitation upon the State becomes a vague, philosophical proposition without practical application and without effective sanction. Benjamin Constant explains this situation admirably, and at the same time he shows the different forms of refusal of obedience, just as the ancient theologians had carefully distinguished between the different kinds of resistance to oppression.

Benjamin Constant shows first that we cannot uphold the proposition that obedience is due unreservedly to every act called a law without absurd results. "Should calling a thing a law always suffice to oblige man to obedience? And again, if a number of men or even a single man without authority . . . give to the expression of their particular will the title of law, are the other members of society obliged to conform to it? The affirmation is absurd; but the opposite viewpoint implies that the mere calling a rule law does not of itself confer upon it the power of obedience, and that such duty supposes a previous determination of the source whence the law emanates. Shall we allow such examination knowing that it will raise a question of determining whether what is presented to us as a law emanates from a legitimate authority, but that once so enlightened the examination should not be allowed as to the very content of the law? It will then be necessary, in all systems, to grant that the individuals may resort to reason, not only to determine the character of the authorities but for the purpose of judging their acts. The necessity of examining the content as well as the source of the law results therefrom. Notice that those very people who make declarations that implicit obedience to laws, whatever those laws may be, is their absolute and bounden duty, always except from this rule the things which are of interest to them. Pascal, for instance, made an exception as to religion; he did not submit to the authority of civil law in matters of religion." <sup>13</sup>

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<sup>13</sup> Benjamin Constant, *l. c.* I, pp. 306 to 308.



The right of the individual to refuse to obey a law contrary to right is incontestable. Without it law perforce becomes tyrannical. This pretended dogma of passive obedience to law has been the cause of many evils. But, at the same time, this right to refuse obedience to the law must be exercised only with great prudence and precaution. The oppressive character of the law can very clearly be seen when it is directly contrary to the natural rights recognized by all. It is better then to oppose the law with passive resistance. Then only do we do our duty, and this passive resistance does not cause trouble in society. Although Benjamin Constant does not say so expressly, he certainly believes in the existence of a supreme tribunal (*une haute jurisdiction*) in every State, chosen in such a way that independence, impartiality, and knowledge would be above suspicion of any kind; which upon requests from the citizens would be charged with deciding whether such laws conform to superior right, and which would have the power to annul such laws as are in contravention thereof.

It seems better on the whole to reproduce at length just what Benjamin Constant has to say in this respect: "Obedience to law," says he, "is a duty; but like all duties, it is not absolute; it is relative; it rests on the supposition that the law emanates from a legitimate source and is confined within just limits. This duty does not cease when the law differs only in certain respects from this rule. We must sacrifice a good deal for public peace; we should find ourselves guilty in the eyes of morality if by a too inflexible attachment to our rights we should disturb tranquillity as soon as it seemed to us that our rights were being infringed in the name of the law. We are under no such obligation as regards laws like those passed for example in 1793 or even later whose corrupting influence threatens that which is most respected of our whole existence. No duty would bind us in regard not only to laws which would restrain our legitimate liberties and restrain such of our actions as there is no right to forbid, but which would also command us to act contrary to the eternal principles of justice or of compassion, which men can refrain from observing only by belying their nature. The doctrine of obedience to law has caused through tyranny and storms of revolutions probably more evils than all the other errors which have led men astray. The most execrable passions have entrenched themselves behind this form, under an

impassive and impartial appearance, for no other purpose than the licensing of all sorts of excesses." <sup>14</sup>

Benjamin Constant does not limit himself to these general propositions; he states precisely the ways in which we may recognize a law which is contrary to right. "Retro-activity is the first of these characteristics. Men have consented to legal impediments (*aux entraves des lois*) only for the purpose of attaching to their actions certain definite consequences, thereby being able to direct matters themselves and to choose lines of conduct to their own liking. Retro-activity deprives them of this advantage. It shatters the conditions of the social pact; it takes away the benefits resulting from the sacrifice imposed by the social pact. A second characteristic of illegality in laws is the compelling of actions contrary to morals. Any law that commands that sort of information which involves denunciation is not a law. Any law that divides the citizens into classes, that punishes them for what has not happened on their account, that makes them responsible for acts not done by them — any such regulation is not a law." <sup>15</sup>

Finally, Benjamin Constant insists on another point, namely, that it is only with extreme prudence, with infinite caution, that we should invoke the incontestable right of refusing obedience to a law which is contrary to right; and that it is better to oppose it by a mere passive resistance. "I do not pretend to recommend disobedience in any way whatsoever. Let it be forbidden, not through deference for the authority which usurps, but through consideration for the citizen whom thoughtless struggles would deprive of the advantages of the social State. As long as a law, even though bad, does not tend to deprave us, as long as authority demands of us only sacrifices which render us neither vile nor ferocious we can submit to it. We compromise only for our own good. But should the law prescribe . . . that we trample our affection and devotion beneath our feet . . . cursed be and let disobedience follow such enactments of injustice and of crime thus dignified under the name of laws." <sup>16</sup>

"But passive resistance to the execution of an oppressive and tyrannical law is a general and permanent duty for ordinary

<sup>14</sup> Benjamin Constant, *l. c.* I, pp. 312 and 313.

<sup>15</sup> Benjamin Constant, *l. c.* I, pp. 313 and 314.

<sup>16</sup> Benjamin Constant, *l. c.* I, pp. 314 and 315.



citizens, for administrators, and for judges. Not to become a party to the execution of a law which appears to be unjust is one's positive, general, absolute duty. This force of inertia entails neither turmoil, revolution, nor disorder. There is no excuse for a man who lends his assistance in the carrying out of a law which he believes iniquitous, for the judge who presides in a court which he believes illegal or who pronounces a sentence of which he disapproves, for the minister who orders the execution of a decree contrary to his conscience, or for the satellite who arrests a man whom he knows to be innocent for the purpose of giving him up to his executioners."<sup>17</sup>

This passage plainly shows that Benjamin Constant believed that tribunals have not only the power but also are under bounden duty of determining the constitutionality, in the general sense, of laws invoked before them, and of refusing to apply such laws as they believe to be contrary to superior right, the very underpinning of the constitution.

## V

We have just seen that Benjamin Constant has formulated the doctrine of limitation of the power of the State with the natural rights of the individual as a basis in the rather pompous style of his time, but with an admirable clearness and logical completeness. This doctrine has been and still is, we are happy to say, the French classical doctrine. Many publicists have not gone as far as Benjamin Constant, and have not recognized a right in the individual to refuse obedience to laws contrary to superior right (*au droit supérieur*). So, also, many have denied to tribunals the right of passing on the constitutionality of law. But in spite of these reservations, the principle of sovereignty limited by the rights of the individual is still dominant in French classical doctrine.

This doctrine has found its last and certainly its most faithful and complete expression in an excellent book of the deeply lamented Professor Esmein,<sup>18</sup> whose work is particularly interesting, first

<sup>17</sup> Benjamin Constant, *l. c.* I, pp. 315 and 316.

<sup>18</sup> Esmein, professor of law, one of the faculty at Paris, died at Paris, July 21, 1913. His scientific accomplishments have been rather extensive. Books and articles on all branches of law and the history of law have been published by him. His *Éléments de droit constitutionnel français et comparés* has become a classic. The first edition was published in 1896; the sixth in 1914, after his death, was published by M. Joseph

because it is at once that of a historian and of a professional jurist well versed in juridical technique, and secondly because the book is a remarkable attempt to construct an inflexible State with the principle behind the individualistic doctrine as a foundation. My only regret is that Professor Esmein did not dare to go the whole way, and, after having energetically affirmed the principle of limitation of the sovereignty of the State, did not recognize the right of the individual to refuse obedience to any law overstepping the limits of this sovereignty.

Esmein defines the State as the juridical personality of the nation. What constitutes, says he, a nation in law (*en droit*) is the existence in a society of men of an authority superior to the individual wills. What is the source of this authority? Is its power legitimate, and why? These are questions which all in all do not seem to interest the master. It is enough for him to declare that this authority does exist, that it must exist; and that, furthermore, such authority does not recognize any superior or opposing power so far as the relations of which it has control are concerned; that this authority is sovereignty; and that it has two aspects, namely, *internal* sovereignty, or the right to issue commands not only to all citizens of which the nation is composed but also to all those who are within the territorial boundaries of the nation and *external* sovereignty, or the right to represent the nation and to bind it in its relations with other nations.

Is the power of the sovereign State unlimited? Or on the contrary is there any limit to such power? If there is, upon what principle? What is its extent? Esmein does not fail in clearness in stating the question. His answer is equally clear: "It seems," he writes, "that sovereignty must necessarily be unlimited, and that consequently the right of the State should be also limitless. . . . Such was unquestionably the Greek and Roman conception. . . . One of the ideas most firmly established and most prolific in modern times, on the contrary, is that the individual has rights anterior and superior to those of the State. We shall see later how this conception of individual rights is justified, what is its origin, and the ways in which it is understood. But, for the time being, it is sufficient to recognize that this principle, once admitted, forms

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Barthélemy. Reference is usually made to the sixth edition unless some other edition is specifically mentioned.



with all its consequences an essential end for constitutional law. In fact, it limits more narrowly than any other law the exercise of sovereignty, because it forbids the sovereign making laws which interfere with individual rights and commands him to promulgate those necessary to assure an efficacious enjoyment of these rights.”<sup>19</sup>

Every organization of the State must be directed and, in the modern parliamentary State, has in fact been directed toward this end: to guarantee to the individual the respect and the protection of his individual rights; to protect individual liberty against the encroachments of the State. The whole work of Esmein is inspired by this idea; and the juridical construction which he puts upon the State is very logically and firmly established according to the principles of the individualistic doctrine and on the basis of the idea that sovereignty is the will of the nation politically organized.

For Esmein, however, the limitation upon sovereignty by individual rights does not go so far as to create an obligation upon the State of accomplishing certain positive prestations for the benefit of the individual. The State is bound to do nothing which shall be an infringement of the rights of the individual; it is bound to guarantee them and to protect them; but the individual cannot demand anything more from it. And so Esmein does not recognize the right of the individual to assistance, the right to instruction, or the right to employment through the State.

“Individual rights,” says he, “have one characteristic in common: they limit the rights of the State, but do not impose on it any positive service, any prestation for the benefit of the citizen. The State must abstain from certain infringements for the purpose of leaving individual activity free. But the individual has nothing more to claim in this respect. For this reason we should not class among his rights, as has sometimes been done, the right to assistance, to instruction, and to employment, which each citizen might claim from the State.”<sup>20</sup>

That is clear; but the following is less so. M. Esmein continues in this manner: “The obligation of furnishing assistance to all, that is, instruction or work, might at most be considered as a duty of the State.” This statement is not very clear; for, in fact, if the

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<sup>19</sup> Esmein, *Droit constitutionnel*, sixth edition, published by M. Joseph Barthélemy, 1914, pp. 29 and 30.

<sup>20</sup> Esmein, *l. c.* p. 348.

State is under a duty of furnishing assistance, instruction, and employment, there exists a corresponding right in the individual to demand these things. Does M. Esmein mean by this that it is simply a moral duty binding on the State and not a legal obligation? This makes Esmein still less comprehensible; as I understand him, in fact, there is a moral duty binding on the individuals who are in power. But I cannot understand, by that, a moral duty upon the State, since according to M. Esmein the State is a juridical person, and consequently can have only legal obligations implying corresponding rights.

Undue emphasis need not be given this matter, but we must recognize that Esmein places himself in formal contradiction to the general but decided tendency of modern positive legislation found first of all in France. Everyone recognizes today that if there is not a right to employment, at least there exists the right to assistance and to instruction.

## VI

Even though Esmein energetically affirms that the sovereignty of the State is narrowly limited by the individual natural rights of the person, he refuses to recognize in the individual the right to resist oppression. Not only does he refuse the right to aggressive resistance and the right to defensive resistance, but he also refuses even the right of passive resistance. Recalling that the Declarations of Rights of 1789 and 1793 had proclaimed that the right of resistance to oppression was the consequence of the other rights of man, the learned and lamented professor writes: "These are errors belonging to the past; the syndical right itself is less dangerous."<sup>21</sup>

By syndical right M. Esmein simply means freedom of association concerning which he has ideas quite contrary to mine, which there is no occasion for discussing here. Esmein tersely protests against every pretended right of passive and defensive resistance in the following: "Another error," says he, "is that which consists in proclaiming that the citizen, without rising up in violence, can not only refuse to recognize the laws of his country which offend his conscience but refuse also to submit to them. The first duty of the citizen is to respect the laws of his country, especially in a free country where one can always hope to win over public opinion

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<sup>21</sup> Esmein, *l. c.* p. 1108.



and thereby secure abrogation or modification of those laws which are offensive. It had been previously said by Hobbes that those who profess the error pointed out put down human society so far as it is in their power.”<sup>22</sup>

I highly regret that Esmein, short of arguments, should have been induced to invoke in favor of his thesis the opinion of the theorist *par excellence* of political absolutism. We have previously seen<sup>23</sup> with what force and skilful argumentation Benjamin Constant established the inviolable right of the individual to refuse obedience to laws contrary to right.

It goes without saying that Esmein, rejecting passive and defensive resistance, condemns *a fortiori* aggressive resistance. “It is difficult,” says he, “to conceive of a maxim more dissolvent to political society.”<sup>24</sup>

Whatever be the opinion of Esmein on these particular points, the fact remains that the contemporary French jurisconsult, best representative of the metaphysical doctrine of the State, constructs a juridical State having for its basis essentially this principle, namely, that sovereignty is limited by the natural rights of the individual, which rights determine at the same time the course and the extent of the action of the State. Benjamin Constant went the whole way; Esmein only part way. But in its entirety, the doctrine is the same and its juridical construction rests on the same foundation.

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<sup>22</sup> Esmein, *l. c.* p. 1109.

<sup>23</sup> *Supra*, chap. VI, section IV.

<sup>24</sup> Esmein, *l. c.* p. 1109.

## CHAPTER VII

THE GERMAN DOCTRINE OF PUBLIC LAW AND THE  
METAPHYSICAL CONCEPTION OF THE STATE

THE political doctrines of Kant and of Hegel, previously studied,<sup>1</sup> were really juridical doctrines. But neither one nor the other was a jurist by profession. They had indicated the bases for a juridical theory of the State, but they did not work it out, and had they cared to do so, they could not have constructed such a theory. Not until the last part of the nineteenth century do we find in the legal literature of Germany a true juridical theory of the State. Up to that time public law had not completely divorced itself either from politics or moral philosophy. And with respect to public law the works of the professional jurists contain scarcely a practical explanation of the rules of positive law so far as the political and administrative organization is concerned.

The first German jurisconsult who attempted to construct a juridical theory of the State is Gerber, whose work entitled *Grundzüge des deutschen Staatsrechts* appeared in 1865. The third and last edition was published in 1880. Gerber's book had an immense following. He was the first in fact clearly to formulate the idea that the State is a juridical person distinct at the same time from the prince holding the power and the subjects of this power; and that it is this person, the State, which is invested with public power conceived as subjective right. This idea was destined to become the fundamental conception underlying later attempts to formulate the whole juridical theory of the State — the theory which finds its full development in the work of one quite worthy of admiration, namely, Professor Georg Jellinek.

## I

In the preface of his book, Gerber explains that a number of the German publicists of his time see in the principles underlying modern political constitutions not so much juridical principles as

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<sup>1</sup> *Supra*, chaps. III, IV, and V.



principles of politics and of political philosophy; that others let themselves be dominated by the conception of the ancient German public law, which created a patrimonial right of the prince out of the public power just as if the new constitutional right was the final product of the ancient territorial right.<sup>2</sup>

This ancient conception of public law, the patrimonial conception of the State, or conception of the princely State, was the general conception in all Europe in the seventeenth and eighteenth centuries. It disappeared in France with the revolution. But it subsisted in Germany not only in the minds of the princes but even in the writings of the jurists. Gerber, on the contrary, supposes the State to be a juridical person, distinct from princes; he makes such juridical person subject to the law; he affirms that it is the State, as such, which is endowed with the power of issuing commands, that is, endowed with sovereignty. The State is through and through an organized juridical person of which the prince and even the nation are only the organs.

The following is an important passage of the book in which the direct influence of Hegel appears very clearly, but of Hegel translated by a jurist: "In the State a nation receives the juridical ordering of its collective life. In the State the people become a complete moral unit (*sittlich*) with juridical recognition and value. In the State a people seek and find the most essential means for the protection and satisfaction of their collective interests. In it they receive organization which makes possible the use of all moral forces for the common good. The State is the juridical form for the collective life of a people, and this juridical form is part of the original and elementary type of the moral order (*sittlichen*) of humanity. Through the natural observation of a people, unified in the State, the idea of an organism results, that is to say, of a grouping whereby each person finds the place best fitted for him in contributing to the collective end. The fact that the people have arrived at the point of having a collective juridical conscience and of having the capacity of willing, in other words, that in the State the people find their juridical personality, is first perceived by means of this juridical conception of the State. The State in so far as it protects and brings into prominence all the forces of the people directed toward the moral realization of the common good

<sup>2</sup> Gerber, *Grundzüge des deutschen Staatsrechts*, Preface to the first edition, 1865.

is the highest juridical personality which is known to the juridical order. Its capacity of willing is of the widest scope which law can create. The power of the will of the State is the power to command; it is called the power of the State. (*Die Willensmacht des Staats ist die Macht zu herrschen; sie heisst Staatsgewalt.*)”<sup>3</sup>

In the following passage from Gerber, Hegelian inspiration again appears very clearly: “The power of the State is the power of a willing organism morally conceived as a person. It is not the artificial and mechanical assembling of a certain number of individual wills, but the moral collective force of the people conscious of itself. Its existence or its nature does not depend upon a certain determination and is not created by a deliberate act; but in that it is the most powerful social form of humanity, it is a natural force which is originally contained in the State. The juridical manifestation of the power of the State is that of issuing commands. That means a power of willing, efficacious for carrying out of duties involved in political union, and to which all the people and all members thereof are subordinated. Its effectiveness even in regard to apparent internal forces rests on this, that it is the highest power among the people and that the general conviction of its irresistibility (*Unwiderstehlichkeit*) is established. To be a complete realization of the idea, that is to say, to represent the moral collective will of the people truly and completely, the power of the State must have this characteristic, namely, that it must not receive the determinant motives of its action from a superior power existing outside of itself, but that it find such motives solely within itself. In other words, it must be sovereign.”<sup>4</sup>

But has the State thus posited, the State which is the highest realization of the moral good, the State as the most exalted juridical personality, the State which possesses the power of issuing commands (*herrschen*), that is, an unconditioned and irresistible power — has the State, thus conceived, a juridical power without limitations, or, on the contrary, is it a power limited by law? Gerber did not overlook the question, and credit is due him for maintaining in unambiguous language that the power of the State has limits beyond which it cannot go; limits imposed on it by law. The jurisconsult was able to resist the influence of the Hegelian doctrine,

<sup>3</sup> Gerber, *Grundzüge des deutschen Staatsrechts*, third edition, 1880, pp. 1 to 3.

<sup>4</sup> Gerber, *l. c.* pp. 19 to 21.



which was then so strong, and outlined in clearest language the juridical limitations upon the action of the State. But as we shall see he remained somewhat isolated in this respect so far as German doctrine is concerned. The jurists who followed him borrowed his concept of the juridical personality of the State, which juridically may be easily construed to be unlimited political power; but they have well guarded themselves against accepting that part of his doctrine which proves the existence of limitation upon the powers of the State.

Gerber's idea appears even in the title of one of the chapters in his book, *Limitations upon the Power of the State*. He distinguishes therein between general and particular limitations.<sup>5</sup> But the principle underlying such limitations and according to which they must be established is not set forth very clearly. Gerber, however, seems to admit certainly that the powers of the State are limited by a right (*un droit*) anterior and superior to the State. The limitation unquestionably in his mind is one juridical in character, since he reiterates that the State is a juridical person, that its will has a juridical capacity. Consequently, if one speaks of limiting the activity of this will, the only question can be one of a limitation juridical or legal in character. Gerber's mind was certainly dominated by the individualistic conception, recognizing in the character of man, as such, natural rights anterior and superior to the State and coming to limit its action.

Along this line of thought the following passage is, as a matter of fact, the most remarkable in Gerber's works: "The power of the State is not an absolute will. It is to serve only the purposes of the State; it must exist for it and it only. In it are contained the natural limits with respect to the domain of action allowed to the State. The power of the State is dynamically the highest power residing in the people; but juridically it exists only within the sphere of its own ends, or, in other words, only within the sphere of its juridical existence is the power of the State supreme in its decrees."<sup>6</sup>

Gerber goes on to observe the difficulties attendant upon determining even in a general way the precise limits circumscribing the action of the State, and points out that, although ideas in this respect vary according to peoples, "there is, nevertheless, a series

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<sup>5</sup> Gerber, *l. c.* pp. 31 *et seq.*

<sup>6</sup> Gerber, *l. c.* p. 31.

of interests in the life of all peoples concerning which these limitations upon the power of the State have a wholly particularized importance. The question has reference to those manifestations of life and those situations in which an intervention in the form of tutelage or constraint by the State would appear as infringement of the moral dignity of the people and especially as an obstacle to its free development."<sup>7</sup> It is worthy of notice that the jurisconsult also declares that the State cannot in any way interfere with the freedom of public opinion, of religious belief, of education; nor interfere in any way with one's choice of profession or with the freedom of the press.<sup>8</sup>

In this respect Gerber's doctrine, if it is not the individualistic doctrine *in toto*, comes singularly close to it.

## II

Gerber was the precursor of contemporary German doctrines of public law growing out of the metaphysical conception of the State. These doctrines, so interrelated in German legal literature, have found their most complete and exact expression in the comprehensive and, indeed, remarkable work of Professor Jellinek. Jellinek was for a few years *Privatdocent* in Vienna. He was called to the university of Heidelberg where he taught from 1887 to 1911. He was stricken and died in 1911 in the prime of intellectual vigor. In public law he stands unquestionably as the most representative jurist in the Germany of today. His two most characteristic and important works are: *System der subjektiven öffentlichen Rechte*, first edition 1892, and *Allgemeine Staatslehre*, first edition 1900. The work of Jellinek is, as it were, a synthesis of the movement of absolutist ideas proceeding from Kant and Hegel, having for their inspiration the thought that the State is a great moral personality, which realizes and alone can realize the moral idea, and in consequence may impose its will without reserve and without restriction. But, at the same time an ingenious though sterile effort appears, having for its purpose reconciliation of this omnipotence of the State with public law upon which it has been superimposed, in order to explain how the modern State, while being all powerful, is at the same time a State under law, a *Rechtsstaat*.

<sup>7</sup> Gerber, *l. c.* p. 33.

<sup>8</sup> Gerber, *l. c.* pp. 36 and 37.



The German doctrine of public law in that stage of development to which it had been raised by Jellinek, which has not been surpassed since his death, is made up of the four following elements:

First: The State is premised as such. It exists. It is a being distinct from the nation, distinct from the individuals, though it is, to be sure, a national corporation, and the nation is the aggregate of the individuals.

Second: The State is a legal person, capable of rights and subject of the public power, the latter being a subjective right of the State. Jellinek calls it the *Herrschaft*. It is an unrestricted and irresistible power. Sovereignty is a characteristic of the public power of the State, a characteristic which according to Jellinek, it may not but in most cases does possess.

Third: This sovereign public power is the right which the State possesses of never circumscribing its own action except by its own will, and consequently of determining according to its own understanding the extent of its action and that of the individuals which are subordinated to it; and, furthermore, of creating as a result thereof objective rights by its own will without the intervention of other wills directing or controlling its action.

Fourth: But the sovereign State, invested with the *Herrschaft*, can voluntarily submit itself to law, it can be subject to a self-imposed limitation. Such auto-limitations are determined only by its own will. It thus remains sovereign after such limitations upon its own power. The auto-limitation is an auto-determination. By voluntarily accepting obligations growing out of a jural principle which it has itself created or resulting from a contract to which it has consented, it submits itself to law, it limits its action by law; it is legally bound. But, in spite of that, its sovereign *Herrschaft* retains its entirety, since its will to submit itself to right, to the law, to a contract, has been determined only by itself. The modern State is thus a *Rechtsstaat*, a State under law.

Can any one fail to see that we have here only a sophistry? This auto-limitation of the State is illusory. If the State in fact is in submission to law only because it so desires, only when it so desires, and only to the extent that it so desires, it is not in reality under obligation to law at all. The State, it is said, is subjected to the laws which it has made, in so far as it maintains them; to the treaties which it has signed, so long as it pleases to abide by them.

But this does no more than justify in advance all arbitrary, and in fact tyrannical, acts as well as all international usurpations by giving them the appearance of having juridical value. We shall see later that Jellinek is unabashed by such consequences.

### III

The premise for the whole doctrine is borrowed from Gerber; the State taken as such is a subject of right. It is the subject of that subjective right, the commanding power, the *Herrschaft*. The following is the definition given by Jellinek: "As a legal conception, the State is the corporation of a people, established on certain territory and invested with an original power of issuing commands (*Herrschenmacht*), or to use a well-known expression, a territorial corporation invested with an original power of issuing commands."<sup>9</sup>

The commanding power with which the State is invested is an irresistible power (*unwiderstehliche*). The State may formulate unconditional decrees, and can exercise constraint to the fullest extent. "*Herrschen* signifies the right to issue commands unconditional in character and to be able to exercise constraint to the fullest extent."<sup>10</sup>

Such is the power of the State (*Staatsgewalt*). It is the criterion by which the power of the State is distinguished from all other powers. In the countries where the power of *herrschen* is granted to a corporation or to an individual member of the State, the acquisition is not one of proper and original title, but the result of a concession: it is derived from a power of the State, which alone possesses complete and original title to the power of *herrschen*.<sup>11</sup>

In these affirmations formulated by Jellinek the direct influence of Hegel can be seen. The name of the celebrated philosopher, moreover, is often found in his writings. But Jellinek owed it to himself to endeavor to find a basis for public law. In the transcendency of its developments, in the vague and finely spun abstractions of his formulas, Hegel was able to avoid the problem. A jurist by profession like Jellinek was not able to do so. He had to explain at any cost how the State comes to be in submission to law, even

<sup>9</sup> Jellinek, *Allgemeine Staatslehre*, 1900, p. 161.

<sup>10</sup> Jellinek, *l. c.* p. 388.

<sup>11</sup> Jellinek, *l. c.* pp. 389 and 390.



though it is by definition a will which is self-determinate, an unconditioned and irresistible power. It is by means of his ingenious theory of auto-limitation that he believed he had solved the problem.

#### IV

Jellinek, as a matter of fact, is not the originator of the theory; he merely developed it and stated it more precisely. It was thought out by Jhering, one of the most vigorous and supple minds of the nineteenth century. It is set forth in the first volume of his book entitled *Der Zweck im Recht*, one of the most interesting books in legal literature ever written in any country, a book which contains an extremely realistic philosophy but one, it must be admitted, which is not only deceptive, but places law on very fragile foundations.<sup>12</sup>

For Jhering the will is the primordial fact. Will is the true creative force in the world, meaning by force the source of causality. As in God this force is will, so it is in man.

This will, like everything else in the world, is in subjection to a law. But the law by which it is governed is a law of purpose and not one of cause. It is the end which determines the manifestations of will, which determines at one and the same time its value and its effects.

The ends, therefore, which determine the will are personal in their nature, and the means by which the will attains the realization of its desires is constraint (*der Zwang*). There are wills determined by egoistic ends and there are wills which impose themselves by constraint. In other words, there is egoism and force. There is nothing else in the world.

But if this be so, how can nature go on in its eternal course of becoming which brings it constantly nearer the absolute idea, that is, God? How has law come to be formed? In spite of the originality and power of his mind, it can be easily seen that Jhering did not withstand the influence of Hegelianism.

Jhering answers the question thus: Nature has taken egoism and constraint into its service. The State, following the example

<sup>12</sup> Jhering, *Der Zweck im Recht*, I, 1877. Volume two is not accessible in French. The first volume was poorly translated into French, in 1901, by M. Meulenaere under the title, *L'évolution du droit*. [There is an English translation of volume one, under the title, *Law as Means to an End*. — Translator.]

of nature, has also taken egoism and force into its service, and has created the law out of it. "How," writes Jhering, "can the world exist in egoism? Because it takes it into its employ, and pays it the salary which it demands. Egoism becomes interested in nature's purposes; nature thereby secures its participation. This is the sacred maxim by which nature as well as humanity and the particular individual take possession of egoism to secure their own ends."<sup>13</sup>

Then what is the State according to Jhering? It is society in so far as society holds the power of constraining, of regulating, and of disciplining. The sum of the rules in accordance with which the State should put constraint in motion constitutes the law, which is thus simply the discipline of constraint. Consequently, the organization of the power of constraint is the very reason for the existence of the State. It contains two elements: (1) the establishment of the external mechanism of its power; (2) the discipline of its action. The mode of accomplishing the first is the power of the State. The mode of accomplishing the second is the law. The two notions are conditioned upon each other; the power of the State needs the law; the law needs the power of the State.

The character of the power of the State is completely moulded by the ends for which the State is formed. It is a supreme power superior to every other will on any determinate territory. This power is not only a power by virtue of right; in order to have a State, it is and must be a material power (*Macht*), that is to say, power in fact superior to all other authority existing in the territory in question. All other conditions in respect of the State have their security in but one condition, namely, that there must be a supreme material power (*Macht*).

"Before this condition is fulfilled," says Jhering, "all the others are anticipated; for, in order to fulfill the condition, the State must exist; and it exists only when the question of power is solved. . . . The absence of material power (*Macht*) is the mortal sin of the State for which there is no forgiveness, a sin which society neither pardons nor endures. A state without material power of constraint is a contradiction in itself. Nations in the past have tolerated absolute abuse of the power of the State, the lash of Attila, the frenzy of Roman emperors. They have often celebrated as heroes

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<sup>13</sup> Jhering, *l. c.* p. 38.



tyrants at whose feet they found themselves in the dust — drunken and satiated. Forgetting that they themselves were the first victims, they have supported such a human power when, like the whirlwind, it was being used to overthrow everything before it. Even in a state of frenzy, despotism remains a political form; and therefore a mechanism of the social power. But anarchy, that is to say, the absence of the power of constraint, is not even in form a State; it is an anti-social situation, the destruction, the annihilation of society. Whoever puts an end to it by any means whatsoever, by the sword or by fire, whether he be a national usurper or a conquering foreigner, renders a service to society; he is a savior and benefactor, because the most unbearable kind of State is always better than its entire absence. If a people find it difficult to pass from a state of barbarism to a political order, there is need of an iron hand to accustom them to education and to obedience. The transition always entails despotism which sets up against the arbitrary power of anarchy the arbitrary power of the State.”<sup>14</sup>

This long passage has been given in full because it is peculiarly characteristic. In it the immediate and direct influence of Hegel can be seen. It is also easy to see the consequences which a government, devoid of scruples and desirous of conquests, can deduce from such maxims.

## V

The State being thus defined as the power of organized constraint, what is law? It is, answers Jhering, the sum of rules of constraint applied within the State. The definition is made up of two elements: the rule (*Norm*) and its realization by means of constraint (*Zwang*).

Only standards established by society and having an enforcing agency behind them can be called jural principles (*les règles de droit*). Then, according to Jhering, since the State has by definition a monopoly of constraint within a given territory, only those principles which have behind them the enforcing agency, the State, are jural principles (*les règles de droit*). Consequently, jural principles are those which are clothed with such characteristics by the State. In other words, the State alone creates the law.<sup>15</sup>

But if the State creates the law, if only the principle which the

<sup>14</sup> Jhering, *Der Zweck im Recht*, 1880, p. 311.

<sup>15</sup> Jhering, *l. c.* p. 318.

State brings into execution by enforcement is a jural principle, the State cannot be subjected to law and limited by law; there can be no public law. Very well, answers Jhering: How can the result be otherwise? How can the constraining power of the State be subjected to law and limited by law? How does it elevate itself to the position of right and law (*du droit*)? By subjecting itself to a rule, says Jhering, by auto-limitation.

"It is necessary," he writes, "that the State be bound by law. Only by such means can the dangers in the application of the rule be swept away; only thus can equality, security, and the legitimacy of the law appear in place of arbitrary action. That is what is meant in our language by the word *Rechtsordnung*, and that is what we have in mind when we speak of a power (*Herrschaft*) of right or legal power. That is what we ask of law when we wish it to correspond to the notion we have of it, to the notion of a right — the functions of the State under law (*Rechtsstaat*). Right (*le droit*) is in the full sense of the word the force of the rule of law (*de la loi*) reciprocally obligatory, the proper subordination of the power of the State to the law which it has created."<sup>16</sup>

Thus, the State is subjected to law; it is a *Rechtsstaat*. But it is subjected to the law which it creates itself. It submits itself voluntarily to the law which it enacts itself; there is not, nor can there be for the State, any other juridical dependence than this. What motives, then, can bring the State, which has a monopoly of the constraining powers, which is by definition an irresistible force, and which, consequently, has nothing to fear, thus to submit itself to the ways of justice (*la voie du droit*) and to subject itself willingly to the law which it has itself created?

The following is Jhering's answer to the question: "The motive which impels the State to do so is identical with that which leads man to control himself, namely, egoism and personal interest. The conquest of one's self finds its reward in itself. But to understand it, man needs experience and discretion. . . . Man needs discernment to profit by the lessons of experience and moral force to appreciate them. When these two conditions concur, when the power of the State is conceived as possessing discernment and moral force, the problem is solved. The power of the State subjects itself to law, because it is convinced that its own interest is furthered

<sup>16</sup> Jhering, *l. c.* p. 344.



thereby. Only at the point where the power of the State finds itself observing its own commands does it acquire real authority. Only where right and law exist can the national patrimony prosper, can commerce and industry develop, can the moral and intellectual force of the people acquire its highest development."

Jhering concludes with the following proposition so often quoted: "Right and law (*le droit*) is the settled policy of force; not the policy of the moment or the policy of passion and of passing interests, but that broad and far-sighted policy, the policy of the future and of the end."<sup>17</sup>

In short, according to this doctrine, there can be a jural principle only when it obtains the sanction of the State. The State alone creates right and law (*le droit*). The State is subordinated to right and law (*le droit*), because it places itself in submission to it voluntarily; it is subordinated to right and law (*le droit*) only to the extent that it so desires. It submits to it through egoism, through knowledge of its own interest. It limits its authority by law because of the good that will result therefrom, because experience • has proved that in thus limiting its authority by law obedience to its action is more easily maintained, and its position is more completely assured.

One can easily see how fragile such a limitation is, how insecure a basis it affords for public law. Jhering himself, however, seems to have perfectly understood it. Led, nevertheless, into asking himself whether the State is always bound to respect the law that it has made, he thus answers: "Every one, from the point of view of his own natural feeling says no. But the question here is one of scientifically justifying the opposite solution. Such solution rests on this consideration, namely, that right and law (*le droit*) is not an end in itself, but only a means of attaining ends. The final end, then, of the State as of right and law is the safeguarding and the conservation of the vital elements of society. Law exists because of society and not society because of law. If the extraordinary situation arose whereby the State, with its power, found itself under obligation, in the alternative, of sacrificing either law or society, it would not only be authorized but obliged to sacrifice law, and to conserve society."<sup>18</sup>

Similar doctrines formulated by one of the great jurists of Ger-

<sup>17</sup> Jhering, *l. c.* pp. 366 and 367.

<sup>18</sup> Jhering, *l. c.* pp. 417 and 418.

many have been the source of all manner of internal despotism, of all manner of external violence and savagery. At the beginning of the war, M. Bethmann-Hollweg, Chancellor of the German Empire, made the statement to M. Goschen, the English ambassador, that international treaties were scraps of paper.<sup>19</sup> He proclaimed in the Reichstag that necessity is bound by no law.<sup>20</sup> He could have substantiated his statement only too well by the teachings of the great jurist, Jhering.

It is fitting to say, however, that Jhering believed that violation of law by the State is something quite undesirable; and that positive legislation should spare the power of the State as far as possible, and that the law-giver may do this by making provision for necessity in the law itself, as certain modern laws and constitutions have done.

## VI

This doctrine of auto-limitation of the State, formulated for the first time as far as I know by Jhering, Jellinek made his own. He stated it with precision, and he gave it a still more juridical character than Jhering had previously done.

He begins by declaring that jural principles (*les règles de droit*) are characterized by the following three elements by which they may be distinguished from all other principles, namely, legal, moral, or religious: (1) jural principles are principles governing the external conduct of men among one another; (2) they are principles which emanate from recognized or external authority; (3) they are principles whose obligatory force is guaranteed by an external power. All law (*tout droit*) requires as one of its necessary characteristics a force behind it, insuring its application (*Giltigkeit*). A rule takes on its juridical character only when it comes to be enforced. A principle said to be one of right and law, which as yet has not been enforced or has ceased to be enforced, is not really a jural principle.

In Jellinek's theory, nevertheless, in order to have a jural principle a sanction enforced by constraint through the State is unnecessary. On this point he certainly differs with Jhering, according to whom, as we have seen (*supra*, section IV), there is in truth

<sup>19</sup> The English Blue Book, 1914, p. 78.

<sup>20</sup> Journal "Le Temps," August 6, 1914.



a jural principle only when it is sanctioned by the constraining power of the State. In order to have a jural principle, it is sufficient, according to Jellinek, that there should be some guarantees in respect of its application, guarantees which more often consist in the intervention of the force of the State, but which may merely consist of something else, as, for example, that found in the force of public opinion, in the general organization of the State. If this is not admitted, says the jurisconsult, we should be obliged to admit the non-juridical character of most of the rules of international law and of many rules of public internal law, all sanction for which, because of their very nature, is impossible. They are, nevertheless, jural principles because they are accompanied by guarantees, and often powerful guarantees, to insure their execution.

Jellinek concludes with these words: "It is thus not material constraint (*der Zwang*), but the guarantees — constraint being only a means — that form the essential characteristics of the jural principle. Such principles of right and law are not, to be sure, norms of constraint, but norms to which guarantees are attached."<sup>21</sup>

This being granted, Jellinek formulates the following question: Is the State amenable to a juridical ordinance? Is there a law (*un droit*) for the State? And if there is, what is the foundation of it? The author is thus led into developing a complete theory, sociological in character, with regard to the formation and evolution of law and of the State; a doctrine the details of which one has difficulty in following. I therefore confine my efforts to setting forth its fundamental principles.

The State is originally a situation of fact and one infinitely variable and infinitely changing. This situation, as a fact, progressively transforms itself into a situation of right and law. The political order of things gradually becomes an ordering of a juridical character. Two psychological elements especially aid in bringing about this change. The first element, juridical in its nature, which transforms into norms what existed previously as fact, is the spirit of conservatism. The second element, which gives rise to the conception of right existing over and above positive law and brings about a change in the existing juridical order, is the rational element.<sup>22</sup>

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<sup>21</sup> Jellinek, *Allgemeine Staatslehre*, 1900, pp. 303 to 306.

<sup>22</sup> Jellinek, *l. c.* p. 323.

During the process of formation of States, there are periods in which the political order appears to be merely *de facto* power. On the other hand, the law is never powerful enough to solve the profound conflicts of force that may arise in States. The power of the law has an insurmountable limitation in the very fact that the State exists. The law never has the power of determining in a critical period the course of the State's existence. To disguise striking violations of the jural order, men resorted to the category of right of necessity (*Notrecht*). According to Jellinek, "it is merely a variation of the expression: Force goes before right." The juridical doctrine intervenes later; but it does nothing more than simply rationalize the facts.<sup>23</sup>

Thus, law is formed spontaneously. Even the ordering of the State may spontaneously become a juridical ordering. But another question presents itself which undoubtedly has to do with the first, but which is, nevertheless, a distinct and separate question, namely: What part does the State play in forming the law which is established within its limits? This question, says Jellinek, leads directly back to the old question: Is there a law (*un droit*) superior to the State? <sup>24</sup>

This last question, according to our author, is poorly phrased, or at least phrased in too general a way. In fact, if in speaking of the State we mean the political community as it exists among modern peoples, there is no doubt that a law existed before it; but if we think of the State dynamically, if we define it as being the group invested with a power — the highest known to the epoch — the answer will be altogether different. There can only be law in such a grouping. However imperfect the organization of the human group may be, one always exists. If a non-religious group, however imperfect its organization may be, has no other group above it upon which it depends, it is a State. The State being thus understood in a very general way, it is correct to say that there can be law only in the State, and that there is no law anterior to it.

As the different groups gradually become more extended and more complex, jural principles come into being or take shape within the secondary groups which go to make up the central group. But the central group holding the supreme power, in a word, the

<sup>23</sup> Jellinek, *l. c.* p. 327.

<sup>24</sup> Jellinek *l. c.* p. 329.



State, tends to regulate the whole social organization, to become the only source of law; at least the only source for the realization of right. The State has a tendency to bring within its control all the means of force belonging to the collectivities subordinated to it; and this process is consummated when it has reached the point at which the State becomes exclusively possessed of the power of commanding. Thus, if not the whole of the juridical formation, at least the juridical protection ordained by law becomes the affair of the State. The power of judging passes exclusively into the hands of the State and complete jurisdiction is vested in or is conceded to it. "In this way," says Jellinek, "it finally becomes the right of the State to regulate the application of all the law within the four corners of its territory, so much so, that in the modern State all law resolves itself into that created by the State and applied by it."<sup>25</sup>

Undoubtedly, adds the jurisconsult, in modern States many groupings also exist that have a body of law distinct from that of the State: churches, corporations, communities, etc. But the constraint necessary to realize such a body of law belongs exclusively to the State; and, on the other hand, it is exclusively by means of the will of the State that the right of these collectivities can acquire the character of objective right, that is to say, can become a jural principle imposing itself by means of a jurisdictional sanction. "The creation of objective right of a group has today become an affair within the exclusive control of the State."<sup>26</sup>

And so, after this long sociological detour, after discussing the spontaneous formation of law, after affirming the existence of a law anterior to the modern State, Jellinek also arrives at the same general conclusion as that of contemporary German juridical doctrine, namely: In the modern State law is the exclusive creation of the State, and consequently — logically and necessarily — what the State wills is law.

## VII

We then find ourselves confronted with the ever recurring question: The command of the State is a principle of right and law binding on the subjects; is it also binding on the State itself?

Many authors, says Jellinek, argue that in starting with the

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<sup>25</sup> Jellinek, *l. c.* pp. 330 and 331.

<sup>26</sup> Jellinek, *l. c.* p. 331.

proposition that the State can change all legal principles at will we must necessarily come to this conclusion, that the State cannot be bound by its own public law. These authors declare that in public law there can be and there are commands addressed to the diverse organs of the State, but that there are and can be none addressed directly to the State itself. We must, moreover, recognize that such reasoning imposes itself upon one through the power of irresistible logic, whatever Jellinek may say of it, and whatever efforts he may make to avoid its consequence.

Our jurisconsult, nevertheless, rejects it energetically; he is frightened by it. The result would be, says he, that what appears to be law to a single private individual or to an official would not be law for the State. "Accordingly as we change positions," he writes, "what was previously law for us ceases thereafter to be such. If one looks down from the pinnacle of the State into the depths of the law, one will discern nothing. For the State all law is non-law (*Unrecht*) — a juridical nonentity to which it is a stranger and to which it so remains, but which is imposed upon its subjects and for them is law. Such a proposition," continues our author, "cannot logically be established, except with an inflexible theocracy as a basis. Only a god, only a monarch honored as a god, can make the acts of his inscrutable and ever changing will a law binding on all except himself."<sup>27</sup>

This cannot be so in cases where the State acts according to fixed rules which are incapable of being changed, except in accordance with definite juridical forms. Such a rule contains in itself the subordination of the activity of the State in itself.

But can it be said that the organs of the State are subjected to a jural principle, but not the State? No, says Jellinek; and to understand the answer one must understand the German juridical doctrine, called the juridical theory of the organs of the State, according to which the human individual, acting as juridical organ of a collective juridical person has not, in his character of being an organ, an existence distinct from that of the person of whom he is the organ, any more than one of the sense organs can have a distinct existence apart from the human being.

That being understood, to say that the organs of the State are limited in their action by a jural principle is to say that the

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<sup>27</sup> Jellinek, *l. c.* p. 332.



State itself is limited by the rules which it establishes. The activity of the State itself is subordinated to law, since no activity of the State exists other than that which is exercised by means of its organs. Consequently, the State comes within the jurisdiction of its own tribunals, which must apply the law to the State as to private individuals. The State can modify the law, abrogate it, replace it by other law; but as long as the law exists the State is subject to it and the tribunals must so apply it.

Jellinek, like Jhering, declares that this subordination of the State to law brings about a better obedience to the State's commands, that inviolability of the juridical ordering, even in respect of the State, inspires confidence in the minds of individuals. It is thus a condition necessary to the development of culture. It alone creates social confidence without which social intercourse can scarcely rise above its modest beginnings.

In his desire to state precisely the way in which the law is enforced as against the State, Jellinek explains that the mere fact that law is applied by the State is not on its part a discretionary act (*reine Willkür*), but the performance of a true obligation, because in establishing the jural principle by a unilateral act of its will, the State pledges itself to apply the principle and to conform to it.

The jurisconsult even compares this obligation which the State thus assumes with the obligations which may arise for private individuals from their own unilateral acts. I must say that I do not understand this comparison. I do not deny that instances are growing more and more numerous in which the individual may be under obligations because of his unilateral acts; but in such cases he is bound by virtue of a jural principle which is not of his making, which is superior to him, and to which he is subjected; whereas the question to be determined is precisely whether the jural principle, emanating from the State, can be imposed on the State from which it has sprung.

Jellinek seeks to establish what he calls a social-psychological foundation for the subordination of the State to law. In the course of his book, *Allgemeine Staatslehre*, he often expresses this idea — one quite true for that matter — that the underlying element of every rule of law is the belief, deeply impressed on the consciousness of men of an epoch, that such a principle exists as a jural principle

(*un règle de droit*). Then, says he, one certainly can affirm that in the modern State the conviction that the State is bound by its law is being impressed on the minds of men in an ever increasing manner.

In this statement the subordination of the State to law, which itself is derived from the State, is finally placed on a firm footing. And at the same time this subordination of the State to law leaves the irresistible unrestricted power of the State intact, since this subordination is voluntary, in that the State limits its action by its own will, and this remains self determinate. Its will thus preserves intact its essential character, namely, that of being a will which is never determined otherwise than by itself.

### VIII

I have already shown several times how fragile is the foundation thus given to public law, how the power of the State, limited by law only because it so wills, resembles an absolute and unlimited power. I have even qualified a similar doctrine as sophistical, because only by an effort in logic can it pretend that the State is bound by law. But for the sake of fairness as well as accuracy it should be said that, after having set forth his doctrine, Jellinek seems to have had scruples. He asks himself, in fact, whether it suffices for the foundation of public law; whether a right truly superior to the State and imposing itself on the State by its own sanction does not after all exist? He seems to think so without expressing, however, his opinions as to the basis and extent of this superior right.

He declares that the creative activity of the law as a function of the State can be juridically limited even where there is a highly developed system of law. There is today, says he, in the law of peoples whose law has reached a high point of development, a foundation apart from all arbitrary legislation. It is the result of the whole historical development of a people. Jellinek cites as an example the principles of penal law, which, says he, are not dependent upon the arbitrary action of the State. A statute, for example, stating that murder is not punishable would be beyond the real power of the legislator. Moreover, if the legislator of a country declared it not punishable, other forces than his own would insure retribution for the murder through means wholly unorganized.



"Accordingly," writes Jellinek, "apart from the formal and purely juridical viewpoint, a distinction may be made in all law between the variable and the constant elements, or at least the elements which change very gradually. These constant elements are recognized, expressly or impliedly, in the constitution, as the embodiment of the character and spirit of the whole civilization of a people and form in this manner a juridical standard for appraising even acts of the will of the State, in form unassailable, as for example, formal laws or the decisions of a sovereign tribunal."<sup>28</sup>

Jellinek tersely adds: "Thus a formal law or valid decision, bound to be carried out and irrevocable, can be appraised as a non-law and not as merely an injustice (*als Unrecht nicht nur als Ungerecht*)."<sup>29</sup>

It is also necessary to note that in a foot-note to his *Allgemeine Staatslehre* (page 332, note 1), Jellinek declares that if the auto-limitation of the State is the only and ultimate juridical basis of its obligations, it is not the primary and real origin of it; and he refers back to page fourteen of his book, *Die rechtliche Natur der Staatenverträge*, in which he says: "The limits fixed for the course of judicial decision are not at all the same as those for the science of law."

All this reveals Jellinek's hesitations and scruples. Taken by itself the sentence just quoted, namely, that a law can be not only an injustice but also a non-law might lead one into believing that Jellinek fully admits the existence of a law superior to the State and of a legal limitation imposing itself generally and rigorously on the State. If we read this proposition, however, in the light of the developments preceding and following it, we cannot give it this meaning. I think that in that passage Jellinek has really no such juridical limitation upon the power of the State in mind; that he holds there is none other than the precarious one resulting from auto-limitation. But he admits that we cannot ignore the fact that there are certain limits beyond which the State cannot historically, morally, and politically go; limits which are determined by science not by the course of judicial decision. It is beyond the course of decision; it is meta-judicial.

The following, which may be found on page thirty-three of his

<sup>28</sup> Jellinek, *l. c.* p. 337.

<sup>29</sup> Jellinek, *ibid.*

*Allgemeine Staatslehre*, strengthens me in my belief that the foregoing is really the correct interpretation: "In order to solve the question of limiting the powers of the State, we must set aside those insufficient instruments of juridical manoeuvre upon which alone so many have sought to rely in treating the problem. The solution of the question, to use one of my own expressions, is meta-juridical in character."

Finally, what Jellinek says of international law shows clearly that in the depth of his thought there is no true juridical limitation upon the power of the State.

## IX

In one of his first works, published in 1880 under the title *Die rechtliche Natur der Staatenverträge*, Jellinek made a study of the basis of international law from the point of view of treaties, and attempted to establish the obligatory character of contracts between States on the theory of auto-limitation. He developed the idea that without doubt, historically, their obligatory character might have originated otherwise; but that juridically no other basis was possible.

In his *Allgemeine Staatslehre* Jellinek again discusses the question of the basis of international law, looking at the matter from a broader point of view. For him the problem of finding a basis for international law is evidently similar in character to that of determining the basis of internal public law. International law is the law which should be applicable to sovereign States in their relations with one another, and, at the same time, can result only from the will of these sovereign States. How can there thus be an obligatory international law for these States when they make this law themselves? "It goes without saying," says Jellinek, "that international law is rejected as non-existent by those who approach the problem from the civilistic standpoint."<sup>30</sup> He means (and he is not wrong) that the greater part of the civilians do not understand the problems of public law, accustomed as they are to see in law only a rule emanating from a superior authority for the regulation of the private relations of its citizens.

What, then, for Jellinek, is the foundation of international law? The same as that of internal public law: the auto-limitation of

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<sup>30</sup> Jellinek, *l. c.* p. 338.



the State. States submit themselves voluntarily to the rules of international law and in consequence thereof they become bound by law, but only to the extent of such submission.

But there is another element. International law has also a psychological basis, and, just as such an element can be found in every law, so particularly in respect of internal public law. "If States," writes Jellinek, "recognize international law as being obligatory upon them, then through the psychological nature of all law, a firm basis for international law is thereby established. Now it can no longer be questioned that this recognition on the part of the members of the society of States does exist today."<sup>31</sup>

And just as the individuals that go to make up a nation believe in the existence of internal jural principles as the true source, the ultimate basis, of the internal law of such nation, so is there the belief among the States of which international society is composed, that there is a right among States, that there exist jural principles applicable to members of this society, which are the true foundation of international law. But international law differs from internal public law because the latter is made up of rules of organization and of internal hierarchy, while international law is made up only of rules of co-ordination, since the authorities which establish this law and the subjects of the law obliged by it are the States themselves.

Jellinek believes that the historical evolution of international law has been the same as that of other branches of law. It has been slower; it is less advanced; but it is of the same character. International relations were at first simple situations of fact, which becoming permanent, gave rise to the notion of international rules. The notion of rules led to the notion of law, that is to say, to the notion of rules having behind them a legal obligatory force. In international relations, as in all human relations, there has been transformation of situations of fact into situations of law.

The next stage is the intervention of *Vereinbarungen*, that is to say, agreements between States establishing rules of international law. Internal positive laws are established by a unilateral act of the will of the State. International positive laws are established by *Vereinbarungen*, that is, by the concurrence of the wills of States; by international treaties which are not con-

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<sup>31</sup> Jellinek, *l. c.* p. 338.

tracts. Contract gives rise to subjective and concrete obligations. The international *Vereinbarungen* establish a general and permanent objective rule, in a word, a jural principle.

But, says Jellinek, one must guard against founding international law, as does Triepel,<sup>32</sup> exclusively on *Vereinbarungen* formed between States. "Such a conception," says he, "leaves international law as a whole all in the air." The existence of an international juridical order that alone gives sanction to the *Vereinbarungen* cannot in turn be founded itself on a *Vereinbarung*. The birth of the international juridical order cannot in any way be taken as parallel with the original creation of a new public law in the case of the formation of a State, because in such case the men who participate in the new juridical formation are already imbued with the juridical order of the State. They simply apply to the new ordering by analogy jural principles which have already been applied as such, and which by such application only take on a new formal juridical character. But, continues Jellinek, "what is the origin of the belief that the ordering between States is no more than a morality of relation, a morality of the State, an egoism of the State, or any other non-juridical phenomenon? One who would treat international law as so strictly legal cannot like Triepel premise its existence; but must first found its existence in a more penetrating fashion."<sup>33</sup>

To Jellinek, moreover, it is wrong to say that international law is not law, properly so called, because it is not sanctioned by an organized constraint. A principle, to be a jural principle, does not need to be sanctioned by a material organized constraint properly so called. It is only necessary that its execution be guaranteed. According to Jellinek, therefore, the necessary guarantees are not lacking with respect to international law.

Undoubtedly constraint, juridically organized, does not exist as a sanction for international law, since there is no superior power (*Macht*) existing above the States. But this is true with respect to the most important parts of the internal juridical order without their losing, however, the character of jural principle. For a considerable part of international law, there are very important guarantees. "The protection of the individuality of the State," writes Jellinek,

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<sup>32</sup> Völkerrecht und Landesrecht, pp. 63 *et seq.*

<sup>33</sup> Jellinek, Allgemeine Staatslehre, p. 339, note 1.



"the jurisdiction and administration dependent on international law, receive guarantees of the highest order from the community of interests of States. What is called international administration functions by means of the strongest guarantees, and one has difficulty in deriving arguments against international law from its practice. The relative strength of States, on the other hand, as well as public opinion which manifests itself in the expressed opinions of statesmen, of parliaments, and of the press, form secondary guarantees for international law, the existence of which cannot be overlooked." <sup>34</sup>

All that is very well. But the jurisconsult does not stop there; and we shall see presently the restrictions placed by him on the application of international law both with respect to its extent and enforceability; restrictions which reduce it to nothingness. This question in fact presents itself: What is to be decided when in fact the rules of international law happen to be in opposition to the immediate interests of the State? Jellinek does not hesitate to answer as follows: "Whenever, upon investigation, international law is found to be in conflict with the existence of the State, the rule of law retires to the back-ground (*tritt hingegen Zurück*), because the State is put higher than any particular rule of law as the study of the relations of internal public law has already taught us. International law exists for States and not States for international law." <sup>35</sup>

We have found in Jhering a similar formula as regards internal public law. Thus, in the opinion of the two jurisconsults, public law is arrested at the point where superior interest of the State begins. They thus legitimize all tyrannical acts within, all acts of brigandage without. The invasion and pillage of Belgium, the burning of Louvain, the massacre of children and women, the torpedoing of the *Lusitania*, all the abominable crimes which have filled the world with horror were justified in advance by two of the greatest jurisconsults in Germany.

They do not content themselves with simply stating the principle; they attempt to develop it and they seek a scientific basis for it. They reason in this manner: Undoubtedly international law exists; but it evidently contains many gaps, even more than internal public law. Every department of law has in fact portions which

<sup>34</sup> Jellinek, *l. c.* p. 339.

<sup>35</sup> Jellinek, *l. c.* p. 340.

are the outgrowth of compromise of conflicting forces. Law appears only when a conflict has been appeased by a compromise, and the conflicts of force are an essential factor in the formation of a new law. The exterior policy of the State is circumscribed to only a very limited extent as yet by jural principles; and in the relations of States among themselves there is a large domain in which it is power *de facto*, actual force (*faktische Macht*) that decides, and in which conflicts of interests provoke struggles of all kinds, wars, or otherwise.

Such a state of affairs is not to be regretted, says Jellinek. "In fact, if there existed an interstate and especially a super-state ordering which was wholly efficient and decided all conflicts according to pre-established legal principles, it would result in conserving in the modern world and for an indefinite time the infirm, the old, and the survival of the past, thereby rendering all salutary progress impossible."<sup>30</sup>

Here is thus formulated again by a professional jurist the abominable doctrine of war as an instrument of human progress and source of the legal order. Jellinek insists on this and cites examples to support his thesis. Naturally, it is the creation of the German empire following the great wars of the nineteenth century, which, according to him, is the evident demonstration of the doctrine, inasmuch as there has been no happier event in the world's history.

"Let us but think," writes Jellinek, "of the great wars of the second half of the nineteenth century. If these historical conflicts, for the solution of which there existed not a single jural principle, could have been decided according to some jural principle and by any judge whatsoever, the judgment could have only appraised the existing situation in accordance with law. Germany and Italy would still be geographical conceptions, the States of the Balkan peninsula (with the exception of Greece) would still be Turkish provinces; the maladministration of Cuba and of the Philippines would still be in force."

From all this he draws the following conclusion: "National currents and the particular interests of States are so powerful that they have prevented the formation of a true international society. The States are in juxtaposition without organization into a society of States. We can scarcely make exceptions as regards certain

<sup>30</sup> Jellinek, *l. c.* p. 340.



business organizations. The community of States is accordingly in its nature anarchical; and international law since it has for its source unorganized authority, an authority which does not possess the power (*Macht*) of a *Herrscher*, can justly be considered as a law of anarchy (*un droit anarchique*); which brings out at the same time its lack of sanction and its deficiencies." <sup>37</sup>

Such were the negative conclusions as to international law of the greatest publicist and jurisconsult of Germany before the war. But what now remains of even the little which he conceded to international law?

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<sup>37</sup> Jellinek, *l. c.* p. 341.

## CHAPTER VIII

## REALISTIC CONCEPTIONS OF THE STATE IN GERMANY

**A**LONGSIDE the metaphysical doctrine of the State a very strong current of ideas has been growing in our day in France and Germany tending to deny the juridical personality of the State as distinct from those who govern, and affirming that juridically we are capable of seeing only those who really exercise power. But while in France these realistic doctrines had for their object the establishment of limitations upon the power of the State on a firmer basis than the metaphysical doctrine could, in Germany, on the contrary, they tended above all toward establishing more definitely than ever the absolutism of those who govern.

## I

I classify as realistic conceptions all those which reject the idea of the State as a single collective personality having an existence real and distinct from the individuals of whom the society of the State in question is composed and distinct from the individuals who in fact wield political power and force within a given territory; that is, doctrines according to which we must consider, even juridically, only the individuals who in fact hold power, individuals whom we designate as rulers and, regardless of the manner in which they are grouped, whether there be only one — king or emperor — personally monopolizing power by force or whether as in modern States there be several — as chiefs of the State, or parliaments — co-operating in the exercise of powers and carrying them out by force.

Before the Revolution the realistic conception of the State was the dominant conception. It had realized itself as a fact and had logical connection with the feudal conception and with certain institutions of Roman law with which it was combined. Kings and princes were considered as being personally endowed with the right of issuing commands, endowed with a right of sovereignty assimilated almost completely to the right of property as developed



by the Romans. The *imperium* is truly a *dominium*. There had risen a combination of the Roman conception of *imperium*, the commanding power, and of the feudal conception founded on the idea of property as the basis for the power of commanding and also on the strong juridical construction which the Roman jurists had given to *dominium*. From such ideas a system resulted the broad outlines of which should be given here.

The power to issue commands is a property right with which the king taken individually is invested. To use legal terminology, let us call it a subjective right. The subject of this right is the king in whom it resides, and he as an individual transmits it to his heirs, following an order of succession modeled after private succession. Diplomatic agreements are contracts between princes relative to their patrimonial right of power. Princes can cede, concede, or contract away all or any part of their patrimonial power, as every proprietor can give, grant, or make contracts with respect to all or any part of his property. Sovereignty is property of the prince. Such is the patrimonial conception of the State in the fullest sense of those words.

It was realized in fact through the operation of the factors already briefly pointed out. It was advocated in France by such theorists as Bodin in the sixteenth century, Loyseau, at the end of the sixteenth and the beginning of the seventeenth centuries, and Domat and Lebreton, in the seventeenth century.<sup>1</sup>

As regards positive law, the legislation of the Revolution substituted the metaphysical conception of national sovereignty for the realistic conception of patrimonial sovereignty of the king.<sup>2</sup>

But the latter did not wholly disappear. Certainly important elements of it with respect to international relations remain. There are international institutions which can be explained only by the survival of patrimonial conceptions, notably lease or pledge of territory and also the constitution of the Congo Free State in 1885 under the sovereignty of Leopold II, King of the Belgians, which has since become a Belgian colony. Furthermore we find that in the nineteenth and twentieth centuries a group of doctrines has arisen which to a certain extent grew out of the ancient patrimonial conception, and vigorously rejected the metaphysical con-

<sup>1</sup> For further details see my book, *Les transformations du droit public*, 1913, pp. 1 to 11.

<sup>2</sup> Cf. *supra*, chap. I.

ception of the State, seeking to build up a purely realistic juridical conception thereof.

## II

All these doctrines are in agreement on one point, namely: it is vain and extra-scientific to affirm that a personal reality, such as the State, exists distinct from the individuals. It is vain, it is extra-scientific to affirm that there is a will of the State of which the chiefs of State, parliaments, officers, are only the representatives or mandataries. We can scientifically affirm only what we observe directly. Again, we verify by observation only the existence of individual wills; we see the individuals in whom power is vested, chiefs of State, representatives, and officers; there can be no question of other wills, except the individual wills of those who, by whatever title, are vested with authority.

Although all realistic doctrines are in agreement as to this negative standpoint, a profound diversity appears among them both with respect to their positive conclusions and the tendencies which have been their inspiration.

Some, on the one hand, have had in fact as their aim restoration of the ancient realistic conception of the patrimonial State in order to place the power of the prince on an even more secure footing than could the metaphysical conception.

They arrive at the conclusion that the power of commanding, the *Herrschaft*, is a subjective right to which the prince personally has title, an absolute unlimited right having no right above it, or beside it, beneath which *a fortiori* not a single right exists.

The other realistic doctrines, on the contrary, have been determined above all by what seemed to their authors the certain impotence of the metaphysical doctrines to establish on solid foundations juridical limitation upon the powers of the State. The champions of realistic doctrines, belonging to this second group, have been especially impressed by the fact that, since Hobbes and Rousseau, the principal advocates of metaphysical doctrines have set forth as their conclusion the total omnipotence of the State; some the omnipotence of the prince, others the omnipotence of the general will, but all the omnipotence of the State; and that these metaphysical doctrines were in fact powerless even in France in many cases to protect the individual against the arbitrariness



and the tyranny of such power. This is the reason why many publicists resolutely reject the metaphysical conception of the State and attempt to place the legal limitation of the power of the State on more secure footing than could the metaphysical doctrine.

As was said at the beginning of this chapter, it is in Germany that realistic doctrines tending to prove the limitless absolutism of the prince have been formulated; in France, on the contrary, publicists have tried to establish a true and stable limitation upon public power solely on the basis of observed facts and through the reality of social life. As between France and Germany the same opposition found in case of the metaphysical doctrines can also be found in the realistic doctrines.

### III

The German jurisconsult who best represents the realistic conception of the State at the end of the nineteenth century is unquestionably the Bavarian, Seydel. Professor in the University of Munich and a man of vigorous mind, he published his great treatise on Bavarian public law and a commentary on the constitution of the Empire<sup>3</sup> in which he maintains that the States, members of the German Empire, alone have sovereignty; and that being States, the empire taken in itself has no sovereignty, and is not in reality a State. This theory which clearly reveals the persistent spirit of particularism in Bavaria, at least at the time Seydel was writing, has naturally been severely criticised in Germany. An explanation of Seydel's realistic doctrine cannot be found, as a matter of fact, in these great works, but in a little book published in Würzburg in 1873, soon after the Franco-Prussian War of 1870-71, and entitled *Grundzüge einer allgemeinen Staatslehre*.<sup>4</sup>

In the introduction of this book Seydel declares that realism is the characteristic *par excellence* of our time; and that realism must be injected into the science of law as it has been into the other sciences. "To learn the truth and publish it," he writes, "without any other consideration, is the final end of science; and is accordingly at once the highest form of realism and idealism."<sup>5</sup>

<sup>3</sup> Bayerisches Staatsrecht, two volumes, second edition published in 1913; and *Kommentar zur Verfassungsurkunde für das deutsche Reich*, second edition, 1897.

<sup>4</sup> His *Staatsrechtliche und politische Abhandlungen*, 1893 and 1902, might also be consulted.

<sup>5</sup> Seydel, *Grundzüge der allgemeinen Staatslehre*, 1873, Introduction, p. v.

Consequently, if we care to prevent the science of law from disappearing in the march of the social sciences, paths of approach by which the latter have been developed must be opened. "It must not pursue deceiving images; it must endeavor to lay hold of cold reality. . . . Law has been created by men and for men. It did not come out of the soil as a gift from nature, gathered without effort by lucky hands. It was acquired by strenuous endeavor, by the efforts of a millenium, just like everything else that humanity can call its own." We must go then to juridical realism as did Jhering in his *Der Kampf im Recht*, published in Vienna in 1872. "There remains much to be done in this field; many errors which led to a false juridical idealism must be set aside. There are scarcely any false fictions which have not multiplied themselves, thus closing the paths of truth. This source of error, however, ceases to be dangerous when recognized; and the fact that such a point of view is beginning to make itself clear is truly a fortunate symptom. Not so very long ago, however, it would have been impossible to recognize the truth of the following proposition formulated by Unger: 'fiction is the only proper form of expression for the juridical assimilation and the equality of treatment of different relations in themselves; consequently, we cannot with the help of fictions clarify or justify juridical relations; fictions do not contain a fruitful principle and cannot, moreover, be considered as juridical premises. They are rather, on the contrary, the abbreviated formulas of an order of things previously created and given shape; they are instruments of juridical terminology and not of juridical construction.' These words of Unger," continues Seydel, "are pregnant with meaning, and a train of consequences are connected therewith. This idea in itself sufficed to dissipate the cloud befogging the minds of the followers of Puchta. The subjects of right [*i.e.* legal persons], which do not exist in fact, but are merely a product of the imagination, are doomed to the same fate, including not only the collectivities, concerning which it is said that they are something different from the sum of their parts — that they are not equal to the sum of the needs growing out of the interests of the individual units — but also include many other things which have never existed but have simply been imagined,

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<sup>6</sup> System des oesterreichischen allegemeinen Privatrechts, 1864. VI, p. 35.



— many things whose existence is not due to the reality of their being, but simply to imagination.”<sup>7</sup>

Every idea in Seydel’s statement is profound as well as exact, and is the basis for those doctrines of juridical realism which in many of my own writings I have tried to develop and defend, namely: to banish from the juridical world all such rubbish as fictions and endeavor to understand society as it is by establishing the direct observation of facts.<sup>8</sup>

But although our juridical realism led us to establish a basis which to us seems sound, or at any rate more secure than the individualistic theory, for purposes both of juridically limiting the powers of those who govern and keeping them within narrow limits by the addition of serious guarantees, the realism of Seydel led him to formulate as axiomatic the following unacceptable and singularly dangerous proposition: “There is no law without the *Herrscher*, beneath the *Herrscher*, or alongside the *Herrscher*; there is law only by means of the *Herrscher*.”<sup>9</sup> The *Herrscher* is the man or group of men who, within a given territory, have control, as a fact, of the power of issuing commands. Such a statement is an affirmation in unusually forceful terms of the limitless absolutism of those who govern.

#### IV

But let us see how Seydel deduces this proposition from his juridical realism.

For him the State exists because of the fact that a certain number of men who occupy a definite portion of the earth’s surface are united under a superior will. It follows from this that the State is the product of the human will, not the product of a natural power or of an evolution understood in the sense in which a plant, without any will of its own, grows only by virtue of physical laws. The men who create a State, however, desire that it conform to their nature. But such an act of will is none the less a free act, in no way necessary. The particular State is always created by the human will. The idea that the State is an organism is a valueless idea philosophically or scientifically. Such a mode of expressing

<sup>7</sup> Seydel, *Grundzüge*, 1873, Introduction, pp. vi and vii.

<sup>8</sup> See especially my book, *L’État, le droit objectif et la loi positive*, Paris, 1901.

<sup>9</sup> Seydel, *Grundzüge*, p. 14.

one's self rests on an obscure idea, and confounds the impulsion of the human species creating the State with the act of creation that results in its realization.<sup>10</sup>

According to Seydel, therefore, the State is purely a product of the human will. The idea from which the doctrine of the social contract was derived is, he says, very well taken. The application of the juridical notion of contract to matters with which it has no connection is really what is unsound in the doctrine; it is applied to the foundation of society, when in reality law and the notions which result therefrom can exist only after society has come into being.

For Seydel, moreover, the question of the formation of the State by human beings is a matter altogether apart from the science of law. "For," says he, "law exists only through the State. As regards the science of law, the State is simply a question of fact, or as Stein would say, the question of power, as a fact,<sup>11</sup> but certainly not this fact, namely, that the collectivity of men has a separate and independent existence outside and above the collectivity itself. For it is difficult to discern anything like logic in this proposition, especially when we recognize with Stein that the collective existence of the State is identical with the existence and the development of the individuals of which it is composed; that the extent of development of all the citizens is the condition precedent to and measure of development of the State itself."<sup>12</sup>

After having thus affirmed that the State is not a metaphysical entity having a separate existence distinct from the individuals, that a State is simply a question of fact, Seydel goes on to say that such a proposition has consequences of no inconsiderable importance. It leads, says he, to a repudiation of every rational conception of the State; we must not according to such a proposition consider the State in itself, but always particular and determinate States. "The question is not to understand either what the State should be or what are its characteristics *in abstracto*, but to understand better what we as human beings mean by the State; what are the characteristics of all these groupings of men that we are in the habit of designating by the word State."<sup>13</sup>

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<sup>10</sup> Seydel, *Grundzüge*, pp. 1 and 2.

<sup>11</sup> Stein, *Verwaltungslehre*, second edition, I, p. 5.

<sup>12</sup> Seydel, *Grundzüge*, p. 3.

<sup>13</sup> Seydel, *ibid.*



The State is not the only form of union of men among themselves. Numerous intermediary degrees exist between the bestial life of primitive men, in which sexual instinct alone appears as the germ of an exceedingly precarious human society, and the complete union in the form of the State, in which divers and well defined stages are presented as: family community, tribal community, racial community, each one of which is already dominated by a superior will and from which the State is derived by the formation of a new element, namely, its establishment on a definite portion of the earth's surface.

A race and a people united in the State have in common as regards each other the characteristics of union (*Vereinigung*); that is, the characteristics of a being dominated by a supreme will. This supreme will is a logical necessity. In fact, as the separation of men rests on the differences in their wills, their union cannot be realized in any other way than through the suppression of these differences of will. It is not a question of determining how it can be done. "It is sufficient to affirm the logical necessity of the conception that the will, dominating a union of human beings, must be one and indivisible."<sup>14</sup>

According to Seydel, therefore, in order to have a State, two elements are logically necessary: (1) territory and individuals, (2) a supreme will to which the individuals are subjected.

The result of this proposition, he adds, is unquestionably that the State is not the commanding will, nor is it invested with the commanding will. The State is distinct from this will; it is not this will; it is the object created by it. The will of the *Herrscher* is over the State, and its subordination to such will gives to the individual and to the country thus subordinated to it the very character of a State. We call them States only when they are submitted to a *Herrscher*: similarly, we call a thing property only by virtue of its having an owner. Accordingly, thinks Seydel, any line of thought which confounds the State with the commanding will and which attributes a will to the State must, scientifically speaking, be completely rejected. "The State and the *Herrscher*, like property and owner, are two things quite distinct; this is particularly clear since the *Herrscher* can lose his *Herrschaft*."<sup>15</sup>

The underlying principles of Seydel's realistic doctrine appear to

<sup>14</sup> Seydel, *l. c.* p. 4.

<sup>15</sup> Seydel, *l. c.* p. 5.

be well settled. For him, the State consists of individuals and territory, objects of a commanding and supreme power — a power which is a right of the individual or the individuals who, in fact, have control of such power, and whom he calls the *Herrscher*. The State does not have a will; the State is not a subject of rights; it is an object of the right of power belonging to the *Herrscher*. It is the theory of the State as object, opposed to the theory of Gerber and of Jellinek, namely, that of the State as subject of rights.

Seydel, moreover, expressly and energetically repudiates the conception of the State as a person, which, he says, is as false, as untenable, as the conception of the State as an organism. Both have an unpardonable vice, namely, that they make out of that which is a product of imagination, a simple comparison, a scientific principle of philosophy and of law.<sup>16</sup>

## V

So far I agree with Seydel. I agree with him that, in reality, it can be said that a State exists only when in a group of men on defined territory a differentiation can be made between those governing and those governed; and that all such expressions as personality of the State, will of the State, the State as an organism, are vacuous words devoid of meaning. But I now come to that part of Seydel's doctrine in which he attempts to found the unlimited absolutism of the *Herrscher*, against which I protest energetically. Having admitted the preceding, and having recognized the fact that the union of human wills cannot take place except by the establishment of a single will, possessing a supreme commanding power, the problem is then to determine, says Seydel, just how such will, as well as the collectivity of the State, comes into being.

This one supreme will could not have been established by consent of the individuals who are subordinated to it. If in fact the individuals had agreed to submit themselves to a common superior will, such will would have been useless for the reason that such a union, existing apart from and before the State, need not be sought through it. The superior will must then have been created in some other way. Such a will can be only a human will, since on earth no other being but man is gifted with reason and will. The union has

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<sup>16</sup> Seydel, *l. c.* p. 5.



thus been brought about because one or several individuals have in fact acquired the supreme commanding power, the *Herrschaft*, as against the social group. Whether only one individual or several individuals acquire the *Herrschaft* makes no difference; the situation in either case is the same. In the case of a plurality of persons governing, there appears as among them the same relation as that which was produced as regards the aggregate collectivity, namely, a difference of wills. This difference of wills is obviated, however, either because the will of the majority imposes itself on the minority as the will of the *Herrscher*, or else because the different individuals in possession of the *Herrschaft* arrive at a common will by an understanding.

"Thus," writes Seydel, "the will to *herrschen* is always and for all time a will over the State (*über Staat*) and not a will of the State (*eine Wille des Staats*); and it is because we have not recognized this relation that we have been led to the chimera of the personality of the State." <sup>17</sup>

But, for Seydel — and here I absolutely reject him and energetically protest against the want of logic and the pitfalls of his doctrine — this will of the *Herrscher*, even though it is only an individual human will, has, nevertheless, a character quite its own, which clearly distinguishes it from ordinary individual wills. The will of the *Herrscher* is by nature a commanding will; it possesses a power of right; it has the right and as we shall see later the unlimited right of imposing itself on other wills. Its manifestations are in the form of orders which require obedience; it has the right of commanding, and it creates law by its commands.

This will of the *Herrscher*, nevertheless, is not by nature an egoistical will. The human will, being that of a reasonable being, is always in pursuit of an end. The State, being a product of the human will, has been constituted with an end in view; and this end can be none other than the common interest of the men united in a State. For that reason, the will of the *Herrscher* in the State is not an egoistical will. The *Herrscher*, as such, does not need to guard individual interests, but merely the common interest of his dependents (*salus populi suprema lex esto*).

Yet, says Seydel, this limitation upon the will of the *Herrscher* is not and cannot be juridical, since the only source of law is to be

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<sup>17</sup> Seydel, *l. c.* pp. 7 and 8.

found in this will. It is a simple material limitation existing in the very origin of the *Herrschaft*. As soon as the will of the *Herrscher* exceeds this limitation, becomes egoistical, as soon as it becomes the tyranny of an individual or the domination of a caste, and thus places itself in opposition to the common interests of its subjects, it mistakes the foundation upon which it rests, and places itself in opposition to its own essence. The individuals united in the society of such a State do not find themselves governed any longer in the way States should be governed; society finds itself again facing the pre-political period. The consequence of such contradiction — in which the *Herrscher* sets itself against the very purpose of its authority — leads society to revolution.

Seydel is thus led to outline a sort of theory of revolution. For him revolution is not, in a scientific sense, a violation of law. It is the act by which individuals seek to recover the ancient political union which for the time being has been lost. It is the reconstruction of the foundation for a new juridical and political formation. In the same way the conduct of the *Herrscher*, which has been the cause of the revolution, is not a violation of law; "because the *Herrscher*," says Seydel, "from whom the law is derived, is placed above the law. The *Herrscher* who creates a law without sense does not violate any law, because the source of law is his own will. But he has sinned against the very nature of his *Herrschaft*. Such anti-State acts of the *Herrscher* and the revolution of the people are outside the domain of law."<sup>18</sup>

Thus Seydel is led to declare that we must not confound law and morality. They are not equivalent concepts and can be opposed to each other. It is possible that a juridical command be in opposition to a moral prohibition and that a juridical prohibition be in contradiction to a moral precept. This is a consequence of the absolute nature of the *Herrschaft* and of the essence of law, which is a notion of power (*Machtbegriff*).

Undoubtedly, according to Seydel, the end of law is not to place interest in opposition to moral sentiment, as if they were rivals. But if it does so, law does not cease to be law. For the basis of law is the *Herrschaft*; the basis of the *Herrschaft* is material power. "*Denn der Grund des Rechts ist die Herrschaft; der Grund der Herrschaft ist die Macht.*"<sup>19</sup>

<sup>18</sup> Seydel, *l. c.* p. 9.

<sup>19</sup> Seydel, *l. c.* p. 12.



## VI

We have thus reached the most fundamental principle of the doctrine. The omnipotence of the individual or the individuals holding the *Herrschaft* and creating law by their own will is affirmed. This *Herrschaft* is founded on *Macht*, that is to say, on force. The *Herrscher* creates the law by his own will; his orders are always law, however immoral and however irrational they may be; and he can compel obedience by material force.

No attempt is made, moreover, to determine what may be the basis of this power, whether or not it is legitimate, and upon what its legitimacy rests. To Seydel these questions are devoid of interest. The existence of the State is a question of fact; in this respect it does not differ from the *Herrschaft*; and it can and must be considered independently from the cause by which it was established. From the scientific point of view there is no sense in talking about the legitimacy of the *Herrschaft*. More specifically, it does not appear necessary to make it depend on and be derived from the consent of the subjects or from a declarative act of submission. There is even less reason for considering it as founded on a concession, because in such a case a will which is in fact subordinate appears to be superior.

We thus come to the two following propositions wherein, in language forceful and precise and deserving literal translation, the whole doctrine of Seydel is recapitulated: "The *Herrschaft* is simply the existence of power over the State as a fact — a fact from which law is derived. . . . Law is not anterior to the State, but takes the highest position in the State. Law is nothing more than the collection of determinations by which the commanding will (the will of the *Herrscher*) governs that human grouping, the State. The source of law is therefore the will of the *Herrscher*." <sup>20</sup>

Let us not offer the objection, says Seydel, that the common law does not owe its existence to the will of the *Herrscher*. Customary law itself receives its obligatory force from the will of the *Herrscher*. Custom in itself does not create law; but it becomes common law by the will of the *Herrscher*. If custom lacks the tacit or expressed assent of the *Herrscher*, it cannot of itself become law.

Seydel concludes with these words: "It is thus an uncontro-

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<sup>20</sup> Seydel, *l. c.* p. 13.

vertible truth that there is no law without the *Herrscher*, above the *Herrscher*, or on equal footing with the *Herrscher*. A law can exist only through a *Herrscher*." <sup>21</sup>

This formula is at least so clear that no question can arise either as to its extent or its consequences. It is a complete absolute negation of all internal public law. Or, at least, if public law does exist, it is not binding on those having control of the public power. What is called public law is nothing other than a collection of empirical dispositions destined to regulate practical life, for determining the manner in which laws shall be made, the mode of regulating the functioning of the administration and of tribunals. But they are orderings which have no imperative force as regards the *Herrscher* who creates them, who, if he so wished, might not create them, and who can withdraw any of them at his pleasure. There is no law above the *Herrscher*, and whatever he may do, he never violates the law.

## VII

We can guess what becomes of international law with such a conception of public law and of governing power. "Between States," Seydel declares expressly, "no juridical command is possible, because the juridical command presupposes a superior will as the source of the law. If such a superior will existed, there would be a world State, and the ideas of the Middle Ages would be realized in the lay *imperium mundi* or the spiritual sovereignty over States." <sup>22</sup>

Granting the premise, all that has been quoted is quite logical. Law, having as its only source the power of the *Herrscher*, in order to have international law a super-political *Herrscher* would be necessary. But none exists; and his existence would be even contrary to the idea of the State, because, in a subordinated State, there would in reality be no *Herrscher*.

Seydel goes even further. He states his ideas in fact even more precisely when he thus writes: "Between States there can be no law; might alone counts as between them; there is therefore no international law. *Zwischen den Staaten kann mithin kein Recht sein; zwischen ihnen gilt nur Gewalt. Es gibt darum kein Völkerrecht.*" <sup>23</sup> Such a statement is at least frank. Seydel continues in this manner:

<sup>21</sup> Seydel, *l. c.* p. 14.

<sup>22</sup> Seydel, *l. c.* pp. 31 and 32.

<sup>23</sup> Seydel, *l. c.* p. 32.



"*Herrschers* can find it quite opportune for their interests to formulate, to establish certain rules as between themselves; but each one is bound by these rules only in so far as he so wills. Such a rule is evidently not a law. Just as there is no law between States, there is likewise no jurisdiction between them. Conflicts of interests find their last solution in war. Out of the complexity of the foreign relations of the State arises the most important function of the *Herrscher*: to defend the interests of the collectivity not only within but also as against the other *Herrschers*. And since he may be compelled to use physical power as a last resort in preserving such collective interests, such power must be at his disposal at all times. This physical power (*Macht*) resides in the army, which is, therefore, the instrument for the realization by material constraint (*Zwang*) of the will of the *Herrscher* at home and abroad." <sup>24</sup>

Thus, we have the last word of the doctrine: the power of material constraint by the army, within and without, for the realization of the will of the *Herrscher*, who has limitless powers, who creates the law, and who must be irresistible. Such is the teaching of one of the greatest jurisconsults of modern Germany.

### VIII

I hasten to say that this doctrine of Seydel's was sharply criticised even in Germany, and particularly by the great jurisconsult, Gierke, professor at the University of Berlin, who in answer to Seydel printed in 1874 in the *Zeitschrift für die gesammte Staatswissenschaften* published at *Tübingen* (page 153) a very remarkable article entitled *Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien* (the fundamental conceptions of public law and the most recent theories of the State). Gierke insists, and with much eloquence, on the authoritativeness of the law as against the State.

It is impossible here to explain in detail the doctrine of Gierke, a doctrine often obscure, and at any rate singularly complex. It attempts, on the one hand, to reconcile the autonomy of the individual with the omnipotence of the State and, on the other hand, to subordinate the State to law, while maintaining that it is omnipotent. Under the cover of the abstract and obscure

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<sup>24</sup> Seydel, *ibid.*

formulas of Gierke, a doctrine appears to be set forth which comes very near being the individualistic doctrine as formulated in the Declaration of the Rights of Man. Here are at any rate the two passages of the article which appear to me most characteristic.

"Since human existence," says Gierke, "is not solved in the life of a species but is at the same time an end in itself, we must recognize the individual and not the State as a primary essence, existing by itself, and finding its ultimate end in itself. Only a part of the individual belongs to the State as a member thereof. The rest of what goes to constitute his being is completely independent of the collective life of the State, and forms the subject matter of his free individuality. The individual being and the being as a member of the State exist like two domains of autonomous life beside each other, either one of which cannot exist without the other, each finding its complement in the other, but each having, nevertheless, a direct end in itself."<sup>25</sup>

If there is a sphere of individual autonomy, Gierke thinks, nevertheless, that the jural principle is essentially social and comes to limit narrowly individual activities. "Social life," he writes, "cannot exist without at the same time having concurrent wills submitted to an imperative rule. Beside the conception of moral duty there arises this conception, namely, that there are in social relations a *Dürfen* within and a *Müssen* without. There is need not only of harmony of wills with themselves, but also of a harmony of all the wills among themselves; and thus arises the conception of law."

That being assumed, the problem of the relations of the State and of law arises. Is the State bound by law? Is law anterior or superior to the State? Gierke puts the question himself, and answers in this manner: "There is between law and the State a reciprocal penetration of a particularly close and intimate nature. The law is innate in the State. Law is no more begotten by the State than the State is begotten by law. But, although each has its own reasons for being, each is developed by the other, each is the complement of the other. . . . Today the State acts as an organ in the formation of law. But for that reason the State does not become either the ultimate source of law or the sole

<sup>25</sup> Gierke, *Die Grundbegriffe des Staatsrechts und die neuesten Staatstheorien*, *Zeitschrift für die gesamte Staatswissenschaft*, Tübingen, 1874, p. 306.



organ in its formation. The ultimate source of law resides rather in the common consciousness of a social being. The common belief that something is right needs, for its external realization, materialization by a social expression, as for instance, in a rule of law . . . not unfrequently this expression takes place through and by means of the State, which has for its principal rôle the shaping of the juridical consciousness of the people in the form of law. But social organisms other than the State can formulate law. . . . Juridical life and the life of the State are two independent sides of social life. While power is a rational condition for the State because a State without omnipotence is not a State, it is immaterial, so far as the notion of law is concerned, that there exist for it means of external power; for law without power and without action always remains law." <sup>26</sup>

The sphere of action of the law and that of the State are distinct; but, nevertheless, just as a number of important functions of the State are those concerned in formulating law, so a number of essential functions of law reside in the State. For, on the one hand, the creation of law and the protection afforded thereby are necessary functions of the State and, on the other hand, it is an incontestable as well as rational function of the law to govern and to direct the internal life of the State. Public law is, for Gierke, that part of the law which governs and directs the internal life of the State; and he believes, contrary to Seydel, that a jural principle, based on the juridical consciousness of the individual, imposes itself as a duty on the State and creates for it limitations of a juridical order, determined by the autonomy of the individual.

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<sup>26</sup> Gierke, *l. c.* p. 179.

## CHAPTER IX

## REALISTIC CONCEPTIONS OF THE STATE IN FRANCE

IN France all realistic doctrines, in this respect differing from the German realistic doctrines, have been determined by this end: to establish upon a firmer basis the legal limitation upon the State, and to secure through such limitation more serious guarantees and more efficacious sanctions than the metaphysical doctrine can do, or as a matter of history, has done. All the publicists in France who have tried to construct a realistic theory of the State have been struck by the intrinsic contradictions of the metaphysical conception, which affirms, on the one hand, that the State is a sovereign person, that is, a person having a will determining its own action only by itself, and, on the other hand, that this will has nevertheless juridical limitations upon its action. If this will is sovereign by definition, it is logically impossible to limit it by a standard superior to it. We have seen that all the explanations given which were not vain and sophistical were nevertheless incapable of solving the contradiction. And this is true also of the theory of auto-limitation.

The individualistic doctrine had for its purpose the establishment of the autonomous will of the individual as against that of the State. But either the will of the State can in no way limit the autonomy of the individual with the result that the State ceases to be sovereign and individualism leads logically to anarchy, or else the State can circumscribe the autonomy of the individual will. To remain sovereign, however, it must be within its power to determine in a sovereign manner the extent of the restrictions which it imposes, with the result that the sovereignty of the State becomes limitless. The autonomy of the individual then disappears; an autonomy which the sophistry of Jean Jacques Rousseau, of Kant, and of Hegel has not been able to save.



## I

It is in the presence of such inextricable difficulty that the creation of a juridical theory of the State has been attempted in France by completely eliminating the notion of sovereign personality and by formulating a doctrine which will not only explain the imperative force of the law and of other public acts, but which will at the same time construct a solid foundation for the limitation upon the power of those who govern as well as secure a sanction for such limitation.

Realistic doctrines, which for a long time have had few followers in France, have shown marked progress within the last few years. Although they differ in detail, they agree on the following points:

1. The State does not exist as a collective person distinct from the individuals constituting a given society and from the individuals who are in power. That these different social groups, modern nations, great and small, are realities, are facts, can not be denied. To question their reality has never been more difficult than in the epoch through which we now are passing. The individuals constituting such States are united to one another by the very strongest ties, the origin of which must be left to sociologists to determine. At a given moment nearly all the individuals composing the social group of a nation are found to desire the same things, believe in the same future, have identical recollections of the past, hope for the same things, pursue the same ends, and be conscious of the same ideal. But they are, nevertheless, individual intelligences having the same beliefs and thinking as a unit; they are individual wills willing the same things and acting as a unit in their execution; they are human beings, individually suffering and individually trusting in the future. Because a million, ten million, forty million individuals will and do the same things, think and believe the same things, we cannot conclude that for this reason there exists a person one and collective, a national person, organized as a State, having a conscience and a will distinct from those of the individuals. We can speak of the national spirit, of the personality of the nation and of the State; but they are the purest metaphors even though convenient and expressive. They are not expressions of reality scientifically established by observation.

2. Political power is a fact. Such power is vested in those men

who in fact are in possession thereof; in those who are governing. Why is it that they and not others have such political power? Because in fact it is so. It is the result of the political evolution of each nation; and the determination of the causes and the characteristics of the political differentiation in each country must be left to the historical sociologist. Those who govern have, in fact, control of a power which is never legitimate by origin, and which, consequently, never constitutes a right in them. The individual has no rights against those who govern; and, on the other hand, they have no rights against him.

3. The next step is to say this is anarchy; and those are not wanting who have said so. The writer of these lines has, however, been exceedingly well treated, as an anarchist and professor, by his eminent colleague, M. Hauriou.<sup>1</sup> But let us rest content. These realistic doctrines do not lead to anarchy. They teach, in fact, that if the power of those governing is never legitimate by origin, if it is never imposed as such because the will of those who govern is of a different nature from that of those who are governed, yet the power of those who govern is imposed legitimately if it is exercised in conformity to the jural principle (*la règle de droit*), the basis of which must necessarily be determined. Obedience is due to every act of the ruler which conforms to law (*au droit*); such obedience is due not because it is an act of one in authority, but because such act is in accordance with law (*au droit*); it is due only when and to the extent that such act conforms to law (*au droit*).

All French publicists who espouse the realistic conception are in agreement on these different points. It may be perceived how through such a conception the basis for juridical limitation upon the powers of the State is more solid than that given by the metaphysical conception. What is called the will of the State is nothing more or less than an individual will. Those who govern are individuals like any others; and if the will of those who are governed is submitted to law (*au droit*), the will of those who govern, simple individuals like those governed, is also submitted to law (*au droit*).

It is more difficult to explain how rulers can be bound by laws which they have made. Those who govern do not in reality make the law. One of two things happens: either the law, as promulgated, formulates a jural principle (*une règle de droit*) or brings one

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<sup>1</sup> Hauriou, *Principes de droit public*, first edition, 1910, p. 79.



into play, or else such principle is completely alien to law. In the latter case, no obedience is due it. In the former, obedience is due it by all — those who govern as well as those who are governed. It is in this case imperative; not because it contains an order of the governor to the governed, but because it formulates or brings into play a jural principle (*une règle de droit*), which by its very nature is binding on all.

One can also see how, according to this realistic conception of the State, the sanction of such principles imposing themselves on those who govern will be more easily and more efficaciously organized. According to this conception there is no political organ that can pretend to be invested with a sovereign will; and consequently there is no political organ whose decisions can not be the object of an organized redress and brought before a tribunal. In this way the pretension that decrees emanating from parliaments are not subject to question or appeal of any kind because they represent sovereignty breaks down. Certainly we must stop somewhere, because there must always exist a point beyond which there can be no higher authority to which to appeal. A situation will also undoubtedly be reached at which assurance by force of the execution of the decision rendered by such superior authority will be impossible, because such execution would be necessary as against those who govern, who, in fact, have control of the strongest force. But even then there remains the *ultimum remedium* of resistance to oppression in its three forms, so well analyzed by the ancient theologians, namely, passive resistance, defensive resistance, and aggressive resistance — three forms of resistance the legitimacy of which is firmly established according to the realistic conception.

If all the French advocates of the realistic doctrines are in agreement on the preceding points, an important problem arises concerning which it must be admitted there are profound differences of opinion. It is said that the act of those governing is not binding in and of itself, but only by virtue of its conformity to the jural principle (*la règle de droit*). The nature of this jural principle is still to be learned. What is the foundation of it? How can it be recognized? How is it determined? In the answers to these questions extreme differences of opinion are first found. Personally, I think that the realistic conception of the State is alone admissible; but I can not fail to recognize the fact that the problem

of establishing a basis for the principle which renders legitimate and at the same time limits the action of those who govern raises grave difficulties. The principal solutions which have been proposed will be indicated.

## II

The politician, publicist, and philosopher who in the first half of the nineteenth century formulated a realistic doctrine of the State with most *éclat* is Royer-Collard. He was born in 1763 and died in 1845. Royer-Collard was a member of the Council of the Five Hundred. He was appointed professor of the History of Philosophy at the Sorbonne in 1811, and his consummate success there as a teacher secured for him a widespread reputation. Elected deputy in 1827, he remained a member of that body till after 1830. As a Royalist he allied himself with the July Monarchy. In politics he attracted special attention as leader of the party of constitutional theorists (*les Doctrinaires*), who pretended to found their opinions and their votes upon a definite doctrine, founded on immutable principles, scornful of compromises and of arrangements. Royer-Collard wrote very little; his philosophical works are exceedingly few in number.<sup>2</sup> His political doctrine can be found chiefly in his political speeches, particularly in his celebrated speech on the Heredity of the Peerage, delivered in the Chamber of Deputies on October 4, 1831.<sup>3</sup>

In his very searching study of Royer-Collard, Émile Faguet expresses himself in this manner: "Royer-Collard perceived in 1815 that for sixty years the French had but one question to determine when in political discussion, namely: where is sovereignty? . . . Royer-Collard answered in the following manner: The question is badly phrased. You ask: where is sovereignty? I answer: there is no sovereignty. As soon as there is sovereignty, there is despotism; as soon as there is despotism, there is either social death or at least profound organic disorder. To ask, where

<sup>2</sup> Royer-Collard's philosophical writings were printed along with Jouffroy's translation of Reid's works at Paris, 1828-36.

<sup>3</sup> Archives parlementaires, second series, LXX, p. 339 *et seq.* As to Royer-Collard's political doctrines, see de Barante, *La vie politique de Royer-Collard, ses discours, ses écrits*, second edition; E. Spuller, *Royer-Collard*, 1893; Émile Faguet, *Politiques et moralistes du XIX<sup>e</sup> siècle*, first series; and Nesmes-Desmarets, *La doctrine politique de Royer-Collard*, 1908.



is sovereignty, is not only to be a despotist but also to declare oneself so to be; it is to have no smack of liberty, no feeling of liberty, no instinct of liberty. That there is no sovereignty is the underlying principle of Royer-Collard's whole political theory."<sup>4</sup>

Émile Faguet, in the passage quoted, sums up perfectly the idea underlying Royer-Collard's political conceptions, and points out well how he came to form a truly realistic notion of the State. Royer-Collard thinks that so long as the idea of sovereignty is retained the problem of limiting the power of the State by law becomes truly insoluble; that the problem can be solved only by completely discarding the concept of sovereignty; and that sovereignty also leads to despotism, whether it be vested in prince, people, or parliament. But the question as to how those holding power can legitimately impose their wills by force and to what extent they are to be permitted to do so, remains to be explained.

An explanation and solution of the problem was attempted by Royer-Collard in the speech previously mentioned, which he delivered October 4, 1831, before the Chamber of Deputies during the debates over proposed legislation which had for its object the changing of the law with respect to the heredity of the peerage, voted on by both chambers, and enacted on December 29, 1831, with a provision that peers should thereafter be named by the king without restriction as to number, but confined, however, to certain nobilities. The first paragraph of the law reads as follows: "Their rank or dignity (as peers) is conferred upon them for life and is not transmissible by inheritance." This suppression of the heredity of peerage was voted on only after a long and very brilliant discussion in which Royer-Collard, Guizot, and Thiers upheld the inheritance of peerage against the prime minister Casimir Périer, who carried the vote by his authority.

While advocating retention of the rule of inheritable peerage, Royer-Collard found himself constantly confronted with the following objection: the hereditary system, whether it be applicable to the king or to a body, is inconsistent with the principle of national sovereignty. His answer led him into an explanation of the whole theory of public law. "Yes," says he, "nations are sovereign in the sense that they are not possessed like territories, but belong to themselves and have in themselves, by virtue of their own natural

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<sup>4</sup> Émile Faguet, *Politiques et moralistes du XIX<sup>e</sup> siècle*, first series, p. 260.

right, the means of providing for their own conservation and their own salvation; they are sovereign also in the sense that general consent is the only true basis for governments, which, therefore, exist through nations and for nations. But these incontestable truths are rather maxims of morals than principles of government; they rather express the divine sovereignty of reason and of justice than this human and practical sovereignty, that makes laws and administers States. It is that sovereignty which we are looking for. Where can it be found? Is it in public place that it pronounces its oracles? Is it the majority of individuals, the majority of wills, as they happen to be, that is the sovereign?"

Royer-Collard could but answer in the negative, and he puts his answer in terms of singular force. "If that be so," says he, "we must publish it widely: the sovereignty of the people is only a sovereignty of force and the most absolute form of absolute power. Before such a sovereignty, unguided by rule and unlimited in power, without duty and without conscience, there is no constitution, no law, neither good nor evil, either for the past or for the future. . . . But, gentlemen, force is not destined in this manner to exercise a veritable sovereignty on earth. Force constrains; it does not oblige. To oblige is the attribute of quite another sovereignty. The will of one, the will of many, the will of all, remains only force, more or less powerful; to none of these wills, on the sole claim of will, is due either obedience or the least respect."<sup>5</sup>

This is profoundly true. Those who possess power have force — nothing more. Whatever be their origin, they possess nothing more than force, and this force does not bestow upon their will any superior quality permitting it to impose itself upon the governed and commanding their obedience to its impositions. On what condition and to what extent, therefore, can the will of those who govern be imposed on those governed? Royer-Collard thus answers: "When such will manifests itself in conformity to law; when it has for its object the protection of the legitimate interests which have their origin in law."

He explains himself with exceeding clearness in the next passage of his speech, as follows: "Societies," says he, "are not numerical assemblings of individuals and of wills. They have another element

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<sup>5</sup> Archives parlementaires, second series, LXX, p. 360.



than number; they have a stronger bond — law, the privilege of humanity, and the legitimate interests which spring from law. Law does not spring from force, but from justice, the sovereign arbiter of interests. Under the auspices of law, societies are formed for the purpose of dethroning force and setting up justice in its place. Notice, gentlemen, that this decomposition, if I may so put it, of all society into rights and interests, substituted for individuals and wills, is at the same time the reason and the sanction of representative government.”<sup>6</sup>

In this connection Royer-Collard explains the whole theory of representative government. According to him in this form of government there is representation of interests and of rights and not representation of individuals and of wills. Representative government is the best guarantee that has been found for insuring protection and respect for interests and for rights by the individuals who hold power.

But what are these rights, or rather what is this law, which is the foundation of legitimate interests; what is this law which limits the power of those who govern, and gives validity to their acts when they conform to its precepts? Evidently, according to Royer-Collard, it is natural law, conceived as the rule of conduct for man living in society, an absolute, immutable law revealed to man through natural reason. Such expressions as natural law and human reason often recur in his text. Although Royer-Collard does not express himself very clearly, he must have had in mind as the basis of such law the autonomy of the human person. But what are the obligations which this law imposes on those in power? Are they simply under obligation of protecting the rights and interests of the individual and of not infringing upon them? Or, moreover, does it go so far as to compel those in power to furnish individuals certain positive prestations? These and many similar questions are neither raised nor answered by the great orator.

But after reading his whole discussion a single underlying idea, something very well defined and unassailable, remains, which may be summarized as follows: any affirmation of sovereign personality of the State is false; such a conception can lead only to despotism; liberty is irreconcilable with the notion of sovereignty;

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<sup>6</sup> Royer-Collard, *l. c.* p. 360.

the pretended sovereignty of the people is the omnipotence of the majority, which leads perforce to anarchy or to tyranny; those who govern hold the reins of power merely as a fact; their will is not superior to the wills of the governed; such will imposes itself on the latter only when it has conformed to the precepts of law revealed through reason and only to the extent to which it has so conformed.

### III

These ideas of Royer-Collard's were not completely abandoned in France during the nineteenth century, even though the metaphysical conception of the State prevailed, generally, among jurists and publicists.

Royer-Collard's ideas, however, recur again, one might almost say in a diffused state, in the writings and speeches of Guizot. Esmein cites a notable passage, borrowed from one of Guizot's pamphlets entitled *Moyens d'opposition*, in which we may read: "Take, for example, men free and independent, strangers to any necessity for internal subordination of one individual to another, alien to any such uniting in a common interest . . . , how does power arise in such an environment? It belongs to the one that makes himself known as the most capable of exercising such power, that is to say, most capable of giving satisfaction with respect to the common interests. . . . As long as no external and violent causes intervene to disturb the spontaneous development of things, the bravest will be the one in command, the able the one who governs. Among men left to themselves, governed only by the laws of their own nature, power is what accompanies and reveals superiority. By making itself recognized, the latter makes itself obeyed. But, it is asked, what will happen in such societies as they become more highly developed and more complicated? When those who in fact control become incapable of understanding and of satisfying the general interest of the people, or when they are no longer willing to take account of such interests but, on the contrary, turn to satisfying their personal interests through the use of their superior position, a struggle is then brought about that can end only by destroying such society or by the displacement of such power. . . . Therein lies the whole secret of revolutions. Therein lies particularly the end, the fundamental principle, of



representative government. It has for its precise purpose the establishment of those natural and legitimate relations existent between society and power, that is to say, the delimitation of such power in law, since there is no such limitation in fact."<sup>7</sup>

This passage, which is not particularly clear, shows pretty well, however, that to Guizot political power is a question of fact, and that those who are in control can legitimately impose their wills only in so far as they understand and desire to satisfy the general interests of the people. Are not the general interests of the people as discussed by Guizot and Royer-Collard's legitimate interests identical?

The ideas of Royer-Collard and of Guizot were also expressed before the National Assembly on February 24, 1875; but they received only ironical reception. The Assembly at the time was occupied with the proposal of M. Raoul Duval to write into the constitutional laws, which were about to be enacted by that body, the principle of popular referendum. On this subject M. Paul Cottin delivered a discourse which the Assembly considered the work of a crank and of little importance. "What then is political power if it is not an authority which is imposed, a superiority which is not questioned, force, as has been said, in the service of law? And what can be its origin if not an imposed authority; force for the most part, often individual force, and sometimes the force of things superior to all particular wills?"<sup>8</sup>

M. Lepère, who was later the keeper of the seals, answered M. Cottin by energetically affirming the dogma of national sovereignty and by referring to his statements as unusual. On M. Lepère saying, "I have not been able to discern just how far M. Cottin has faith in national sovereignty," the latter immediately exclaimed: "I have no faith in national sovereignty. I deny its existence." The official report adds: "Exclamations on the left, laughter on several benches on the right."<sup>9</sup> Thus it may be seen no one in the Assembly seemed to have taken the declarations of M. Cottin with any seriousness. Yet he had done no more than set forth the ideas developed in 1831 by Royer-Collard with the applause of

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<sup>7</sup> Cited from Esmein, *Droit constitutionnel*, sixth edition, 1915, p. 42, note 2. Cf. Tchernoff, *Le parti republicain sous la monarchie de juillet*, p. 17.

<sup>8</sup> *Annals of the National Assembly of 1871*, XXXVI, p. 618.

<sup>9</sup> *Ibid.*, p. 619.

the Chamber and to enunciate the elements of a scientific theory of the State.

In our day these ideas have been taken up and stated more precisely by divers publicists, especially M. Charles Benoist, in his doctrine of social life, and by myself in the theory of social solidarity.

#### IV

Assuredly the Deputy, M. Charles Benoist, is one of the most authoritative representatives of the realistic conception of the State. He has set forth his ideas in this respect in three very interesting and very suggestive works: *Sophismes politiques de ce temps*; *La politique*; and *La crise de l'État moderne*, as well as in his reports and speeches to the Chamber of Deputies in favor of proportional representation.<sup>10</sup> The noted representative was struck especially by the existing defects in the actual electoral organization, an organization which gives preponderance to a legal majority, when, on the contrary, a rational political representation should be a proportional representation of opinions and a professional representation of groups. In the presence of such a situation, M. Charles Benoist was led naturally to ask himself what was the significance of the prevailing opinion according to which individual representation is associated with the idea of sovereignty. He conscientiously sought the nature of this sovereignty, but never succeeded in determining it. Such a task, for that matter, was impossible because no such sovereignty actually exists. Such is the genesis of the ideas which led M. Charles Benoist to solutions not very unlike my own. Unlike M. Benoist, however, I have attempted to work them out juridically.

In his book entitled *La crise de l'État moderne*, M. Charles Benoist writes as follows: "Upon closer examination, what is the value of this notion of sovereignty in the modern State? Where does it come from? We can answer that: it is a mystical and theological idea. What is its purpose? We cannot see. In what respect is it a hindrance? That stands out before us."<sup>11</sup>

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<sup>10</sup> See, especially, M. Charles Benoist's report on the several proposals relating to proportional representation in the *Journal officiel*, documents parlementaires, Chambre 1905, session ordinaire, p. 472.

<sup>11</sup> Charles Benoist, *La crise de l'État moderne*, p. 31.



M. Charles Benoist again writes as follows: "It is a question of making people see that the notion of sovereignty in itself, whether it applies to princes or to peoples, is an antiquated notion, false in its origin, further falsified by history, and, all things considered, useless, worse than useless — dangerous."<sup>12</sup>

But so far these are only negative propositions. M. Charles Benoist did not stop there. In his substantial little volume, *La politique*, he outlines the principal features of the realistic doctrine of the State, a doctrine which he sums up very clearly in the following passage: "To us it seems wiser and more just to abandon or, as we have been reproached for doing, to throw overboard the very notion of sovereignty; though certainly it is a very venerable and ancient notion, so ancient that it no longer has a place in contemporary political society any more than do the Assyrian or Egyptian gods in our museums . . . or the worm-eaten fetishes of the peoples of Central Africa. . . . Let us leave behind us this corpse from which all warmth of life has gone; and, since politics is the science of social life, let us found our theories only on what is living in society. The idea of sovereignty is false and useless. It may have once been true and may have formerly served fashions which are dead today. But how long is modern Europe going to continue to believe in sovereignty after it can no longer be found in fact? No answer need be given; for there is not at present, nor will there ever be sovereignty among the nations of western Europe. Something else has everywhere arisen in its stead."<sup>13</sup>

Here, then, is the import of the doctrine already explained: there is no sovereignty; there is no commanding and superior will of the State. How, therefore, can the will of those governing impose itself? To complete the theory it is absolutely necessary that this last question be answered. No one could fail to recognize the fact that the solution proposed by M. Charles Benoist is a little indecisive and uncertain. Certainly the idea in the mind of the eminent publicist, similar to Royer-Collard's and our own, is that the will of those who govern can command the obedience of those who are governed only when its manifestations are in conformity to jural principle, and that only by such conformity to law does such will obtain its imperative force.

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<sup>12</sup> Charles Benoist, *Sophismes politiques de ce temps*, p. 141.

<sup>13</sup> Charles Benoist, *La politique*, pp. 41 and 42.

That such is really M. Charles Benoist's belief is proved by the spirit visibly displayed in all his works, as well as by the proposal made by him in the Chamber of Deputies to create a supreme tribunal for deciding all complaints of citizens with respect to infringements of their rights by laws. On January 28, 1903, M. Charles Benoist along with M. Jules Roche and M. Audiffred signed a petition praying that there be added to the constitutional law of February 25, 1875, an article drawn up as follows: "A supreme court shall be established charged with the determination of all claims by citizens in respect to violations of their constitutional rights by the legislative and the executive power." And on the same date M. Charles Benoist personally suggested a proposition relative "to instituting a supreme court to settle questions relating to infringements of the rights and liberties of citizens."<sup>14</sup>

What, then, is the foundation of these rights which are thus recognized as the rights of citizens, and which at the same time create limitations upon the power of those who govern? On this point M. Charles Benoist's doctrine remains indefinite and uncertain. He introduced the very vague idea of social life, of the social organism; an idea which seems to me incapable of solving the problems involved.

Undoubtedly we can speak of the life of a social body, of the social organism. I, myself, have often used the term; and I do not protest against its use. But we must understand that they are merely convenient metaphorical expressions and not the source of a solution for the problems that are raised in determining the basis of the jural principle which controls the acts of those who govern. The doctrine that likened human societies to living organisms, as exemplified by the works of Herbert Spencer in England, Schäffle in Germany, and R. Worms in France,<sup>15</sup> had at one time no little vogue. Today, with little less unanimity, it is denied. Herbert Spencer and Schäffle themselves declared that their ideas were misapprehended, since they had in mind a mere comparison and not an absolute analogy between societies and living organisms. Thus, Professor Jellinek is quite right in the following remarks:

<sup>14</sup> Journal officiel, documents parlementaires, Chambre 1903, session ordinaire, pp. 95 and 99.

<sup>15</sup> Herbert Spencer, *Principes de sociologie*, French translation, 1882; Schäffle, *Bau und Leben des sozialen Körpers*, 1896; R. Worms, *Organisme et société*, 1896.



"From all this there can be no other result than that the scientific conception of the State gives rise to a new category, quite unlike that of an organism, an autonomous category quite independent of every other analogy." <sup>16</sup>

What, then, is this category, wholly alien to the conception of sovereignty, which, according to M. Charles Benoist, is the substratum of the State and the foundation of law? The eminent representative thus answers: "No. At present sovereignty does not exist, even among the nations of western Europe; but all about us there is something else, something which is not intermittent, which is never arrested, which existed yesterday and will continue to exist tomorrow; which existed before us, is in us, and will be in existence after us; something which is not restrained, but embraces everything, and in which everything is epitomized; something which is not precarious, which can not be suspended by anything or anybody, can not be divided or destroyed, the extent or duration of which can not be measured by us and which is of supreme force and of supreme majesty. This something is national life. Is the nation sovereign? One need not trouble himself to ask; it lives. Physically everyone lives in the nation. Accordingly, everyone has the right to live there politically, provided he has the means and to the extent that he has the means of so doing in obeying the law." <sup>17</sup>

M. Charles Benoist has in mind this idea of national life in that part of his book, *La crise de l'État moderne*, in which he discusses, especially, the organization of suffrage by proportional and professional representation. After showing that the formation of professional groups is always more comprehensive and more coherent, he writes: "Can we not remake and restore by these social realities, by these collective lives of the individual, the frame-work which has so unwisely been broken down? Since it comprehends the whole problem of organizing universal suffrage as well, could we not borrow from them the element of such organization? The individual would lose nothing by it; he would profit thereby, for he would again become a concrete being. The citizen would again become a living person. There would be only one thing

<sup>16</sup> Jellinek, *Allgemeine Staatslehre*, p. 140.

<sup>17</sup> Charles Benoist, *Sophismes politiques de ce temps*, p. 161. Cf. Charles Benoist, *La politique*, p. 42.

changed. The whole modern State would be changed thereby for the better. Voting, instead of being an exercise of sovereignty, would be a function of national life. The theory of national life would replace the theory of national sovereignty.”<sup>18</sup>

## V

All that is very well. But, more precisely, what is this national life? By what law is such life governed? Unquestionably, according to M. Charles Benoist, this national life is not a life identical with those of living, organic individuals. The law regulating this national life is not a law of a biological order, identical with that which presides over the phenomena of life among living individuals as organisms. In using these terms in connection with national life, M. Charles Benoist is unquestionably speaking metaphorically. But metaphors, though very convenient, are singularly dangerous because vacuity of thought may be easily veiled under high sounding metaphorical phrases.

If the law derived from national life is not a biological law, a law of cause, a law establishing the succession of phenomena, it is a normative law (*une loi normative*), a rule of conduct. Such is unquestionably M. Charles Benoist's idea. But he does not explain to us how this rule of conduct, imposing itself on the legislator and the individual, is derived from what he metaphorically calls national life. However, when the question is forcibly thrust upon him, he unwittingly reverts to the idea of sovereignty, to the idea of the commanding power of the State. Thus, he introduces in his work an appearance at least of fundamental contradiction. But let each judge for himself.

After the passage last quoted, M. Charles Benoist adds: “At this point we arrive at a notion — that of the law — which completes and corrects, in the notion of national life, whatever might tend to make it too absolute. Left entirely to themselves all these lives, which are in juxtaposition or are superposed on or linked to one another, are united, are thrown together, in an infinite complexity, and often enter into conflict. Individual lives, the national life, the social life, and the universal life — all these lives so left to themselves would end in anarchy. Something is necessary in

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<sup>18</sup> Charles Benoist, *La crise de l'État moderne*, pp. 32 and 33.



lives politically organized to assign them their proper places, to localize and distinguish them in the process of uniting them; something which will include and maintain them, which will foresee excess and repress it, which will guide and check them. This something is the law. . . . But in order to deny sovereignty let us not deny legal authority, let us not deny the law. On the contrary we proclaim it. And it is this notion, the notion of legal authority which alone corresponds to the actual condition of our political societies, it is this notion of law as well as the notion of national life and inseparable from that notion of life, which we oppose to, which we seek to substitute for, the idea of sovereignty which we abandon and reject.”<sup>19</sup>

After reading such a statement one might say to M. Charles Benoist that all such distinction is simply a matter of words, that instead of sovereignty he uses the phrase legal authority. But it is the same thing — identically the same thing. In truth, however, I do not think that such objection can be sustained. This becomes clear from the development of his ideas in the passage following the one previously quoted, the idea underlying which is this: Law emanates from authority; it commands the obedience of all members of the nation, having for its sanction the constraint which those governing can bring into play; not because it emanates from a person having a commanding will superior to theirs — a sovereign will — but because and only in so far as it has for its object the maintenance of order, and only when it conforms to the conditions underlying the development of national life. Such conditions are to be found in morals, in customs, and in public opinion; customs, morals, and public opinion being at once a guarantee “that the law will be neither too abusive nor too arbitrary.”

M. Charles Benoist concludes thus: “Let us not speak only of national life. Let us speak of legal authority; but with the understanding, of course, that this authority has the national life as its perpetual source, by which it is perpetually rejuvenated, in which it is continually merged, and from which it derives its ever recurring vigor. Let us speak of these two things together: national life and legal authority. Neither the idea of life, the idea of law, the idea of order, nor the idea of force — none of these are lacking;

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<sup>19</sup> Charles Benoist, *La politique*, pp. 42 and 44.

the legitimate attributes of sovereignty, coercive force, the power of constraining by law, and taxation, will be invested with legitimate authority. As for sovereignty, let us without remorse drop it from our political vocabulary, for time has set about to erase it."<sup>20</sup>

All that is very well: I agree with it entirely; but M. Charles Benoist does not tell us by what means we are to recognize that a law is contrary to or in conformity with right and law and the conditions of national life, for he does not set forth these conditions. He does not say whether there is a jural principle imposed on the legislator, nor what the foundation of such principle is, nor whether he recognizes that the individual has a right against those who govern, nor whether there is an obligation upon the legislator not only to protect individual and collective interests but also to accomplish certain positive prestations for the benefit of the individual.

In a word, M. Charles Benoist talks like a brilliant and well informed publicist, but not like a jurist.

## VI

We perceive the weak points of these different realistic doctrines which have just been set forth. The doctrine of solidarity has been proposed as the culmination of these doctrines in that it determines in as precise a way as possible the origin and extent of the jural principle, which creates at the same time a basis for the duties and the powers of those who govern, thereby limiting their action and imposing on them positive obligations. It is not my purpose to set forth this doctrine in detail the elements of which may be found in several of my works, particularly in my book *L'État, le droit objectif et la loi positive*, 1901,<sup>21</sup> to which I beg the reader's permission to refer. I merely wish to call attention to the new elements that the doctrine of solidarity seems to me to have introduced in the realistic theory of the State.

The negation of the sovereign personality of the State is clear, that is, the idea that what constitutes the binding force of decisions made by those who are in power is not the pretended sovereign

<sup>20</sup> Charles Benoist, *La politique*, p. 156.

<sup>21</sup> See also, Duguít, *Traité de droit constitutionnel*, 1911, I, pp. 50 *et seq.*, and II, pp. 1 *et seq.*; also *Les transformations du droit public*, 1913.



character of their will, but the conformity of these decisions to certain standards (*certaines règles*), which in a given epoch have permeated the consciousness of men, and which are imposed both on those governing and those governed: all that has been iterated and affirmed. But this superior principle of right and law (*cette règle supérieure de droit*) was generally founded on recognition of individual rights attributed to man because of his nature, rights which by this title were anterior and superior to society and to the State. The representatives of the French realistic doctrines from Royer-Collard to Charles Benoist have not explained the basis and import of this principle about which, however, they never ceased talking.

The doctrine of solidarity was urged to show that the jural principle (*la règle de droit*) does not rest on the metaphysical and self-contradictory conception of rights of the individual anterior to society but is directly derived from the same elements which constitute the social bond. What are these elements? An analysis which seems decisive has been attempted by M. Durkheim in his excellent book, *La division du travail social*, 1895, many of the detailed solutions of which are quite contestable, but the underlying principles of which seem sound.

In every grouping two elements constitute the social bond; two elements that may appear in infinitely variable forms, but the basis of which, reduced to its simplest terms, is always the same. They are (1) the similarity of needs, which is the basis of solidarity either through mechanical interdependence or through similitude; (2) the difference in needs and in aptitudes which produces and makes necessary an exchange of services, and which founds solidarity either by organic interdependence or by divisions of labor.

Thence is derived the following formula for the jural principle (*la règle de droit*) imposing itself on all the individuals of a social group, both great and small, both strong and weak, as well as the governing and the governed: Do nothing which can possibly infringe upon social interdependence, either through similitude or through division of labor; do all that is within your power, within your given situation and within your aptitudes, to insure and increase social interdependence both by similitude and by division of labor.

The idea I have attempted to convey in these few words I have tried to develop in the works previously cited. Many authors, and some among them the most eminent, have done me the honor of expounding and of criticizing this doctrine.

Of these criticisms some have no bearing on the doctrine. For example M. Esmein says: "Those rights and legitimate interests in which Royer-Collard sees the very foundation of political society, are equivalent to the subjective juridical situation and to the jural principle, which are used by M. Duguit as the foundation for his whole system. . . . As for the jural principle (*la règle de droit*) and especially the subjective juridical situation, they are Germanic abstractions that will be impressed with difficulty upon French minds."<sup>22</sup>

If the notions underlying the jural principle and the subjective juridical situation are borrowed from Royer-Collard, it is difficult, it seems to me, to believe at the same time that they are Germanic inventions. The truth of the matter is that these conceptions are neither borrowed from Royer-Collard nor derived from Germanic doctrines. The notion of the social juridical situation, which is not a subject for development here, is wholly alien to Royer-Collard's doctrine. As for my conception of objective right and of the jural principle (*la règle de droit*), let me say that it is wholly different from the doctrinal conception of rights and of legitimate interests. The latter evidently rested on individual rights determined *a priori* through reason. My affirmation of the jural principle (*la règle de droit*) is based exclusively on a fact, namely, social interdependence, established by observation. The difference is fundamental.

To say, on the other hand, that such conceptions as the jural principle (*la règle de droit*) and the subjective jural situation are Germanic abstractions, that is to say, are inspired by German doctrines, is to commit a material error. I have developed these ideas in a book entitled *L'État, le droit objectif et la loi positive*, published in 1901 and written in answer to Jellinek's famous work entitled *System der subjektiven öffentlichen Rechte*, 1897. I attempted to work out an objectivistic doctrine of the State and of law in opposition to the German doctrine represented by the most illustrious of jurist-publicists then living in Germany — a doctrine

<sup>22</sup> Esmein, *Droit constitutionnel*, sixth edition, 1914, p. 43.



which is essentially a subjectivistic doctrine. Let me say, moreover, that the authors who are acquainted with the legal literature of Germany, and who do me the honor of reading my works, do not make such a mistake. M. Hauriou, notably wrote as follows: "Meanwhile the tempest of objective law, unchained by M. Duguit, burst forth (*L'État, le droit objectif et la loi positive*, 1901). We know the history of the cyclone. To the impetuous affirmation of the German doctrine that all public law is subjective, M. Duguit answered with a similarly impetuous affirmation that all public law is objective. He found his strength in liberal and constitutional sentiments, because the German doctrine of *Herrschaft* is essentially administrative and anti-liberal." <sup>23</sup>

## VII

With respect to the serious objections made to the doctrine of the jural principle founded on the theory of social solidarity, it may be said that, although they are very different in form, in the last analysis they all come to this: In admitting, it is said, that the law is a social standard (*une règle sociale*) and not the power of an individual will, in admitting that social interdependence is the fundamental element of social integration, one is simply admitting a fact. But a fact can not be the foundation of a rule, of a precept of conduct, any more than it can be the basis for a jural principle (*une règle de droit*) or moral principle; and thus, it is said, the whole system gives way.

Out of all that has been written on this matter, I shall confine myself to a citation of the following passage borrowed from an excellent book, which my distinguished colleague Geny, professor in the faculty of law at Nancy, has just published. "If from facts," says he, "we can discern a certain ordering (*un certain ordre*) in the relations of men, we should at least be able to deduce therefrom a rule for the future conduct of humanity, to deduce a standard that ought to be imposed for the purpose of bridling rebellious ideas. M. Duguit, however, pretends to find a basis for this principle in social interdependence or, let us say, more generally, in the very fact of social life." <sup>24</sup>

<sup>23</sup> Hauriou, *Revue générale de droit*, 1914, p. 334.

<sup>24</sup> Geny, *Science et technique en droit privé positif*, Part II, 1915, p. 251.

My answer is that this reasoning is true as regards the moral rule, but that it is not true as regards the jural principle (*la règle de droit*). To establish a rule of morals it is necessary in fact to establish a criterion of good and of evil. The moral rule compels us to do one thing because it is good, and forbids us to do another because it is bad. The rule of morality bases its precept on a certain value inherent in the very act which it commands; and we may maintain that such a rule is not truly imperative, except when the criterion of what is forbidden and of what is commanded is outside the facts and superior to the facts.

To act in conformity to law, on the contrary, is to act in conformity to what is social. The jural principle (*la règle de droit*) says: Do such a thing because it is social; refrain from doing such and such a thing because it is anti-social. A juridical obligation is not an obligation to do what is good in itself but an obligation to do what has a social value, that is, not to do what is anti-social. It finds its proof in the fact that the whole world agrees in recognizing that the criterion of the jural principle is the social reaction which is caused by a violation of the principle; a reaction capable of being socially organized. Let us not say, then, that the jural principle can not be founded on a fact, since it is nothing more than a precept to conform one's self to facts. The fact is the true foundation of the jural principle, if such fact is truly the social, irreducible, and essential fact; and the whole question is resolved into determining whether or not social interdependence is that fact. It seems to us that it can scarcely be contested. Personally, the more I think of it, the more convinced I become. This fact alone is capable of giving to law a foundation at once positive and solid.

### VIII

The doctrine which has been developed in the works previously cited has also for its object the elimination of the notion of subjective right, implying at the same time elimination of the autonomy of the individual and of the sovereignty of the State. As Auguste Comte has so clearly shown, the notion of subjective right is a notion of a metaphysical order. "There can only be a true right," said the great thinker "so long as regular powers emanate from supernatural wills. . . . In the positive state, which does not



admit of heavenly prerogative, the idea of right disappears absolutely." <sup>25</sup>

There thus disappears, on the one hand, not only the sovereignty of the State, conceived as the subjective right of commanding, the incumbent of which right would be the State personified, but there also disappears the autonomy of the individual, together with his subjective rights. And, on the other hand, there disappears, by that very fact, the contradiction between the sovereignty of the State and the autonomy of the individual which was created thereby, and which could not be explained.

Here again critics have been many and very lively. But since there are no two jurists or philosophers who can agree on the meaning and nature of subjective right, we find in this profound and general disagreement a most satisfactory answer to those who rise up against the elimination of the notion of subjective right. A very distinguished professor, M. Demogue, after having analyzed and discussed all that has been said about the notion of subjective right and of subject of right, was obliged to conclude in these words: "All that is sometimes puerile, sometimes dangerous; and often it is both at once. . . . We must, therefore, attribute to the expression, *subject of right*, no value except as a convenient term. . . ." <sup>26</sup>

Auguste Comte, moreover, wrote as follows: "Each has duties in relation to all; but no one has any right, properly so called. . . . In other words, no one possesses any other right than that of always doing his duty." <sup>27</sup> Expressing the same idea in a more juridical form, I have said: Neither has the State a subjective right to command, nor have the individuals subjective rights of liberty and of property; but all, governing and governed, are submitted to the jural principle, founded on social interdependence; and by the application of this jural principle all individual wills — the will of those who govern as well as the wills of those who are governed — find themselves placed in a certain situation which we call an objective or legal situation, implying in a general way the obligation upon everyone to co-operate according to his position

<sup>25</sup> Auguste Comte, *Système de politique positive*, edition published in 1890, I, p. 361. Rapp, *Catéchisme positiviste*, tenth discourse, Becaut's edition, pp. 299 to 301.

<sup>26</sup> Demogue, *Les notions fondamentales de droit privé*, 1911, p. 200.

<sup>27</sup> Auguste Comte, *Système de politique positive*, edition of 1890, I, p. 361.

in the maintenance of social solidarity in either of its two forms, and to do nothing which constitutes an interference with it.

Positive law cannot derive its obligatory force from a supposed commanding power of those who govern. Positive law is imperative when it realizes the jural principle or puts it into practice; it is imperative only when it has one or the other of these two characteristics, which, indeed, are only one, and only in the measure that it has them. Positive law confers subjective rights on no one; neither on those who govern nor those who are governed. It merely creates objective or legal situations for every one, implying legal duties and by the same token implying the power of accomplishing these obligations and of removing obstacles however they may arise, which would prevent the accomplishment of these duties.

In this manner, not only the employment by those in power of the force of constraint which they control but also the power in the governed to demand the employment of such forces of constraint, are legitimized. But, at the same time, this power of constraint can only legitimately intervene to constrain the refractory for the accomplishment of obligations arising from the jural principle or, if you will, of obligations arising from positive law. Positive law really exists, as such, only when it ascertains a jural principle superior to itself.

Those who govern have power only for the purpose of fulfilling their obligations and only to the extent that they fulfill them. The State is not a power that commands. The State is a differentiated society in which the strongest must employ the force at their disposal to assure the accomplishment of certain services for the benefit of all. Those in power have therefore negative and positive obligations.

First, they have negative obligations. They can do nothing which may impede the free development of individual activity when such activity is in harmony with social interdependence; but individual activity is protected only when it acts in this manner. Individuals have not the right to exercise their free activity as they understand it. If they act contrary to the social solidarity, those in power must intervene to repress such acts. If individuals remain inactive, those who govern have the duty to compel them to act; they also have a duty to prevent them from doing certain



acts that concern only themselves, but are of such a nature as to diminish the social value represented by each individual.

Secondly, those who govern have positive obligations. They must intervene to protect and to guarantee against all obstacles the manifestations of individual activity working to the realization of social solidarity. They must also assure to all individuals the means of freely developing their own activity, because it is an instrument of social solidarity. And so those who govern must intervene to secure to each individual a certain amount of education, the means of subsistence, if such individual cannot procure such means for himself by work, and to assure him work if he can work, in the same way that those who refuse to work or educate themselves can be compelled to do so.

In the doctrine of social solidarity, therefore, we find a complete refutation of the ancient conception of the State; and we can also say a refutation of the German conception. Thus, where we saw and where the Germans still see, a power which has the right of issuing commands, and which can compel by force obedience to its orders, we may now see only a group of men obliged by the social principle (*la règle sociale*) to use their activity and their strength in the service of all.

May I be permitted to conclude this study with the following passage from the introduction of my book, *Les transformations du droit public*, written in 1912: "The principle underlying the whole system of modern public law may be summarized in the following proposition: Those who in fact hold the power do not have a subjective right of public power; but they are under the obligation to employ their power to organize public service, to assure and to control its development. None of their acts are of binding force or of political value, except when they tend toward this end. Public law is no longer a collection of principles to be applied to subjects of rights of different kinds — the one superior, the other subordinate; the one having the right to command, the other the right to obey. All wills are individual wills; all are equivalent in value; there is no hierarchy of wills. All wills are equal if one considers the subject only. Their value can be determined only by the end which they pursue. The will of those who govern has no force as such; it has value and force only to the extent that it makes for the organization and the functioning of

a public service. Thus, the notion of public service comes to replace that of sovereignty. The State is no longer a sovereign power which commands; it is a group of individuals having in their control forces which they must employ to create and to manage public service. The notion of public service becomes, therefore, the fundamental notion of modern public law."

These lines, written before the war, are truer today than ever.



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Without exception the members of the LAW REVIEW Staff for last year volunteered their services for military work, and it is only those few who were not accepted that have returned to School.

Under these circumstances the LAW REVIEW faced the decision of sacrificing quantity or quality. It chose to follow its traditions, and accordingly the size of the Editorial Staff has been materially reduced.

In order to maintain the high standard of our editorial work set in the past we may be forced to reduce the number of recent cases and notes, but in no way will the calibre of the work be affected. We have been successful in securing some very exceptional articles by eminent foreigners and Americans on Constitutional, Administrative, and International Law, and it is the intention of the REVIEW to devote a large proportion of its pages to the treatment of Public Law.

In the troublesome times that are ahead of us we shall rely, to a greater extent than ever before, on the continued loyalty of our contributors and subscribers. The first issue of the REVIEW containing the comments on recent cases and the editorial notes will appear on December first.

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A NOTE ON M. DUGUIT. — We seem on the threshold of a new epoch in the history of the state. The movement towards what is vaguely called the socialization of law is in fact symptomatic of a far wider and deeper political synthesis. Distinguished thinkers all over the world do not hesitate to examine with scant respect the traditional institutions of modern government. Psychologists like Mr. Graham Wallas, soci-

ologists like M. Emile Durkheim,<sup>1</sup> political theorists like Mr. Ernest Barker,<sup>2</sup> are all of them insistent that the traditional defense of parliamentary government has broken down. The great society has outgrown the mould to which the nineteenth century would have fashioned it. The life of the community can no longer be contained in, or satisfied with, its political achievement. It is not so much the general content of our ideals that has been called into question. Rather has a grave doubt been raised whether the present mechanism of politics is likely to take us much further in the direction of their attainment.

It was inevitable that this scepticism should, sooner or later, penetrate the sphere of jurisprudence; and since it was, above all, the effort of Revolutionary France which outlined the character of the modern state, it was in some sort fitting that in France again the attempt to undermine its foundations should have been begun. The revolt against *étatisme* seems, in broad perspective, to have arisen about the time of the Dreyfus case. The republic did not emerge unscathed from that tremendous ordeal.<sup>3</sup> It had to turn its hand to the overwhelming labors involved in the Law of Associations on the one hand, and the separation of Church and State on the other. But, even then, its difficulties had hardly begun. The general democratic movement had left untouched the French civil service. Its hierarchical organization was inherited directly from the *ancien régime*; and Napoleon did no more than make it efficient. The result was to leave the *fonctionnaire* at the mercy directly of the minister, and, indirectly, of the deputy who had favors to bestow and candidates for their reception.<sup>4</sup> The law of associations, passed under the aegis of M. Waldeck-Rousseau, strengthened a movement towards trade unionism in the Civil Service which, though earlier in origin, did not become effective until the protection therein offered by the law opened up a profitable avenue of effort. The outstanding event in the ten years between the Separation and the War has been the challenge issued to the sovereignty of the state by its own servants. They claimed the right to protect themselves against its arbitrary acts. They demanded the right to maintain their professional interests and standards exactly as workers in an ordinary trade. If they did not obtain all they desired they received, at any rate, immense concessions. They revealed the immense growth of what M. Paul-Boncour has happily called economic federalism — the desire of each industrial and professional group to render itself an autonomous unit. It was a movement which essentially implied political decentralization. The effort of the state might be unified, but its methods of attainment could be various. And it became more than doubtful whether, in the new synthesis such decentralization involved, the sovereign state of the nineteenth century would not, in fact, be superfluous.

<sup>1</sup> Cf. especially his *Division du Travail Social* (1893) and the numerous articles in the *Année Sociologique*.

<sup>2</sup> Cf. his important paper on the Discredited State in the *Political Quarterly* for February, 1915.

<sup>3</sup> On its general significance see M. Daniel Halévy's fine essay, *Apologie pour notre passée*.

<sup>4</sup> On the *fonctionnairiste* movement cf. the excellent book of P. Harmignie, *L'Etat et Ses Agents* (1911).



Hardly less significant was the development of French syndicalism.<sup>5</sup> The workers deserted the ideal of Marx, whose purpose was the capture of the bourgeois state, and went back to the theories of Proudhon, who denied altogether its validity. It is probable that we have here been greatly misled by the attractive glamour which attaches to the work of Sorel and Berth.<sup>6</sup> The real syndicalist movement is to be found in the workshops themselves, and in the effort of men like Pelloutier and Griffuelhes to develop a complete economic and social life for the worker outside the state. Political action has not been so much despised as ignored. The French Chamber has been regarded as simply irrelevant. Whatever its pretensions, the revolutionary state has been dismissed as an institution doing for the middle class what feudalism achieved for a landholding aristocracy. Its sovereign powers have been simply the most effective weapon by which it has served its purposes.

In some such atmosphere as this M. Duguit has written. His first volume dates from the second year of the twentieth century. It is already a mature outline of his present attitude, the experience gained in his twenty-five years of teaching as a Professor of Law in the University of Bordeaux. It is almost a prophetic analysis of the tendencies whose effects we have been witnessing. It is in no way an exaggeration of its significance to suggest that no work in the public law of our time has excited so eager a comment. It has divided the lawyers whose work verges on political speculation into fiercely hostile camps. Some, like M. Esmein,<sup>7</sup> fiercely deny its truth either as statement or induction, and urge that it would result in anarchy. They reproach M. Duguit for being in jurisprudence very much what M. Georges Sorel has been in economics — the dangerous apostle of revolutionary change. Others, like M. Berthelémy,<sup>8</sup> perhaps the ablest French authority today on administrative law, have not hesitated to adopt alike its methods and its conclusions. Others again, like M. Hauriou,<sup>9</sup> one of the most suggestive legal thinkers France has produced in the last generation, seem to reach not very different results by very different methods. A whole school of the more brilliant younger jurists, M. Maxime Leroy,<sup>10</sup> M. Georges Cahen,<sup>11</sup> M. Paul-Boncour,<sup>12</sup> are clearly influenced at every stage of their work by M. Duguit's speculations. In England and America its influence is already being felt; and it seems likely enough that the translations of his work which have been, and are to be, published,<sup>13</sup> will have an effect on this generation not very different from the influence exerted by Gierke since Maitland affixed his classic introduction to the famous translation of the *Genossenschaftsrecht*.

<sup>5</sup> Cf. L. Levine. *The Syndicalist Movement in France* — an admirable book.

<sup>6</sup> Especially of the latter's *Réflexions sur La Violence* (W. Huebsch, 1914), which, for all its brilliance, combines much bad history with much worse metaphysics.

<sup>7</sup> Cf. notably the fifth edition of his *Éléments du Droit Constitutionnel*.

<sup>8</sup> Cf. his *Traité de Droit Administratif* (7th ed.) and his paper in the *Revue de Droit Public* for 1915.

<sup>9</sup> Cf. his *Principes de Droit Public* (1916), especially the appendix on M. Duguit.

<sup>10</sup> Cf. his *Transformation de la Puissance Publique* (1907), and later works.

<sup>11</sup> Cf. his able study, *Les Fonctionnaires*.

<sup>12</sup> Cf. his *Syndicats des Fonctionnaires* (1906).

<sup>13</sup> Dean Wigmore has published, in the Legal Philosophy series, a translation of part of M. Duguit's *L'Etat: Le Gouvernement et ses Agents*; but the book loses much

The traditional theory of the state made of it the effective guardian of public order, and gave to it the weapon of sovereignty that it might achieve its purposes. By sovereignty was largely meant the right to act without being called to answer for such acts as it might consider essential to its aims. It was regarded as a person; with the significant limitation that the possession of its rights did not involve, save as an act of grace upon its own part, the assumption of kindred responsibilities.<sup>14</sup> In England, for example, the Crown cannot be sued save by permission of the Attorney-General. All sorts of limitations surround the effort to sue the American state, though certain constitutional guarantees—and very notably the Fourteenth Amendment—have been intended to limit state-omnicompetence. In France and in Germany the performance of public functions acted as a release from ordinary legal responsibility. The divine right of the monarch seemed, by the convenient fiction of national sovereignty, to be transformed into what, if not by definition then certainly in result, is the divine right of the state.

It is against such an attitude that M. Duguit's work has been a magisterial protest. His earliest work<sup>15</sup> (1901-03) remains its fullest exposition. In a treatise on constitutional law (1907-11) which, in the breadth of its analysis challenges comparison with Esmein's almost incomparable study, he has traced its ramifications throughout the field best fitted to display its import. In three lectures at the *École des Hautes Études Sociales* (1908) he has effectively summarized his ideas in their general bearing. The *Transformations du Droit Public* (1913) relates them to the whole course of recent jurisprudence. Their main result is stated in the contribution he has made to the present number of this Review.

Roughly speaking, M. Duguit denies at once the personality and sovereignty of the state. He denies the personality of the state on the ground that it is a clumsy fiction. The only realities are human beings; and to attribute their personality to what is a mere bracket connecting the collective action of some few of their number seems to him an antiquated anthropomorphism that imperils the scientific basis of law. He denies the sovereignty of the state because it seems to him to imply the existence of rights where he sees only the existence of duties. Starting from the obvious fact of social interdependence, he insists that the only justifiable legal theory of the state is one that should enable it to satisfy the clear necessities of the time. But since that accomplishment depends upon the effort of each one of us, all that we possess is not the right to obtain the satisfaction of our individual wills, but the duty to contribute our energetic co-operation to the satisfaction of the social need. For M. Duguit, the state is no more than a group of men between whom, through a variety of historical circumstances, a differentiation

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by this partial reproduction and the translation is very clumsy. Mr. B. W. Huebsch will publish a translation of the *Transformations du Droit Public* early in 1918.

<sup>14</sup> Cf. my *Problem of Sovereignty* (1917), Chap. I.

<sup>15</sup> M. Duguit had, indeed, published an early study on the separation of powers and the constituent assembly.

<sup>16</sup> The translation to be published by Mr. Huebsch will contain a bibliography of all M. Duguit's works.



between rulers and subjects has been introduced. It is not, in his view, an adequate defense of sovereignty as exercised by the rulers, to discuss its origins; the only justification of any policy is the contribution it makes to the social need. Upon each one of us, therefore, is cast the duty of narrowly scrutinizing the action of public authority to see if it fulfills this objective test. If it does not, it cannot, for us, have any legal validity whatever.

Very clearly, such a system of public law is different in character from the traditional notions of Anglo-Saxon civilization. This is not the place to raise the immense difficulties that it involves — difficulties, let it be said at once, that M. Duguit has honestly admitted, and as honestly attempted to answer. It might be said that unless there is in each state some unchallengeable source of authority, there is not, as M. Esmein has argued, any real guarantee of public order. It is possible to argue that M. Duguit has not, as he assumes, suppressed in his system the idea of subjective law; for each individual's notion of what does contribute to the social need will so differ as merely to transfer the subjectivity involved from the order issued by the ruling officials, to the judgment upon the validity of that order by the subjects who receive it. The hypothesis that each of us must, as a duty, contribute our utmost to the public good, involves the necessity of such a social organization as permits the full development of our capacity for that purpose; and this, of course, involves the condemnation of much of the present social order. But it is clear that if this has bowed out rights at the front door, it has, in fact, admitted them again at the back; for if our virtue is to be what T. H. Green finely called our positive contribution to social good, obviously we have the right to demand that nothing shall hinder the performance of our services. These are, of course, the fundamental problems of the modern state. In one way and another they are being raised in every shape on every side of us. M. Duguit would certainly not claim that he has made any final answer to them. But he has obviously restated them in such a form as to set them in a new perspective.

It is perhaps worth while indicating some of the possibilities that are involved in this outlook. The state is reduced to the position of a private citizen, since, like himself, it is brought within the scope of the objective law. That reduction necessarily involves the notion of its full responsibility for its acts, and M. Duguit has been quick to point out how the recent jurisprudence of the Conseil d'État in France is extending on every hand the idea of state-responsibility. It is, moreover, a doctrine that makes against authoritarianism. The only justification of any command is that its result in social good should be commensurate with the force that is involved in its exercise; but that is a matter for the judgment of each one of us. A real impetus is thus given to the initiative of the private citizen, and room is left for that reservoir of individualism upon which, in the last resort, the welfare of the state depends. As a consequence, there is more and more justification for territorial decentralization on the one hand, and administrative and professional federalism on the other. M. Duguit has pointed out how the excessive centralization of France makes for administrative inefficiency. Power should go where there is the capacity for its wise exercise, and there is not the least doubt in the world that, in this respect, at least, we have

much to learn from German experiments in municipal autonomy.<sup>17</sup> The organization of the civil services in France looks to a decentralization by professions, and here, too, M. Duguit has shown himself true to the sympathy his logic demands. It is perhaps right to note that his attitude to strikes in public utilities follows, almost exactly, alike in principle and in detail, the general theorem laid down by the majority of the Supreme Court in its recent decision on the Adamson Law.<sup>18</sup>

Lastly, it may be useful to point out the intellectual affiliations of M. Duguit in England and America. In England, for the most part, those ideas which approximate to his own have not come from the lawyers. The course of legislation, indeed, has for the past ten years been in a significantly collectivist direction; and Professor Dicey has noted in the concurrent revival of the idea of natural law a phenomenon of which the results are not very distinct from those to which M. Duguit looks forward.<sup>19</sup> From this standpoint the direction of labor policy has been particularly important; and especially in its latest phase of what is called guild socialism, it shows in a very noteworthy fashion points of important contact with his theories.<sup>20</sup> His criticisms of parliamentary government have been independently worked out by Mr. Graham Wallas in two books that are already classic;<sup>21</sup> and if Mr. Wallas has been less constructive than critical, where he has dealt with the problems of organization, it has been obvious that the synthesis he envisages would meet with M. Duguit's approval. On the theory of sovereignty itself, the starting point of all recent inquiry has been Maitland's classic analysis of corporate personality. Here, indeed, his conclusions have been antithetic to those of M. Duguit; but since Maitland denied the pre-eminence of the state-corporation over all others, the Austinian idol disappeared from his system. Dr. Figgis, in three admirable books,<sup>22</sup> has done much to dissipate the notion of an omniscient state; and no one has done more than he implicitly to answer the adverse criticisms of Professor Dicey upon the federal idea. The whole tendency in England, indeed, has been to place a decreasing confidence in any final benefit from state action. The social problems it has attempted to solve have grown beyond the methods historically associated with its functioning, and the time is ripe for new discovery.

America is fortunately situated in this respect. The classic home of federalism, nowhere is there ground more fertile for such seed as M. Duguit has sown. It is, indeed, true that recent constitutional practice in America has been towards a centralization based largely on *raison d'état*,<sup>23</sup> but that seems but a temporary synthesis. A significant and

<sup>17</sup> Cf. my *Problem of Sovereignty*, Appendix B.

<sup>18</sup> Cf. his *Droit Social, Droit Individuel*, p. 137 f., with the Adamson opinion (advance sheets), pp. 8-9.

<sup>19</sup> Cf. Dicey, *Law of the Constitution* (8th ed.), p. xxxviii.

<sup>20</sup> Guild Socialism can best be studied in the volume (1914) called *National Guilds*, edited by Mr. A. R. Orage. A curious little volume by de Maeztu attempts to give it a juristic basis in M. Duguit's ideas.

<sup>21</sup> *Human Nature in Politics* (1908); *The Great Society* (1914).

<sup>22</sup> *The Divine Right of Kings* (2d ed., 1914); *Churches in the Modern State* (1913); *From Gerson to Grotius* (2d ed., 1916).

<sup>23</sup> Cf. my note in the *New Republic*, Vol. XII, p. 234.



striking opinion of Mr. Justice Holmes has emphasized the confidence of the Supreme Court in the federal adventure.<sup>24</sup> The pragmatic philosophy of law at which, in the last ten years, Dean Pound has so earnestly labored is, at least in its large outlines, consistent with M. Duguit's conclusions. In a very learned and suggestive work Professor McIlwain<sup>25</sup> has offered a theory of sovereignty full of possibilities to the student of these French ideas; and Mr. Herbert Croly, one of the most penetrating of American observers, has very recently noted the decline and fall of the sovereign state.<sup>26</sup>

But it is above all in the atmosphere of American life that the broad accuracy of M. Duguit's interpretation finds its most striking evidence. The whole background of American constitutionalism is a belief in the supremacy of reason. The very limitation of the much-criticized Fourteenth Amendment only means, as Mr. Justice Holmes has repeatedly emphasized, that legislation must be reasonably conceived and adopt reasonable means of execution; and since that term is a matter of positive evidence it is not a gate but a road. We are coming more and more to bring to the analysis of legal problems whatever facts seem likely to cast light upon their meaning. We are asking the state to justify its existence not so much by the methods it uses as by the value of the results it can obtain. The decline of Congress, for example, is like the similar decline of Parliament and the French Chamber, to be interpreted in the light of its inability to cope with our new demands. We have ceased to look upon historic antiquity as the justification of existence; it is the end of each institution of which we make consistent dissection and inquiry.

In America, perhaps, there has been less speculation than elsewhere as to the new synthesis that is being evolved. It is only in recent years that the problem has become sufficiently acute to merit an urgent examination. Yet it is already obvious that the direction in which the American Commonwealth is traveling gives a new significance to ancient terms; and the political theory of the last generation will need in large part to be rewritten. The kind of background for public law that M. Duguit has drawn serves with great accuracy to describe the changes we have been witnessing. Based, of course, on French experience, it does not at every point fit the orientation of American affairs; yet in its broad perspective it is not inconsistent with the facts at issue. Certainly no student who patiently examined this monumental effort could fail to draw from it at once enlightenment and inspiration.

Harold J. Laski.

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<sup>24</sup> *Noble State Bank v. Haskell*, 219 U. S. 104.

<sup>25</sup> *The High Court of Parliament* (1910).

<sup>26</sup> See his very remarkable article, *The Future of the State*, in the *New Republic*, Sept. 15, 1917.

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## CONTRACTS TO REFRAIN FROM DOING BUSINESS OR FROM ENTERING OR CARRYING ON AN OCCUPATION

### I

#### THE MERE CONTRACT TO REFRAIN FROM DOING BUSINESS, OR FROM ENTERING OR CARRYING ON AN OCCUPATION

IT was long ago assumed that a contract not to engage in a given business or occupation would be void where the promisor was already engaged in it, and the promisee was not and did not intend to be.<sup>1</sup>

The reasons alleged were: the disregard of the social interest in the freedom of individuals to enter whatever business they pleased; the mischief to the party by the loss of his livelihood and the subsistence of his family; the mischief to the public by depriving it of a useful member; and the tendency toward monopoly. The last would seem to be negligible. Today, such is the freedom and

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<sup>1</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [9].\* (" . . . for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, etc., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it.")

[\*Numbers in brackets throughout Notes refer to pages in *KALES, CASES ON CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE*. — Ed.]



ease of transportation and of entering other occupations and businesses that the danger of the loss of livelihood and subsistence for a family is not such as to cause great concern. The same changes make it less likely than formerly that the public will feel the loss of the service of any of its members.<sup>2</sup> But the social interest in all being free to enter whatever business they please is still so far operative that the mere contract to refrain from carrying on a business or occupation will be void.

This last consideration would, it is believed, be sufficient to invalidate the contract even though the promisor had not at the time of his promise entered any business or occupation at all, and was not contemplating doing so.

The above conclusions presuppose the fact that the business is one which the public is interested in having carried on. If the business or occupation is one which, while lawful, is regarded as contrary to the public interest, such as the liquor business, it has been held that the mere contract to refrain from entering or carrying on such a business is valid.<sup>3</sup>

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<sup>2</sup> *Herreshoff v. Boutineau*, 17 R. I. 3, 6, 19 Atl. 712 (quotation given *post*, note 13). But see *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123 [151]. ("The loss to society of a valuable member is as great a public injury now as it ever was, and as great here as anywhere. I hope, indeed, that the market value of a human being is higher now than it was in England at the beginning of the eighteenth century, when the case of *Mitchel v. Reynolds* was decided. The capacity of an individual to produce [using that word in its largest sense] constitutes his value to the public. That branch of industry in which a man has been educated, and to which he is accustomed, and for the abandonment of which he demands compensation, is supposed to be the one in which he can render the greatest profit. The value of what he produces belongs to himself. The actual product belongs immediately to him who employs him, but mediately to the state, and goes to swell the aggregate of public wealth. Therefore, the law says to each and every tradesman: You shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if any man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect you are held discharged from such bargain because of the advantage that will arise to the public from so holding.")

<sup>3</sup> *Harrison v. Lockhart*, 25 Ind. 112; *McAlister v. Howell*, 42 Ind. 15.

## II

### RESTRICTIVE COVENANTS ACCOMPANYING THE PROMISOR'S ENTRY INTO AN APPRENTICESHIP ARRANGEMENT, OR MADE UPON HIS ENTRY INTO THE SERVICE OF THE PROMISEE FOR THE PURPOSE OF LEARNING A TRADE OR BUSINESS

We have the following possible considerations against the validity of such covenants: The social interest in the freedom of individuals to enter what business they please is violated. The contract tends to deprive the promisor of his livelihood, the public of a useful member, and to eliminate competition between the promisor and the promisee. On the other side we have the desirability of permitting the teaching of apprentices or employees by masters. This involves providing the means whereby they may obtain their instruction on the best terms possible. The apprentice must purchase the instruction. Practically, the easiest way for him to do it is to give his services in part payment and a covenant not to compete in lieu of the balance. If the covenant not to compete is not allowed, the apprentice or employee must pay cash, on the basis that the master is training a competitor. The result would be poor instruction, and a price which an apprentice or employee would find difficulty in meeting. If the restriction is not broader than the business of the master, the apprentice would have a large territory in which to carry on the trade or business which he has learned; and other apprentices learning the same trade in other districts could come into the district of the master and there compete with him.

Upon a balancing of the interests, it is clear that where the restriction given by the apprentice or employee is not broader than the master's business, it is valid.<sup>4</sup>

Nor is it any objection to the restriction that it is to continue for the life of the covenantor, and hence may continue after the master has died or gone out of business.<sup>5</sup> The covenant is still an asset of the master's estate after he is dead, or when he sells his business or takes in a partner. Where he has abandoned his

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<sup>4</sup> *Rousillon v. Rousillon*, 14 Ch. D. 351; *Badische v. Schott*, [1892] 3 Ch. 447; *Machine Co. v. Morse*, 103 Mass. 73; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712.

<sup>5</sup> *Hitchcock v. Coker*, 6 A. & E. 438 [12].



business, equity would no longer give an injunction, and the damages at law would be nominal.

Formerly it was said that the consideration must be good and adequate, so as to make it a proper and useful contract.<sup>6</sup> The later view is that a legal consideration which is also of some value must be given. But apparently the court will not undertake to weigh the value of the consideration against what is given in order to determine its adequacy.<sup>7</sup>

Suppose, however, that a country-wide business should exact such restrictive covenants of all employees entering business, or of all persons entering the business in any executive capacity, so that they would have no choice but to stay or change their occupation completely. Would not the balance of considerations be against supporting the validity of such arrangements? Here the loss of a livelihood might be a reality. The public might in fact be deprived of a useful member. The tendency toward monopoly might become decisive. The hiring in such a business is not really for the purpose of training men to go out and conduct a similar business, but rather with the object of keeping them permanently. A restriction, then, upon their going into any other similar business could hardly be regarded as a part of the price for teaching them. Rather must it be looked upon as a method of hampering the employer's competitors. Hence, such wholesale restrictions would

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<sup>6</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [4]. ("Particular restraints are either, first, without consideration, all which are void by what sort of contract soever created. 2 H. 5. 5. *Moor*, 115, 242; 2 *Leon*. 210; *Cro. Eliz.* 872; *Noy*, 98; *Owen*, 143; 2 *Keb.* 377; *March*, 191; *Show*. 2 (not well reported); 2 *Saund.* 156. "Or secondly, particular restraints are with consideration: "Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good.")

<sup>7</sup> *Hitchcock v. Coker*, 6 A. & E. 438 [26]. ("But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary.")

point to a monopoly purpose, both in regard to the business and with respect to securing the use of the labor of certain individuals.

### III

#### RESTRICTIVE COVENANTS ACCOMPANYING THE SALE OF A BUSINESS, WHICH SALE, HOWEVER, IS NOT MADE TO A COMPETITOR

If the restriction is not broader than the business sold and is operative over a territory less than that of any state where the restriction applies, it is valid.<sup>8</sup> The restriction is an essential part of any complete sale of the business. The social interest in the freedom of individuals to sell at the best price obtainable<sup>9</sup> balances

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<sup>8</sup> *Bowser v. Bliss*, 7 Black (U. S.) 344; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. 415; *Holbrook v. Waters*, 9 How. Pr. (N. Y.) 335; *Weller v. Hersee*, 10 Hun (N. Y.) 431; *Hursen v. Gavin*, 162 Ill. 377, 42 N. E. 735; *Duffy v. Shockey*, 11 Ind. 70; *Whitney v. Slayton*, 40 Me. 224; *Doty v. Martin*, 32 Mich. 462; *Dunlop v. Gregory*, 10 N. Y. 241; *Smith's Appeal*, 113 Pa. St. 579, 590, 6 Atl. 251; *Harkinson's Appeal*, 78 Pa. St. 196; *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. 64 (20 Wall.).

<sup>9</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [60]. ("It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions.") *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363 [69]. ("The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor.") *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545 [76]. ("In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business.") *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 [96]. ("A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract.") *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 [102]. ("In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded.") *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 105, 50 N. E. 509. ("The general principle that arrangements in restraint of trade are not favored is, however, firmly established in law, and now, as well as formerly, is given effect whenever its application will not interfere with the right of everybody to make reasonable contracts. Whenever one sells a business with its good will, it is for his benefit, as well as for the benefit of the purchaser, that he should be able to increase the value of that which he sells by a contract not to set up a new business in competition with the old.") *Smith's Appeal*, 113 Pa. St. 579, 590, 6 Atl. 251. ("The principle is this: public policy requires that every man shall not be at liberty to deprive himself or the state of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a



any social interest in the freedom of individuals to enter what business they please.

Formerly it was urged against the restriction that the seller might become a charge upon the community because he could not carry on his trade or business.<sup>10</sup> This was at once met by the requirement that the seller must have received a substantial consideration for the sale of his business.<sup>11</sup> Recently, however, this requirement has been held to be satisfied if some consideration of value in addition to or including the consideration necessary to make a contract is given. The courts will not go into the adequacy of the consideration in each particular case, but will rely upon the seller obtaining, in general, the fair equivalent for the sale of his business.<sup>12</sup> Today, however, the fear of the seller becoming a charge

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man has, by skill or by any other means, obtained something which he wants to so sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it, it is necessary that he should be able to preclude himself from entering into competition with the purchaser.") *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 [165]. ("A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold.") *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123 [142].

<sup>10</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [7]. ("The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, first, the mischief which may arise from them, *first*, to the party, by the loss of his livelihood, and the subsistence of his family; *secondly*, to the public, by depriving it of a useful member.") *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [55]. ("To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.") *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [59]; *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363 [65]; *Oakdale Manufacturing Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 [78]; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 [96]; *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 [102].

<sup>11</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [4]. ("Particular restraints are either, *first*, without consideration, all which are void by what sort of contract soever created. . . . Or *secondly*, particular restraints are with consideration. Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good.")

<sup>12</sup> *Hitchcock v. Coker*, 6 A. & E. 438 [26]. ("But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he

upon the community has practically disappeared. If the business sold is small, the seller may take the consideration and start else-

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has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary.") *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641, 649. ("In many of the early cases the language of the Courts would seem to imply that the adequacy or extent of the consideration had something to do with the validity of the contract. They say that a mere pecuniary consideration is not sufficient; that there must be something, although it does not appear very clearly what, added to this to support the contract. This idea, however, of the necessity of any greater or other consideration for a contract of this description, than any other, was obviously unfounded, and has been exploded by the recent cases. [*Hitchcock v. Coker*, 1 M. & G. 185; *Green v. Price*, 13 M. & W. 698.]") *Duffy v. Shockey*, 11 Ind. 70, 73. ("As to the question of the adequacy of the consideration, we are inclined to view this as we would any other contract made by parties capable of contracting. They should, in the absence of fraud, be presumed to have determined that point for themselves. . . . This presumption is peculiarly proper in this case, for the reason that we are left in doubt as to how much the consideration to be paid by the defendant was. In addition to the 300 dollars, he was to relieve the plaintiffs from their contracts with agents — to what amount we are not informed — he was to take the marble, carved or not, remaining after the completion of the outstanding contracts of plaintiffs. The value of the marble thus disposed of is not given. He was also to buy of plaintiffs marble at fixed prices; but whether those prices were advantageous to the plaintiffs, or defendant, we are not apprised by the pleadings or evidence.") *Hubbard v. Miller*, 27 Mich. 15, 25. ("The fact that complainant paid no more than the cost of the articles at Grand Haven can make no difference. Where a consideration recognized by law as being valuable is paid, the law very properly allows the parties to judge for themselves of the sufficiency in value of such consideration for their contracts. We cannot, therefore, enter into the question whether the consideration was commensurate in value with the restraint imposed. See *Hitchcock v. Coker*, 6 A. & E. 438; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247. And there is no reason for holding that, without the restraint contracted for, complainant would have been willing to purchase for the price he gave, nor can we say that the vendors could have sold at that price without such stipulation. In fact, we must infer that in their opinion they could not readily have done so without it, or they would not have given it. It is clear, at all events, that they thought the sale with the stipulation an advantageous one or they would not have made it. The contract must, therefore, be held fair, reasonable, and valid, unless too general and unlimited as to place, as insisted under the second objection.") See also *Holbrook v. Waters*, 9 How. Pr. (N. Y.) 335; *Pierce v. Fuller*, 8 Mass. 223 (a consideration of one dollar deemed sufficient to support the restrictive covenant).

In *Chapin v. Brown*, 83 Iowa 156, 48 N. W. 1074 [138], it would seem that the Court



where. If the business is so large that the restriction probably covers a wide area, the consideration paid to the seller will usually be such as to keep him from becoming a public charge.<sup>13</sup> Where the restriction is given by a corporation, the fear that the promisor will become a public charge has no place.<sup>14</sup>

regarded the evidence concerning the particular transaction as failing to show any adequate consideration. This can hardly be supported, because the recitals of the contract itself showed plainly that the seller was parting with a losing branch of his business without having it fall into the hands of those who competed with him in his other lines of business. The consideration was legally sufficient to make a contract, and it was a business transaction on its face in which a consideration of value was given for the restriction.

<sup>13</sup> *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535 [33]. (The fact that the seller had become a pauper in the particular case made no difference.) *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 105, 50 N. E. 509. ("The changes in the methods of doing business and the increased freedom of communication which have come in recent years have very materially modified the view to be taken of particular contracts in reference to trade. The comparative ease with which one engaged in business can turn his energies to a new occupation, if he contracts to give up his old one, makes the hardship of such a contract much less for the individual than formerly, and the commercial opportunities which open the markets of the world to the merchants of every country leave little danger to the community from an agreement of an individual to cease to work in a particular field.") *Herreshoff v. Boutineau*, 17 R. I. 3, 6, 19 Atl. 712. ("In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth; as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the State of the benefit of their industry. It would, therefore, be absurd, in the light of this common experience, now to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular State. There is no expatriation in moving from one State to another; and from such removals a State would be likely to gain as many as it would lose.") *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123 [149]. ("The opportunities for employment are so abundant, and the demand for labor on all sides is so pressing and urgent and the supply so limited, that I much question, were we to consider the subject as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family, by an agreement which merely excluded him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural, and commercial industry open to him.")

<sup>14</sup> *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 [102]. ("Among the potent reasons first assigned against such contracts was that the person restrained by thus surrendering his chosen occupation — one for which he has been especially prepared — might become a public charge, and the public be injured in being deprived of his personal skill in the avocation to which he had been brought up. Such reasons cannot be applied to artificial persons without absurdity.")

Another ground formerly expressed for holding invalid these restrictive covenants was that they might leave a given community unserved by anyone capable of carrying on a given business.<sup>15</sup> This may have been an important consideration in the case of a business confined to a small territory at a time when others could not mobilize readily at a given point. It is out of place today, when the ease and freedom of transportation are such that if one man goes out of business in a given locality, there is little need to fear that the public will suffer by reason of the failure of anyone to serve it.<sup>16</sup> Besides, when a business is sold by one to another, the public is substantially as well off as it was before.

The tendency to monopoly by the elimination of competition is, in this class of cases, the slightest. No existing competition has been eliminated. One man has taken another's place. It is doubtful and entirely speculative whether the buyer would have competed if he could not have purchased. About all that can be said is that there is less probability that the purchaser would have competed if he could not have bought, than that the seller would compete if he had not entered into a restrictive covenant.<sup>17</sup>

If the restriction is not broader than the business sold, but

<sup>15</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [7], *ante*, note 10.

<sup>16</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [59]. ("He [Parker, C. J., in *Mitchel v. Reynolds*] refers to other reasons, *vis.*, the mischief which may arise (1) to the party by the loss by the obligor of his livelihood and the subsistence of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor.") *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 [96]. ("Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the Courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place.")

<sup>17</sup> A restrictive covenant may be found to be expressed by interpretation from the sale of a business and good will, in which case the covenantor cannot hold himself out as carrying on his former business at a new address: *Hall's Appeal*, 60 Pa. St. 458.

The assignment by two out of three covenantees to the third of the business protected by the covenant, operates as an assignment of the covenant to the third, and he may release it to the covenantor: *Gompers v. Rochester*, 56 Pa. St. 194.



extends up to, or beyond the limits of any state where it is operative, it should still be held valid. The rational test is the extent of the business sold and not the boundaries of some political subdivision of the country. This is the view of the more recent cases, where the restriction has been held valid even when the sale was to a competitor.<sup>18</sup> The argument that such restrictions tend to force the promisor to leave the state is answered by the fact that this does not cause him to leave his country, and that what is lost by one man leaving the state is gained by others coming into the state.<sup>19</sup> The older decisions, for a time at least, appear to have made an arbitrary rule that a restriction which operated throughout a state was generally void even though not broader than the business sold.<sup>20</sup>

If the restriction is broader than the business sold, and the business sold is not coextensive with the boundaries of the United States, it is void.<sup>21</sup> The seller is doing more than sell what he has.

<sup>18</sup> *Nordenfelt v. Maxim Nordenfelt Guns Co.*, [1894] A. C. 535 [33]; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [55].

<sup>19</sup> *Herreshoff v. Boutineau*, 17 R. I. 3, 6, 19 Atl. 712. ("There is no expatriation in moving from one State to another; and from such removals a State would be likely to gain as many as it would lose.")

<sup>20</sup> *Taylor v. Blanchard*, 13 Allen (Mass.) 370; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N. E. 1030. (Both of these cases involve sales to competitors, but no suggestion has been made that the rule of these cases was limited to the case of a sale to a competitor.) *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509, where the restriction accompanied a combination of competitors, seems *contra* to *Taylor v. Blanchard*, *supra*.

<sup>21</sup> *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 [161]; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299 [45]; *Berlin Machine Works v. Perry*, 71 Wis. 495, 38 N. W. 82; *Alger v. Thacher*, 19 Pick. 51; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; *Lange v. Work*, 2 Ohio St. 519; *Thomas v. Miles*, 3 Ohio St. 274; *Wiley v. Baumgardner*, 97 Ind. 66.

*A fortiori*, it is illegal if, in addition to the restriction being broader than the business sold, the sale is to a competitor: *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [50]. (Sale of one out of fifteen competitors in the United States to another.)

In some cases the courts have not been careful to determine whether the restriction as to territory was broader than the actual extent of the seller's business or not: *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [55]; *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [54].

In *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, where the business sold was dependent upon a secret process, which was also sold, no inquiry seems to have been made as to whether the covenant (which was unlimited) was broader than the business sold.

But in *Watertown Thermometer Co. v. Pool*, 51 Hun (N. Y.) 157, the court seems

He is selling a business in which he might engage in the future. The public policy, therefore, in favor of his being permitted to sell what he has, freely and at the best price, is not applicable. The social interest in freedom of individuals to enter what business they please is not balanced by any social interest in freedom to sell at the best price obtainable. It may be that today there is little danger that the seller will become a charge on the community;<sup>22</sup> but that the public may be deprived of the benefit of his entering the business, and that a possible competitor may be eliminated, constitute an appreciable danger.<sup>23</sup> It has even been suggested that the fact that the restriction is broader than the business sold gives rise to the inference that it is exacted for the actual purpose of monopoly;<sup>24</sup> but this seems hardly so today.

The restriction may be broader than the business sold, because it relates to a territorial area larger than that in which the business was carried on,<sup>25</sup> or because it concerns a related business which was not actually carried on by the seller.<sup>26</sup>

When a professional man sells his practice and covenants not to carry it on in the place in question for the remainder of his

to have sustained a restrictive covenant which was broader than the business sold, going upon the reasonableness of the advantage of the vendee.

<sup>22</sup> But see *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [55]. ("To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.")

<sup>23</sup> *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299 [48]. ("Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly.") *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [55]. ("The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market.")

<sup>24</sup> *Mitchel v. Reynolds*, 1 P. Wms. 181 [9]. ("It shows why a contract not to trade in any part of England, though with consideration, is void, for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.")

<sup>25</sup> *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299 [45].

<sup>26</sup> *Gamewell Fire-Alarm Co. v. Crane*, 160 Mass. 50, 35 N. E. 98 [50]. (The seller, who was a manufacturer, covenanted not to carry on the business of manufacturing or selling, and not to enter into competition with the buyer, either directly or indirectly.) [16]; *per* Van Fleet, V. C., in *Mandeville v. Harman*, 42 N. J. Eq. 185, 193, 7 Atl. 37 [32, note 9].



life, it has been argued that the restriction is broader than the necessities of the case require, since it would still be in operation if the buyer abandoned practice or died in the lifetime of the seller.<sup>27</sup> The reply is that just as the seller has sold his practice to the buyer, so the buyer may again sell his practice to another buyer or take in a partner.<sup>28</sup> Even if the first buyer dies in the lifetime of the seller, the fact that he had a practice protected from the seller's competition may make his practice an asset which his administrator can sell.<sup>29</sup> Furthermore, the buyer purchased the seller's practice, which means the practice which the seller could do during his life. It would hamper such transactions too much if the covenant had to be worded so as to take care of all the contingencies under which the restriction might cease to be of value to the buyer.

Covenants which seem to be broader than the seller's business may be divisible, so that the separable part which is not broader than the seller's business may be enforced.<sup>30</sup>

If the business sold is coextensive with the boundaries of the United States, but the restriction is world-wide, is it valid? It

<sup>27</sup> *Per Denman, C. S., in Hitchcock v. Coker*, 6 A. & E. 438.

<sup>28</sup> *French v. Parker*, 16 R. I. 219, 14 Atl. 870 [29]. ("If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he would secure the purchaser from competition with the defendant forever, than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could, for the same reason, make better terms with him.")

<sup>29</sup> *Hitchcock v. Coker*, 6 A. & E. 438 [12].

<sup>30</sup> *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 [161]. (Restriction applied "within any state in the United States of America, or within the District of Columbia, except in the State of Nevada and the Territory of Arizona," and was held applicable to the area of each State disjunctively described, and enforced in the State where the covenantor's business was carried on); *Smith's Appeal*, 113 Pa. St. 579, 590, 6 Atl. 251 (restriction "in the County of Lehigh or elsewhere"); *Thomas v. Miles*, 3 Ohio St. 274 (restriction in "said city or elsewhere"); *Lange v. Work*, 2 Ohio St. 519 (restriction in "the County of Hamilton, in the State of Ohio, or any other place in the United States." Held valid as to Hamilton County); *Wiley v. Baumgardner*, 97 Ind. 66.

In *Oregon Steam Navigation Co. v. Winsor*, 87 U. S. 64, the restriction was held divisible as to the time it was to be operative. It was enforced during the time it could properly be operative. *Sed quære ad hoc.*

In *Hubbard v. Miller*, 27 Mich. 15, a covenant not to carry on a certain business was, without any express limitation as to territory, construed as forbidding the carrying on of the business only at the city where the business sold had been carried on, and such territory round about as the business would naturally and reasonably be carried on in.

has been said that where the restriction related to the territorial area of a foreign country, that fact could not be an argument against the validity of the covenant.<sup>31</sup> This may be doubted; for it is now apparent that restrictions upon doing business in a foreign country may have a very unfortunate effect upon the public interest in the domestic jurisdiction — especially where the covenantee is engaged in a rival business in the foreign country as well as in the domestic jurisdiction:

#### IV

#### RESTRICTIVE COVENANTS ACCOMPANYING THE SALE OF A BUSINESS TO AN EXISTING COMPETITOR, WHERE THE RESTRICTION IS SO FAR LIMITED AS TO BE VALID IF THE SALE WERE NOT TO A COMPETITOR

If the sale be illegal,<sup>32</sup> then the restriction certainly is. But if the sale taken by itself be legal, the courts have made no distinction, so far as the legality of the restriction is concerned, between the case where the sale is to a competitor and where it is not. Accordingly, the restrictive covenant and the sale to a competitor have been sustained both where the title to tangible assets used in the business passed,<sup>33</sup> and also where there were no such

<sup>31</sup> *Nordenfelt v. Maxim Nordenfelt Guns Co.*, [1894] A. C. 535 [44]. ("The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.")

<sup>32</sup> As to the principles governing the validity of the sale, see *Kales*, "Good and Bad Trusts," 30 HARV. L. REV. 830, which deals with combinations.

<sup>33</sup> *Nordenfelt v. Maxim Nordenfelt Guns Co.*, [1894] A. C. 535 [33]; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419 [55]; *United States Chemical Co. v. Provident Chemical Co.*, 64 Fed. 946 [98]; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723 [161]; *Kellogg v. Larkin*, 3 Pinn. (Wis.) 123 (1851); *Chappel v. Brockway*, 21 Wend. (N. Y.) 157 (1839); *Van Marter v. Babcock*, 23 Barb. (N. Y.) 633 (1857); *Moore & Handley Hardware Co. v. Towers Hardware Co.* 87 Ala. 206, 6 So. 41 (1888); *Beard v. Dennis*, 6 Ind. 200 (1855); *California Steam Navigation Co. v. Wright*, 6 Cal. 258 (1856); *Hubbard v. Miller*, 27 Mich. 15 (1873). But see, *semble*,



assets, and the only way in which the business could be sold was for the seller to agree not to carry it on.<sup>34</sup> Where part of a business has been sold to a competitor by merely covenanting not to carry on the part specified, the sale and the restriction have been sustained.<sup>35</sup>

In some cases there were special elements which furnished arguments in favor of the validity of the sale and the restriction. Thus where it appeared that the competitor who sold out had recently gone into the business for the purpose of engaging in a cut-throat competition and being bought off, there was presented an actual case of excessive competition, and the buyer was in the position of endeavoring to protect his legitimate and established business from the seller's unconscionable conduct.<sup>36</sup> So where it appeared that the seller was making tartar of both rock and bone, and that both were of equal utility, and the seller parted with his bone tartar business only and kept his rock tartar business, the court noted that the public purchasing tartar still had competition as to prices between rock tartar and bone tartar.<sup>37</sup>

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*contra*, Gamewell Fire-Alarm Co. v. Crane, 160 Mass. 50; 35 N. E. 98 [50]; Carroll v. Giles, 30 S. C. 412.

<sup>34</sup> Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357 [72]; Wickens v. Evans, 3 Y. & J. 318, [84]; National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [94]; Mapes v. Metcalf, 10 N. D. 601.

<sup>35</sup> Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; Wickens v. Evans, 3 Y. & J. 318 [84]; National Benefit Co. v. Union Hospital Co., 45 Minn. 272, 47 N. W. 806 [94].

<sup>36</sup> Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363 [65]; United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946 [98], *semble*. (The court noted that the seller sold only part of its tartar business, so that it had been in a particularly advantageous position to cut prices in that part of the business sold, while making a profit on the other part, thus practicing the scheme of local price cutting to put the buyer out of business. The court speaks of the seller as being a dangerous and aggressive rival. The court said: "The plaintiff was making inroads upon the defendant's business, and greatly cutting the prices of its sole manufactured product, while with the plaintiff this product was but a single feature of its manufacturing plant. The defendant had a perfect right to buy off the competition of a dangerous, powerful, and aggressive rival. The law of self-defense and protection applies to one's business as well as to his person.")

<sup>37</sup> United States Chemical Co. v. Provident Chemical Co., 64 Fed. 946 [98].

## V

### RESTRICTIVE COVENANTS ACCOMPANYING THE COMBINATION OF SEVERAL BUSINESS UNITS

If the combination be illegal,<sup>38</sup> then the restriction certainly is. But if the combination taken by itself be legal, the courts appear to have made no distinction, so far as the validity of the restriction is concerned, between the case of a sale and a combination.<sup>39</sup>

The principal question which arises is whether the test of the validity of the restriction is the extent of the business sold or of the businesses combined. Is the restriction void only if it is broader than the business sold or only if it is broader than the businesses combined? The latter position has been sustained.<sup>40</sup> The situation is like that of an incoming partner, who devotes himself to the common business of all the partners, and may properly be restricted so that he cannot carry on the same business in competition with the partnership.

## VI

### COVENANTS NOT TO CARRY ON A BUSINESS GIVEN BY ONE IN THE BUSINESS TO ANOTHER IN THE BUSINESS OR INTENDING TO ENTER IT

It has already been assumed that a contract to refrain from doing business is void when the promisor is already engaged in the business and the promisee is not entering the business and not a competitor. On the other hand, some covenants not to carry on a business are valid when they are secured to enable the promisee to enter the business on more advantageous terms. A common case of this sort is where a professional man, having an established

<sup>38</sup> For the principles applicable in determining the validity of combinations, see *Kales*, "Good and Bad Trusts," 30 HARV. L. REV. 839.

<sup>39</sup> *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 673 [78]; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509; *Robinson v. Suburban Brick Co.*, 127 Fed. 804.

<sup>40</sup> *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973 [84]. ("The circumstances show that it [the restrictive covenant] was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products.") *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 50 N. E. 509. But see *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 690.



practice, covenants with one intending to practice in the same place that he will not longer carry on his profession there. Here the only sale of the covenantor's business is contained in the restrictive covenant not to carry it on. Its validity, however, is beyond question. Suppose, however, the promisee and promisor are already in the business and competing, is the covenant by one to the other to cease business valid?

Where the business is carried on principally with a plant and property which cannot readily be converted to any other use, and will in all probability lie entirely idle during a period provided by the covenant, the restriction is regularly held to be illegal.<sup>41</sup> The moment, however, the restrictive covenant is to take a steamboat off a certain run (which does not in the least involve keeping it idle but only transferring it to another service), it has been sustained.<sup>42</sup> So where competitors agreed to cease competing by dividing the territory where their selling force operated, and reciprocally covenanting not to do business in the specified territory of each other, the covenants have been sustained.<sup>43</sup> So where the business was conducted without any plant at all, the promise to cease business and turn over all orders to the competing promisee was held to be valid.<sup>44</sup>

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<sup>41</sup> *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 So. 669 [176]; *Clemons v. Meadows*, 123 Ky. 178, 94 S. W. 13 [185]. (There was in these two cases the added fact that a demand existed for the full product of the plants shut down.) *Western Woodenware Ass'n v. Starkey*, 84 Mich. 76, 47 N. W. 604 [189]. (Here it made no difference that some of the property used in the business, such as tools and equipment, was sold.) See also *Oliver v. Gilmore*, 52 Fed. 562. (Here it made no difference that the promisor had given a lease to the promisee for the term of the restriction.)

In *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N. E. 1030, it is suggested that even a sale with a restriction on the seller may be invalid where it is in reality an attempt to purchase another out of business. *See quaere ad hoc*.

<sup>42</sup> *Leslie v. Lorillard*, 110 N. Y. 510, 16 N. E. 363 [65]. (In this case there were the additional facts in support of the covenant that competition was excessive and was entered into by the covenantor — a newcomer in the business — for the purpose of compelling the promisee — the established line — to buy him off.)

<sup>43</sup> *Wickens v. Evans*, 3 Y. & J. 318 [84]; *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 47 N. W. 806 [94].

Similarly, where the covenantor and covenantee each engaged in the manufacture of peppermint oil and the covenantor was also engaged in raising peppermint roots, there was no objection to a division of the business, so that the covenantor, as part of the sale of his roots, covenanted not to do any manufacturing for a period of time: *Van Marter v. Babcock*, 23 Barb. (N. Y.) 633.

<sup>44</sup> *Wood v. Whitehead Bros. Co.*, 165 N. Y. 542, 59 N. E. 357 [72]. In *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713, where the promisor was a printer and using a

In looking over these results one is forced to the conclusion that the mere covenant with the competitor not to carry on a given business is specially objectionable where it involves the shutting down and standing idle of a valuable plant, rendering the property useless for the time being. A contract operating in this way presents a distinctive feature which must be considered in balancing the considerations for and against its validity. This distinctive feature is decisive against the legality of the restriction even though the latter be regarded as a method of selling the business of the covenantor.

It may be urged that the covenantee could have purchased the property and then shut up the plant and yet the restriction by the seller must have been held valid. The answer to this is that the actual purchase of the plant and property would in most cases be a guaranty that the plant would not be shut down unless there had in fact been excessive competition — in which case the shutting down would be justified. Furthermore, a plant which is simply shut down for a specified number of years must (if the contract be valid) remain shut no matter what the business conditions may be. On the other hand, a plant and property which are purchased outright and shut down may, and undoubtedly would be, opened by the owner as soon as business conditions warranted that step. These considerations are sufficient to justify the courts in making a distinction between the actual sale of the plant and the shutting down of the plant without such sale.<sup>45</sup>

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CHICAGO, ILLINOIS.

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plant in his business, but where the plant was not sold, the restriction was, nevertheless, sustained.

<sup>45</sup> In *Stines v. Dorman*, 25 Ohio St. 580, D. purchased of B. a hotel property. D. also sold to B. a hotel property, and B. covenanted not to use the premises so purchased for hotel purposes while the property which D. purchased from B. was so used. The restriction was held valid. Suppose, however, it had appeared that this was a mere subterfuge to secure in effect a covenant by B. to shut down his hotel property and go out of the hotel business while still retaining a property useful for hotel purposes? Perhaps the restriction might still have been sustained, because it was probable that under it B.'s property would not remain entirely useless but would be put to some other useful purpose.



# THE STATE AS DEFENDANT UNDER THE FEDERAL CONSTITUTION; THE VIRGINIA- WEST VIRGINIA DEBT CONTROVERSY

## JURISDICTION

THE Constitution of the United States provides that "the judicial power shall extend . . . to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects."

"In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction."<sup>1</sup> By the Judiciary Act of 1789<sup>2</sup> the original jurisdiction of the Supreme Court over all controversies of a civil nature between two or more States was declared to be exclusive.

### I. A SOVEREIGN STATE MAY NOT BE SUED WITHOUT ITS CONSENT

That a sovereign State is not subject to suit without its consent is a principle unchallenged since the time of Rome. It finds its expression in the rule that the sovereign can do no wrong, and has been embodied in the English Common Law even more fully than in the civil law. The principle is so fundamental and elementary that it does not require analytical criticism here.<sup>3</sup>

## II. SUITS AGAINST STATES

### (a) THE CONSTITUTIONAL CONVENTION

The Articles of Confederation gave Congress power over State controversies concerning "boundary, jurisdiction or any other

<sup>1</sup> Art. III, sec. 2, pars. 1 and 2.

<sup>2</sup> Act of Sept. 24, 1789, chap. 20, 1 STAT. L. 80.

<sup>3</sup> 2 LOCKE, GOVERNMENT, § 205; PUFFENDORF'S LAW OF NATURE AND NATIONS, Bk. 8, ch. 10; Vattel, Bk. 1, ch. 4, §§ 49, 50; STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1675.

cause whatever," and made that body the Court of last resort. Procedure was provided for settlement of such disputes through the appointment of a joint commission by the contending States, or should they fail to agree, then by Congress itself from among the States. Should a State fail to appear, the proceedings could be conducted *ex parte*.<sup>4</sup> During the Colonial period the disputes between the Colonies, especially those in relation to boundaries, had been determined by the English Courts, as for example, Mason and Dixon's line.<sup>5</sup> Other disputes were settled by the Privy Council, for example, between Massachusetts and New Hampshire and New York in 1764.

Under the power thus granted apparently only three Inter-Colonial disputes were heard — one between Massachusetts and New York in 1784-86,<sup>6</sup> and one between South Carolina and Georgia in 1785-86,<sup>7</sup> both of which were settled by compromise out of Court. A third, between Pennsylvania and Connecticut in 1782, resulted in the turning over to Pennsylvania of the Wyoming region.<sup>8</sup>

But the mode of settlement provided by the Articles of Confederation was cumbersome and ineffective. On the adoption of the Constitution there were existing controversies between eleven States over boundaries which had arisen under their respective charters, and had continued since the first settlement of the Colonies.<sup>9</sup>

We find no inclusion, in the various drafts of the Article on the Judiciary, throughout the early part of the Federal Convention, of any specific reference to suits between States or between States and their own citizens, or citizens of other States, domestic or foreign. Even after the matter had reached the Committee on Detail, the clause covering the National Judiciary's jurisdiction continued to be defined in the following terms:

"The jurisdiction of the National Judiciary shall extend to cases arising under the laws passed by the General Legislature, and to such other questions as involve the National Peace and harmony."<sup>10</sup>

<sup>4</sup> Art. IX.

<sup>5</sup> Penn. v. Baltimore, 1 Vesey, 44.

<sup>6</sup> JOURNALS OF CONGRESS, IV, 444-53, 536, 564, 592-94, 787.

<sup>7</sup> *Ibid.*, IV, 529, 530, 634, 644, 691-97.

<sup>8</sup> *Ibid.*, IV, 129-40. See also ESSAYS IN CONSTITUTIONAL HISTORY OF THE UNITED STATES, edited by J. F. Jameson, ch. I.

<sup>9</sup> Rhode Island v. Massachusetts, 12 Pet. 657 (1838).

<sup>10</sup> 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, 132, 133.



In a document found among the Mason papers, we see for the first time a change to language in any way approaching the final draft as it stands in the Constitution. This change read:

"The jurisdiction of the Supreme Tribunal shall extend:

1. To all cases arising under laws passed by the General (Legislature).
2. To impeachments of officers, and
3. To *such* other cases as the National Legislature may assign, as involving the national peace and harmony, in the collection of the revenue, in disputes between citizens of different States; [in disputes between a State and a citizen or citizens of another State]; in disputes between different States, and in disputes in which subjects or citizens of other countries are concerned, [and in cases of admiralty juris'n"].

The paper is in the handwriting of Edmund Randolph; certain italics represent changes made in his writing, and the emendations in John Rutledge's handwriting are enclosed in brackets. It is interesting to note that the emendation relative to disputes between a State and a citizen or citizens of another State was made merely in the margin.<sup>11</sup>

Among the Wilson papers we find a very elaborate scheme for giving the Senate jurisdiction in disputes between States over jurisdiction of territory, with emendations by Rutledge.<sup>12</sup>

Finally, in these same papers, we find the provision thus framed:

"The jurisdiction of the Supreme (National) Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors (and other) [other] public ministers [and Consuls]; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between [States, except those wh' regard jurisd'n or territory — betw'n] a State and a citizen or citizens of another State, between citizens of different States and between [a State or the] citizens (of any of the States) [thereof] and foreign States, citizens or subjects."<sup>13</sup>

In the next document from the Committee on Detail, we find the clause reading thus:

"The jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases

<sup>11</sup> 2 FARRAND, 146, 147.

<sup>12</sup> *Ibid.*, 170, 171.

<sup>13</sup> *Ibid.*, 172, 173.

of admiralty and maritime jurisdiction; to controversies between two or more States (except such as shall regard territory or jurisdiction) between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens or subjects." <sup>14</sup>

This is from the Journal of Madison of August 6, 1787.

In the Journal of Monday, August 20, 1787, we find the following proposition was referred to the Committee on Detail:

"The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual State, or the United States and a citizen of an individual State." <sup>15</sup>

In the Journal for Wednesday, August 22, 1787, we find this entry:

"The Committee report that in their opinion the following additions should be made to the report now before the Convention; namely . . . between the fourth and fifth lines of the third section of the eleventh article, after the word 'controversies' insert 'between the United States and an individual State' or 'the United States and an individual person.'" <sup>16</sup>

It was moved, seconded and agreed to delay consideration of this recommendation along with other recommendations of the Committee until copies of the Committee's report could be had by the various members of the Convention. <sup>17</sup>

Finally, in the Journal of Friday, August 24, 1787, by vote of eight to two, we find struck out the provisions giving the Senate jurisdiction over disputes between States and over land questions, which had been modelled on procedure in the Articles of Confederation, because as Mr. Wilson said, it "will be rendered unnecessary by the National Judiciary now to be established." <sup>18</sup>

On Monday, August 27, 1787, we find Madison and Gouverneur Morris moving to insert after the word "controversies" the

<sup>14</sup> 2 FARRAND, 186.

<sup>15</sup> *Ibid.*, 335, 340-42.

<sup>16</sup> *Ibid.*, 366, 367. The formal Journal of the Convention here quoted from is based upon the minutes of the Secretary of the Convention, William Jackson, and in addition to this, Madison, regarded by his fellow delegates as a semi-official reporter, kept his own notes of the proceedings.

<sup>17</sup> *Ibid.*, 368.

<sup>18</sup> *Ibid.*, 400, 401.



words, "to which the United States shall be a party," which was agreed to without debate. Dr. Johnson then moved to insert the words "this Constitution and the," before the word "laws," but Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judicial nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department, he argued, but the motion of Dr. Johnson was agreed to without debate, because, as Madison's Journal shows, it was generally supposed that the jurisdiction given was constructively limited to the cases of a judicial nature.

On motion of Rutledge the words, "passed by the Legislature" were struck out and after the words "United States" there were inserted, without debate, the words, "and treaties made or which shall be made under their authority," conformably to the preceding amendment in another place.

Madison and Gouverneur Morris moved to strike out the words, "the jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to without debate.

Upon Mr. Sherman's motion, after the words, "between citizens of different States," there were inserted the words, "between citizens of the same State claiming lands under grants of different States," similar to the provision in the ninth Article of the Articles of Confederation, which was agreed to without debate.<sup>19</sup>

The next record of proceedings of the Convention shows that Section 2 of Article III came from the Committee on Style, substantially in its final form, with the vital exception that the jurisdiction "over controversies between two or more States" still excepted "such as shall regard territory and jurisdiction."<sup>20</sup>

In the later report of the Committee (September 12) this exception is struck out. No debate is recorded upon it.<sup>21</sup>

The Journal does not record further action taken on this Section, except for September 15, 1787, when it is shown that it was voted to strike out the word "both" in the first line before the phrase, "in law and equity."<sup>22</sup>

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<sup>19</sup> 2 FARRAND, 430-32. See also pp. 423-25.

<sup>20</sup> *Ibid.*, 576.

<sup>21</sup> *Ibid.*, 600.

<sup>22</sup> *Ibid.*, 621.

With particular reference to the history of the development of the second paragraph of Section 2 of Article III of the Constitution, in so far as it concerns our present discussion, namely, the original jurisdiction of the Supreme Court when a State is a party, it is interesting to note specially the trend that the Federal Convention took. For Tuesday, May 29, 1787, we find in the Paterson Records that among Governor Randolph's recommendations was "a nat'l judiciary to be elected by the Nat'l Legr. — To consist of an inferior and superior tribunal — To determinate piracies, captures, disputes between foreigners and citizens, and the citizen of one State and that of another, revenue-matters, national officers." <sup>23</sup>

But, it is to be noted that at this time there was no mention of suits by or between States.

In the next reference to this phase of the judicial power, we find, similarly, no mention of suits by or between States. <sup>24</sup>

Then, when the Report came from the Committee on Detail, we find this language:

"The jurisdiction of the Supreme Tribunal shall extend, . . . (3) to *such* other cases as the National Legislature may assign, as involving the national peace and harmony . . . , [in disputes between a State and a citizen or citizens of another State] in disputes between different States . . . but this supreme jurisdiction shall be appellate only, except in [cases of impeachm't, and (in)] those instances, in which the Legislature shall make it original, and the Legislature shall organize it." <sup>25</sup>

The New Jersey plan does not appear to have dealt with the question of the State as a party. <sup>26</sup> But in the Report of the Committee on Detail, we find this:

"In cases of impeachment, (those) [cases] affecting Ambassadors (and) other public ministers [and Consuls], and those in which a State shall be (one of the) [a] part(ies) [y] this jurisdiction shall be original." <sup>27</sup>

Similarly, in Madison's Journal of Monday, August 6, we find the above emendations adopted in the Report of the Committee on Detail, which Rutledge delivered to the Convention. <sup>28</sup>

<sup>23</sup> 1 FARRAND, 28.

<sup>24</sup> Madison's Journal, 1 FARRAND, 244. See also the Record of Rufus King, 1 FARRAND, 247; Madison's later Record of June 18, 1787, 1 FARRAND, 292.

<sup>25</sup> 2 FARRAND, 146, 147.

<sup>26</sup> *Ibid.*, 157.

<sup>27</sup> *Ibid.*, 173.

<sup>28</sup> *Ibid.*, 186.



Then on August 27 it was voted to strike out the words, "this jurisdiction shall be original," and to insert the words, "the Supreme Court shall have original jurisdiction."<sup>29</sup> And so it remained in the Report of the Committee on Style, and was embodied in the Constitution as finally adopted.<sup>30</sup>

### (b) THE STATE CONVENTIONS

Since the suability of a State without its consent was a thing unknown to the law, its cognizance was not contemplated by those who wrote into the Constitution the clauses conferring jurisdiction upon the Federal Judiciary, the course of which has just been traced through the entire debates in the Federal Convention. And when there arose the matter of presentation of the new Constitution to the various States for adoption by them, we find precisely the same views entertained. When it was argued by George Mason and Patrick Henry and others that the clause authorized jurisdiction to be given to the Federal Courts to entertain suits against a State brought by the citizens of another State, or of a foreign State, Madison replied:

"It is not in the power of individuals to call any State into Court. The only operation it can have, is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens, on whom a State may have a claim, being dissatisfied with the State Courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effect."<sup>31</sup>

Likewise Marshall in answer to the same objection said:

"With respect to disputes between *a State and the citizens of another State*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the Bar of the Federal Court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a Court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it, if a State cannot be defendant — if an individual

<sup>29</sup> 2 FARRAND, 425.

<sup>30</sup> *Ibid.*, 601.

<sup>31</sup> 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2 ed., 533.

cannot proceed to obtain judgment against a State, although he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular State, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals?" <sup>32</sup>

Similarly, Alexander Hamilton in "The Federalist," replying directly to the suggestion that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the Federal Courts for the amount of those securities, said:

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State of the Union. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts by mere implication and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." <sup>33</sup>

### (c) THE DECISIONS

#### 1. *Suits by Citizens of Other States*

The views of the framers of our Constitution did not long prevail, however. Almost immediately the Supreme Court faced the question of a State's suability in the case of *Chisholm v. Georgia*.<sup>34</sup> The sole question there presented was whether, considering the general political doctrines prevailing at the time of the adoption of the Constitution, the framers of that instrument could properly be held to have intended by the use of the words "between a State and citizens of another State," that this derogation from the

<sup>32</sup> 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION, 2 ed., 555-56.

<sup>33</sup> THE FEDERALIST, NO. 81.

<sup>34</sup> 2 Dall. 419.



sovereignty of the States should exist. A majority of the Court said yes, but Justice Iredell dissented, arguing that, under the Constitution, the Federal Courts could take jurisdiction only in those cases in which a State, according to generally accepted principles of law, could be properly made a party; namely, where it appeared as plaintiff or consented to appear as defendant.

In the case of *Georgia v. Brailsford*,<sup>35</sup> it had already been held that a State might appear as party plaintiff in a suit against a citizen of another State, but *Chisholm v. Georgia* aroused such wide-spread disapproval that the Eleventh Amendment to the Federal Constitution was promptly adopted. It expressed the will of ultimate sovereignty of the whole country, superior to all legislatures and courts, and reversed the decision of the Supreme Court. It recites that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," and although not in terms prohibiting suits by individuals against the States, but merely declaring that the Constitution shall not be construed to import any power to authorize the bringing of such suits, it was held that the effect of the amendment was to supercede all suits pending as well as to prevent the institution of new suits against any State, by citizens of another State.<sup>36</sup>

## 2. *Suits by a State's Own Citizens*

But even with the Eleventh Amendment, it will be seen that there is nowhere in the Constitution a declaration that either the United States or one of the States may not be sued by a citizen of the United States or by one of its own citizens, respectively. However, this point was removed from all further controversy by the decision of *Hans v. Louisiana*,<sup>37</sup> which was a suit against the State of Louisiana by one of its own citizens in which the Court, speaking through Justice Bradley, went out of its way to expressly repudiate the decision in *Chisholm v. Georgia*, in spite of the fact, as we have seen, that that decision had been annulled by constitutional amendment. It had already been explained by Chief Justice

<sup>35</sup> 2 Dall. 402.

<sup>36</sup> *Hollingsworth v. Virginia*, 3 Dall. 378.

<sup>37</sup> 134 U. S. 1.

Marshall in *Cohens v. Virginia*,<sup>38</sup> that making a State a defendant in error was entirely different from suing a State in an original action, in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution by suit of claims against a State.

### 3. *Suits between States*

Controversies between States are on a different footing from disputes between independent nations. None are determinable by war, nor even by diplomatic intercourse in the ordinary sense, though, with the assent of Congress some of them may be susceptible of settlement by interstate compact.<sup>39</sup> All that are of a justiciable nature may be determined by the Supreme Court at the suit of one of the parties. The Articles of Confederation, as we have seen, provided for the creation of a special commission to determine State controversies, upon the presentation to Congress of a petition by one of the parties. Eight petitions were thus presented, each involving claims to territory. But commissions were actually appointed in but two cases, and only one of these was adjudicated — the dispute between Pennsylvania and Connecticut over the Wyoming lands, where judgment was given for Pennsylvania.

In order to bring an interstate case within the competency of the Court two conditions are requisite: First, there must be a real collision between States — that is, it must appear that the States are in direct antagonism as States, and second, the controversy must be justiciable.

In *New Hampshire v. Louisiana*,<sup>40</sup> the Supreme Court refused to countenance the attempt of citizens to evade the operation of the Eleventh Amendment by transferring their pecuniary claims to another State and having that State bring suit in their behalf, finding that in fact the original owners of the bonds and coupons in question still remained the real parties in interest though not the nominal parties of record, and that, therefore, the suit was not a *bona fide* one between two States. But later the Court held

<sup>38</sup> 6 Wheat. 264.

<sup>39</sup> Art. I, sec. 10, par. 2.

<sup>40</sup> 108 U. S. 76.



otherwise in *South Dakota v. North Carolina*, 192 U. S. 286, where it was decided that the complaining State was the real owner of the bonds, and not merely an agent for private bondholders. This case will be considered later.

But the mere fact that a State is actually the plaintiff is not a conclusive test that the controversy is one in which the Court will always grant relief against another State or her citizens. Therefore, the question as to the character of interests requisite for the institution and maintenance of suits against a State, whether brought by another State, the United States itself, or by a foreign State, must be considered. In short, the question still to be determined is this: "What controversies are justiciable?" And at the very outset it may be stated as a general rule that Federal jurisdiction of suits brought by a State against individuals is thus distinguished from the jurisdiction of interstate suits: In the first case, the Constitution opens a better court for the determination of causes already justiciable; in the other, it opens a court for the determination of causes not otherwise regularly justiciable at all.

#### (a) BOUNDARY DISPUTES

Boundary disputes became the first important class to be adjudicated, because, as we have seen, the procedure under the Articles of Confederation for the settlement of such disputes was cumbersome and ineffectual, with the result that when the Constitution was adopted there were pending eleven such controversies, dating back to the first settlement of the Colonies.

The first case was *New Jersey v. New York*,<sup>41</sup> decided in 1831. As authority additional to the express provision of the Constitution for its exercise of original jurisdiction in suits against a State, Chief Justice Marshall relied upon the earlier decisions including *Chisholm v. Georgia*, which the Eleventh Amendment annulled, and further observed, confirming prior decisions, that should a defendant State after due service of process fail to appear, the complaining State had a right to proceed *ex parte* to a final judgment.

The second case was between Rhode Island and Massachusetts,<sup>42</sup> decided in 1838. Daniel Webster was counsel for Massachusetts

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<sup>41</sup> 5 Pet. 284.

<sup>42</sup> 12 Pet. 657.

and argued that the Court had no jurisdiction. He maintained that the jurisdiction of suits between States extended only to matters ordinarily judicially cognizable, and not to suits of a political character, such as was a suit regarding boundaries. But the Court held otherwise, in an elaborate and extremely learned, forceful opinion by Justice Baldwin. He said:

"We must presume that Congress did not mean to exclude from our jurisdiction those controversies, the decision of which the States had confided to the judicial power, and are bound to give to the Constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions. In the construction of the Constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted, 12 Wheaton, 354; 6 Wheaton, 416; 4 Peters, 431-32; to ascertain the old law, the mischief and the remedy." <sup>43</sup>

The Court then reviewed the history of State controversies over boundaries, and continued:

"With the full knowledge that there were at its adoption, not only existing controversies between two States singly, but between one State and two others, we find the words of the Constitution applicable to this state of things, 'controversies between two or more States.' It is not known that there were any such controversies then existing, other than those which related to boundary; and it would be a most forced construction to hold that these were excluded from judicial cognizance, and that it was to be confined to controversies to arise prospectively on other subjects. . . .

"There can be but two tribunals under the Constitution who can act on the boundaries of States, the legislative or the judicial power; the former is limited in express terms to assent or dissent, where a compact or agreement is referred to them by the States; and as the latter can be exercised only by this Court, when a State is a party, the power is here or it cannot exist. . . . That the Constitution which emanated directly from the people, in conventions in the several States, could not have been intended to give to the judicial power a less extended jurisdiction, or less efficient means of final action, than the articles of Confederation adopted by the mere legislative power of the States, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of State legislatures, appointed by them, without any action by the people of the State." <sup>44</sup>

<sup>43</sup> 12 Pet. 723.

<sup>44</sup> 12 Pet. 724-28.



As to the Court's ability to enforce its decree Justice Baldwin said:

"This Court cannot presume, that any State which holds prerogative rights for the good of its citizens and by the Constitution has agreed that those of any other State shall enjoy rights, privileges and immunities in each, as its own do, would either do wrong, or deny right to a sister State or its citizens, or refuse to submit to those decrees of this Court, rendered pursuant to its own delegated authority; when in a monarchy its fundamental law declares that such decree executes itself. . . . In the case of *Olmstead* the Court expressed its opinion that if State legislatures may annul the judgments of the Courts of the United States, and the rights thereby acquired, the Constitution becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by its own tribunal. So fatal a result must be appreciated by all; and the people of every State must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves. 5 Peters, 115, 135."<sup>45</sup>

Chief Justice Taney dissented in a weak opinion on the ground that not property rights, but sovereignty and jurisdiction — political rights — were the sole subject of controversy, and such not the subjects of judicial cognizance and control under the Constitution.

Subsequently, Mr. Webster, on behalf of Massachusetts, moved to withdraw the appearance of that State on the theory that jurisdiction had been assumed only because Massachusetts had appeared. But the Court decided otherwise, stating, however, that no coercive measures would be taken to compel appearance, but that complainant might proceed *ex parte*.<sup>46</sup> Thereupon Massachusetts elected not to withdraw her appearance, and the case proceeded upon amended pleadings, and the Court held that the rules and practice of a Court of Chancery should govern in conducting the suit to a final issue, moulded, however, on liberal principles befitting the controversy between two sovereign States.<sup>47</sup>

Similarly in a large number of later cases the same jurisdiction was consistently upheld.<sup>48</sup>

<sup>45</sup> 12 Pet. 751.

<sup>46</sup> *Ibid.*, 755.

<sup>47</sup> 14 Pet. 210.

<sup>48</sup> *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 11 How. 293; *Ibid.*, 17 How. 478; *Alabama v. Georgia*, 23 How. 505; *Virginia v. West Virginia*, 11 Wall. 39; *South Carolina v. Georgia*, 93 U. S. 4; *Indiana v. Kentucky*, 136 U. S. 479; *Nebraska v. Iowa*, 143

## (b) OTHER DISPUTES

But this jurisdiction has not been carried to the extent of covering maladministration of laws of one State to the injury of citizens of another.<sup>49</sup>

However, under certain circumstances, a State can invoke the original jurisdiction of the Supreme Court even though it has no direct pecuniary or proprietary interest involved, but is in the position of a trustee, or as *parens patriae* or representative of a considerable portion of its citizens. And so it was held in *Missouri v. Illinois*,<sup>50</sup> which arose out of the construction, under the authority of the State of Illinois by the Sanitary District of Chicago, of a drainage canal by which sewage was emptied into and thus polluted the Mississippi River, which furnished the water supply to the inhabitants of Missouri. The Court said that "it would be objectionable, and, indeed, impossible, for the Court to anticipate by definition what controversies can and what cannot be brought within the original jurisdiction of this Court."<sup>51</sup>

Similarly, in *Kansas v. Colorado*,<sup>52</sup> the Court had under consideration the rights of States to the water of rivers flowing into and through their respective territories, and held that the conflict of interest was one justiciable by it. The Court said, speaking through Chief Justice Fuller, in reply to the argument that only those controversies are justiciable in the Supreme Court which prior to the Union would have been just cause for reprisal by the complaining State and that, according to international law, reprisal can only be made when a positive wrong has been inflicted or rights *stricti juris* withheld:

"But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated, if well founded? The States of this Union cannot make war upon each other.

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U. S. 359; *Iowa v. Illinois*, 147 U. S. 1; *Virginia v. Tennessee*, 158 U. S. 267; *Missouri v. Nebraska*, 196 U. S. 23; *Louisiana v. Mississippi*, 202 U. S. 1; *Iowa v. Illinois*, 202 U. S. 59; *Washington v. Oregon*, 211 U. S. 127; *Maryland v. West Virginia*, 217 U. S. 1. The cases of *Virginia v. West Virginia*, *South Carolina v. Georgia* and *Virginia v. Tennessee* arose out of compacts made between the States.

<sup>49</sup> *Louisiana v. Texas*, 176 U. S. 1.

<sup>50</sup> 180 U. S. 208.

<sup>51</sup> 180 U. S. 241.

<sup>52</sup> 185 U. S. 125.



They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties." <sup>53</sup>

When the case later came before the Court on its merits,<sup>54</sup> and with the United States as an intervenor, the Court reaffirmed its jurisdiction in the broadest possible terms. The intervening petition of the United States, however, was dismissed on the ground that Congress has no power to control the flow of water within the limits of a State except to preserve or improve navigability. On the question of jurisdiction the Court said:

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other Courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and, unless there be some limitations expressed in the Constitution, it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto." <sup>55</sup>

#### 4. *Suits by the United States Against a State*

There is no express grant by the Constitution of jurisdiction over suits brought by the United States against individual States, but such is necessarily implied, and such suits have been entertained by the Supreme Court.<sup>56</sup>

In the case of the *United States v. Texas*, which was brought to determine the boundary between Texas and the Territory of Oklahoma, Justice Harlan, rendering the opinion said:

"We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence

<sup>53</sup> *Louisiana v. Texas*, 176 U. S. 143.

<sup>54</sup> 206 U. S. 46.

<sup>55</sup> 206 U. S. 83.

<sup>56</sup> See, for example, *United States v. North Carolina*, 136 U. S. 211; *United States v. Texas*, 143 U. S. 621; *United States v. Michigan*, 190 U. S. 379.

of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principals of law. . . . It would be difficult to suggest any reason why this Court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State."<sup>57</sup>

It is to be noted parenthetically that conversely, but only since 1902, it has been definitely decided that the Supreme Court will assume jurisdiction in suits by a State against the United States, when, of course, and only when the United States has consented to be sued.<sup>58</sup>

### 5. *Suit by a Foreign State or Subject against a State*

Although the Constitution provides for jurisdiction over controversies "between a State, . . . and foreign States, citizens, or subjects," such have never arisen. An Indian tribe is not a foreign State within the meaning of this clause of the Constitution.<sup>59</sup> So the question is still open, but both Madison and Story took the view that the Supreme Court would not entertain such a suit. A foreign State could not be compelled to appear as party defendant in such a suit, and therefore the question was, should it be permitted to appear as a party plaintiff unless the defendant State should give its consent.

"I do not conceive," said Madison, "that any controversy can ever be decided, in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made."<sup>60</sup>

But the question is raised from the dictum of Justice Bradley, in *Hans v. Louisiana*, approving the dissenting opinion of Justice Iredell, in *Chisholm v. Georgia*, whether the Court would take jurisdiction even *with* the consent of the parties. Since, however, a State is presumed to have consented to be sued in the Supreme Court by a sister State, and by the United States, on what theory

<sup>57</sup> 143 U. S. 644-45.

<sup>58</sup> *Minnesota v. Hitchcock*, 185 U. S. 373. See also *Oregon v. Hitchcock*, 202 U. S. 60; *Naganab v. Hitchcock*, 202 U. S. 473, and *Kansas v. U. S.*, 204 U. S. 331.

<sup>59</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1.

<sup>60</sup> 3 ELLIOT, DEBATES, 2 ed., 533; STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1699. See also Marshall, C. J., in *Foster v. Neilson*, 2 Pet. 254, 307.



of Constitutional interpretation is it presumed to object to being sued in this Court by a foreign State, except on the theory that when a State has no reciprocal right to sue, it will not be presumed to place itself at a disadvantage?

It is interesting to note, parenthetically, that in the case of the *King of Spain v. Oliver*,<sup>61</sup> the Supreme Court expressly recognized the jurisdiction of the Federal Courts where foreign States are parties, refusing to inquire, however, upon a motion, whether Ferdinand VII, King of Spain, could institute the suit, the United States not having recognized him as King. The suit was in the nature of an action in *assumpsit* to recover duties imposed by the revenue laws of Spain, and subsequently failed on the merits.<sup>62</sup> The jurisdictional question was confirmed in the case of "The Sapphire."<sup>63</sup> This case arose out of a collision between the American ship *Sapphire* and the French transport *Euryale* in the harbor of San Francisco. A libel was filed in the name of Emperor Napoleon III, but before the case was argued the Emperor was deposed. In deciding that the Court had jurisdiction, Justice Bradley said:

"The first question raised is as to the right of the French Emperor to sue in our Courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third Circuit by Justice Washington and Judge Peters in 1810. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and foreign States, citizens or subjects, without reference to the subject matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English Courts in cases growing out of the late Civil War. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into Court by suit."<sup>64</sup>

<sup>61</sup> 2 Wash. (C. C.) Rep. 429.

<sup>62</sup> Pet. Cir. Ct. Rep. 286, 290.

<sup>63</sup> 11 Wall. 164.

<sup>64</sup> 11 Wall. 167-168. See also *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265; *Colombia v. Cauca Co.*, 190 U. S. 524, 106 Fed. 337.

We have thus determined *when* the Supreme Court will take jurisdiction of a suit wherein a State is a party defendant. It is now necessary to consider the procedure leading up to a judgment.

### THE PROCEDURE LEADING UP TO A JUDGMENT

From the decisions which have just been reviewed and from the other decisions incorporated by reference therein, it is possible at once to deduce the three following propositions as to the procedure to be adopted looking to a judgment against the defendant State:

First, if the defendant state does not appear, a subpoena will be issued against it for its appearance.<sup>65</sup>

Second, should the defendant state fail to appear, or should appear but ask that its appearance be withdrawn, the suit will proceed against it *ex parte*. But no coercive measures will be taken against it in relation to its appearance.<sup>66</sup>

Third, the procedure is that of a Court of Chancery, but such as is appropriate between individuals will be modified and accommodated to the dignity of the controversy.<sup>67</sup>

It, therefore, becomes necessary to determine next how the Court will enforce execution of the judgment rendered against the defendant State.

### EXECUTION OF JUDGMENT

The issuance of execution on judgment is a normal feature of any ordinary suit at law, but where a judgment is sought against a State the question of Federal competency to execute it presents a more serious question. It is not possible to seize State funds or other property, except such as the State may hold in private proprietorship. The line between this and property exempt by reason of its devotion to public use is probably somewhere between such property as a State-aided railroad and a State public building. Moreover, a State, while not an independent sovereign, has attributes of sovereignty which will embarrass, if not bar the

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<sup>65</sup> *Chisholm v. Georgia*, 2 Dall. 419; *Graydon v. Virginia*, 3 Dall. 320; *New Jersey v. New York*, 3 Pet. 461.

<sup>66</sup> *New Jersey v. New York*, 5 Pet. 284; *Massachusetts v. Rhode Island*, 12 Pet. 755.

<sup>67</sup> *Rhode Island v. Massachusetts*, 14 Pet. 210.



execution of a judgment that would attain such attributes. Let us see how far the Supreme Court has gone.

### WRIT OF MANDAMUS

The writ of mandamus, as has frequently been decided, is a proceeding ancillary to the judgment, and when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the judgment; and where the Court has decreed that a county or municipal body shall pay a debt it has never hesitated to issue a mandamus against the county or municipal officers to levy a tax to pay the debt, where the county or municipal body is vested with power to tax. But of course the fact that this remedy may be shown to be unavailing, does not confer upon a Court of equity the power itself to levy and collect taxes to pay the debt.<sup>68</sup>

Furthermore, it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety to issue a mandamus is to be determined.<sup>69</sup>

But when the mandamus was sought to be used to coerce *State* officials to perform an alleged duty, the Court found practical difficulty and embarrassment. The Court once ordered a state to release a prisoner condemned under a local statute, which it stigmatized as repugnant to the Constitution, laws and treaties of the United States. It was this order that provoked President Jackson to exclaim: "John Marshall has pronounced his judgment; let him enforce it if he can."<sup>70</sup> The situation grew out of the famous case of *Worcester v. Georgia*, decided in 1832,<sup>71</sup> in which an act of the State of Georgia was held void which attempted to exercise jurisdiction over Indian territory situated within the State's limits. The Supreme Court failed to secure the release of the plaintiff who had been imprisoned under this law, but this failure was due, not to any impotence on the part of the Federal

<sup>68</sup> *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *City of Galena v. Amy*, 5 Wall. 705; *Riggs v. Johnson City*, 6 Wall. 166; *Walkley v. City of Muscatine*, 6 Wall. 481; *Rees v. Watertown*, 19 Wall. 107; *Heine v. Levee Commissioners*, 19 Wall. 655; *Meriwether v. Garrett*, 102 U. S. 472; *Labette County Commissioners v. Moulton*, 112 U. S. 217.

<sup>69</sup> *Marbury v. Madison*, 1 Cranch 137; *Kendall v. United States*, 12 Pet. 524.

<sup>70</sup> 1 BRYCE, *AMERICAN COMMONWEALTH*, new ed. (1911), 269.

<sup>71</sup> 6 Pet. 519.

judiciary, but to the refusal of the President to lend his executive aid. From 1835 to the outbreak of the Civil War there can be no doubt but that the Supreme Court exerted a much less potent influence on solidifying and expanding the Federal power than it had exercised in the preceding thirty-five years. During the two terms of Jackson as President, five vacancies occurred in the Supreme Court, among them the Chief Justiceship, to which Taney was appointed in 1835. The effect of the new appointment upon the views of the Court was shown almost immediately. There was a very decided leaning away from the expansion of Federal power, and towards the expansion of State power. This, indeed, is the only plausible, albeit not a sound explanation of the startling decision in *Kentucky v. Dennison*.<sup>72</sup> The facts were that a certain freeman was indicted by the grand jury of Woodford County, Kentucky, of the crime, under the laws of Kentucky, of seducing and assisting a certain slave to escape from her owner into Ohio. Demand was thereupon made by the Governor of Kentucky upon the Governor of Ohio for the return of the slave under the provision of the Constitution, which recites that "A person charged in any State with treason, felony or other crime who shall flee from Justice, and be found in another State, *shall*, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime,"<sup>73</sup> and the enabling act of February 12, 1793, making it "the duty of the Executive Authority of the State or Territory to which such person shall have fled" to surrender him.<sup>74</sup> But the Governor of Ohio refused to do so, maintaining, among other grounds, that the jurisdiction conferred by the Constitution was limited to such acts as constituted either treason or felony by the common law, or were generally regarded as crimes when the Constitution was adopted, and second, that the Federal Judiciary had no power of coercion over a State executive. Chief Justice Taney, in delivering the opinion of the Court, overruled the first of these contentions, but sustained the second, and said:

"Looking to the subject matter of this law and the relations which the United States and the several States bear to each other, the Court

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<sup>72</sup> 24 How. 66.

<sup>73</sup> Art. IV, § 2. (*Italics inserted.*)

<sup>74</sup> Ch. 7, § 1, 1 STAT. 302, REV. STAT., § 5278.



is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with the power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. . . . And it would seem that when the Constitution was framed and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this Constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."<sup>75</sup>

To this decision — we can scarcely call it reasoning, for it is totally unconvincing as a piece of Constitutional interpretation — no dissent was recorded, and it was approved in a *dictum* in *Taylor v. Taintor*,<sup>76</sup> a case arising also under Article 4, Section 2, of the Federal Constitution, but upon a different state of facts.

In 1879, in the case of *Ex parte Virginia*,<sup>77</sup> the Court, speaking through Mr. Justice Strong, denied a writ of habeas corpus to a county judge of the State of Virginia on the ground that in the

<sup>75</sup> 24 How. 107-110.

<sup>76</sup> 16 Wall. 366.

<sup>77</sup> 100 U. S. 339.

selection of jurors he discriminated against negroes in violation of the Federal Statute<sup>78</sup> enacted pursuant to the Thirteenth and Fourteenth Amendments. In speaking of the *Dennison Case* the Court said:

"The act in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. It was of such an act Mr. Chief Justice Taney said, that a power vested in the United States to inflict any punishment for neglect or refusal to perform the duty required by the Act of Congress, 'would place every State under the control and dominion of the General Government even in the administration of its internal concerns and reserved rights.' But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. The remarks made in *Kentucky v. Dennison* and in *Collector v. Day*, though entirely just as applied to the cases in which they were made, are inapplicable to the case we now have in hand."<sup>79</sup>

Here would seem to be a distinction without merit, based upon the fact that the Thirteenth and Fourteenth Amendments expressly give Congress power to enforce their provisions "by appropriate legislation." But what further power can be granted than that which the Constitution itself gives in Article 4, Section 2, when it says that it *shall* be the duty of the governors of the States to carry out the provision of the Constitution in question? Are we, in short, to give greater effect to an Act of Congress than to the mandatory words of the Constitution itself? Is it not just as reasonable to suppose that the framers of our Constitution did not contemplate any defiance of the direct mandate of the words of the Constitution, as it is to suppose that because of the character of the difficulties feared in the enforcement of the new amendments, following the Civil War, penal provisions were desirable? And so it would seem from the history of the Debates in the Constitutional and State Conventions. Indeed, Charles Pinckney, in his explanations of the new government, said of this part of the Fourth Article of the Constitution that it "is formed exactly upon the principles of the Fourth Article of the present

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<sup>78</sup> 18 STAT. PT. III, 336.

<sup>79</sup> 100 U. S. 347, 348. Mr. Justice Field and Mr. Justice Clifford dissented.



Confederation, except with this difference, that the demand of the Executive of a State, for any fugitive criminal offender, *shall* be complied with.”<sup>80</sup> But apart from any historical aspect, the very words of the Constitution are capable of but one construction. Chief Justice Taney himself declared, in his opinion, that “it has been the established doctrine . . . ever since the Act of 1789, that in all cases where original jurisdiction is given by the Constitution this Court has authority to exercise it without any further Act of Congress to regulate its process or confer jurisdiction.”<sup>81</sup> Furthermore, the Supreme Court, only a few years later (although Chief Justice Taney had died) held, in a series of cases already referred to, that where power is given by statute to public officers, in permissive language, such as they “*may*, if deemed advisable,” — do a certain thing — such language will be regarded as peremptory, when the public interest or individual rights require that it should be.<sup>82</sup>

In *Ex parte Siebold*,<sup>83</sup> the Court rendered a similar decision at the same term, denying a writ of habeas corpus to certain judges of election in Baltimore, alleged to have interfered with Congressional elections. There the Court said through Mr. Justice Bradley, in relation to the Dennison Case:

“There, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from service was held to belong to the government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty.”<sup>84</sup>

Certainly belabored reasoning. Just what is meant by “the government of the United States” and “its own agents” is difficult to imagine, if it does not include *the judicial power* of the government. Mr. Justice Field and Mr. Justice Clifford again dissented.<sup>85</sup>

Such is the extent to which the Dennison Case has been referred

<sup>80</sup> 3 FARRAND, 112. (Italics inserted.)

<sup>81</sup> 24 How. 98.

<sup>82</sup> *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *City of Galena v. Army*, 5 Wall. 705.

<sup>83</sup> 100 U. S. 371.

<sup>84</sup> 100 U. S. 391.

<sup>85</sup> See also *Ex parte Clarke*, 100 U. S. 399; *United States v. Gale*, 109 U. S. 65.

by the Supreme Court in relation to a State's refusal to discharge its duty. Irreconcilable as it is with the undoubted power by very grant of the Constitution, it is still authority, until overruled, for the principle that the Supreme Court will decline to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political department of their governments. And yet the Supreme Court, within the last three years, has cited this case in declaring that "there is no discretion allowed, no inquiry into motives," under Article 4, Section 2 of the Constitution.<sup>86</sup>

What conclusions, then, can we draw from a review of the decisions which persist in such an unintelligent use of the Dennison case? Can we draw any definite line between enforceable and non-enforceable state duties? It would seem not, except to the following extent: Generally speaking, the complainant in a suit against a State asks for relief in one of the three following ways:

First, through the action of complainant. This relief the Supreme Court is undoubtedly competent to authorize; as for example, should a state prove its claim to land held by another state, a judgment will entitle it to take possession. This is nothing more than the situation typical in the various boundary disputes heretofore discussed.

Second, through the cessation of acts within the jurisdiction of the different States, as for example, such relief as was requested and granted in *Kansas v. Colorado*.<sup>87</sup>

Third, and lastly, through *the performance of some act by the defendant State*, such as, for example, was sought in the Dennison case, but denied, when it came to the point of coercion, although as we have seen the Court has never hesitated:

(a) To mandamus county or municipal officials, vested with the power of taxation, to levy a tax, or

(b) To compel by imprisonment subordinate State officials, such as county judges and judges of elections, to obey the Federal penal laws, enacted pursuant to the Constitution.

Suppose that the act in question to be performed by the defendant State be the payment of money?

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<sup>86</sup> *Drew v. Thaw*, 235 U. S. 432, 439.

<sup>87</sup> 185 U. S. 125; 206 U. S. 46.



It is recorded that Edmund Randolph, in pleading for judgment for Chisholm against the State of Georgia, exclaimed: "What if the State is resolved to oppose the execution? This would be an awful question indeed! He to whose lot it should fall to solve it, would be impelled to invoke the god of wisdom to illuminate his decision."<sup>88</sup>

And, as has already been pointed out, Hamilton himself, not accustomed to magnify the position of the States, said it would be of no purpose to authorize suits against States for the debts they owe because recoveries could not be enforced without waging war against the contracting States.<sup>89</sup>

Similarly spoke Daniel Webster:

"It has been said that the State cannot be sued on these (State) bonds. But neither could the United States be sued, nor, as I suppose, the Crown of England in a like case. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligation of a government arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could not, or would not make provision for paying the bond, it is not probable that it could or would make provision for satisfying the judgment."<sup>90</sup>

As opposed to these views, however, in the early cases of *Chisholm v. Georgia*,<sup>91</sup> *United States v. North Carolina*,<sup>92</sup> and *United States v. Michigan*,<sup>93</sup> already referred to, the Court sustained jurisdiction over actions to recover money from a State, albeit the question of execution did not arise. And later, in the case of *Louisiana v. Jumel*,<sup>94</sup> in an action on certain State bonds, the Court used this unmistakable language relative to its *complete* power, although it is true that on the given facts, the Court refused to permit the bondholders by a writ of mandamus to collect the debt due by the State, because they could not themselves have obtained judgment against the State in an action on the bonds:

"When a State submits itself, without reservation, to the jurisdiction of a Court in a particular case, that jurisdiction may be used to give *full effect* to what the State has by its act of submission allowed to be

<sup>88</sup> 2 Dall. 437.

<sup>89</sup> THE FEDERALIST, No. 81.

<sup>90</sup> WEBSTER'S WORKS, vol. vi, 539 — opinion given to Baring Brothers.

<sup>91</sup> 2 Dall. 419.

<sup>92</sup> 136 U. S. 211.

<sup>93</sup> 190 U. S. 370.

<sup>94</sup> 107 U. S. 711.

done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such *coercion* may be employed for that purpose.”<sup>95</sup>

Finally, in 1904, the Court, though divided five to four, affirmed vigorously its ability to enforce pecuniary claims against a State in the case of *South Dakota v. North Carolina*,<sup>96</sup> also previously referred to. There South Dakota sued as owner of certain bonds of the State of North Carolina issued in aid of the construction of two railroad companies. The Court said, speaking through Mr. Justice Brewer:

“We have, then, on the one hand, the general language of the Constitution vesting jurisdiction in this Court over ‘controversies between two or more States,’ the history of that jurisdictional clause in the Convention, the case of *Chisholm v. Georgia*, *United States v. North Carolina*, and *United States v. Michigan* (in which this Court, sustained jurisdiction over actions to recover money from a State), the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this Court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a Court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

“There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff’s claim. If that should be the result there would be no necessity for a personal judgment against the State.”<sup>97</sup>

And so it developed that there was no such necessity, because with a change of State administration at the next election, the State of South Dakota did not press the claims.

This highly important decision presents a most interesting study in itself. Its soundness is not above criticism, for the splendid reasoning in Justice White’s dissent, in which the Chief Justice

<sup>95</sup> 107 U. S. 728. (Italics inserted.)

<sup>96</sup> 192 U. S. 286.

<sup>97</sup> 192 U. S. 320-21.



(Fuller) and Justices Day and McKenna concurred, would seem to be more consonant with the fundamental theory of the Constitution and the Court's prior decisions.<sup>98</sup> But space does not permit of a detailed analysis, nor would such be pertinent to the immediate subject in hand.

### VIRGINIA *VERSUS* WEST VIRGINIA

But suppose it is otherwise? Suppose the defendant State refuses to pay, pursuant to a decree entered by the Supreme Court against it in favor of another State, will the Court *actually compel* payment?

This is the concrete question presented in the long drawn out litigation between the States of Virginia and West Virginia, which commenced in 1870, and is still before the Supreme Court — the present and last proceeding, as yet undecided, in which the State of Virginia has asked for a writ of mandamus against the Legislature of West Virginia, compelling it to raise the money sufficient to pay the twelve million odd dollars which the Supreme Court has decreed West Virginia must pay, making the ninth time that this famous controversy has been before the Supreme Court in one form or another.

Let us review briefly the history of this case.

As the Court has said, the grounds of the claim are matters of public history. After the Virginia ordinance of secession, adopted at Richmond in February, 1861, citizens of the northwestern part of the State who were separated from the eastern part by a succession of mountain ranges and who were opposed to secession, dissented from that ordinance and organized a government that was recognized as the State of Virginia by the Government of the United States. Forthwith a convention of the "restored" State held at Wheeling, proceeded to carry out a long entertained wish of many West Virginians by adopting an ordinance for the formation of a new State, "the so-called Piedmont Government," out of the western portion of the old Commonwealth. A part of Section 9 of the ordinance was as follows:

"The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January,

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<sup>98</sup> See the cases collected in a note to this dissent, 192 U. S. 331.

1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted; and deducting therefrom the monies paid into the treasury of the Commonwealth from the counties included within the said new State during the said period."

The ordinance also provided for a popular vote, a constitutional convention, etc., and ordained that when the general assembly should give its consent to the formation of such new State, it should forward to Congress such consent, with the request for admission into the Union. A constitution was framed for the new State by a constitutional convention, as provided in the ordinance, November 26, 1861, and was adopted. By Article 8, Section 8

"an equitable proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, in the year one thousand eight hundred and sixty-one, shall be assumed by this State; and the Legislature shall ascertain the same as soon as may be practicable, and provide for the liquidation thereof, by a sinking fund sufficient to pay the accrued interest, and redeem the principal within thirty-four years."

An Act of the Legislature of the restored State of Virginia, passed May 13, 1862, gave the consent of that legislature to the erection of the new State, "under the provisions set forth in the Constitution for the said State of West Virginia." Finally Congress gave its sanction by an Act of December 31, 1862,<sup>99</sup> which recited the framing and adoption of the West Virginia Constitution and the consent given by the legislature of Virginia through the last mentioned act, as well as the request of the West Virginia Convention and of the Virginia legislature, as the grounds for its consent. There was a provision for the adoption of an emancipation clause before the Act of Congress should take effect and for a proclamation by the President, stating the fact, when the desired amendment was made. Accordingly, after the amendment and a proclamation by President Lincoln, West Virginia became a State on June 20, 1863.

Then a controversy as to the boundary line between the two States arose, and more particularly whether certain counties

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<sup>99</sup> Ch. 6, 12 STAT. 633.



were properly to be included in the new State of West Virginia. So in 1870 the matter came before the Supreme Court to be decided on original bill, and in an opinion by Mr. Justice Miller, from which, however, Justices Davis, Clifford and Field dissented, the Court affirmed its original jurisdiction over boundary controversies between States and held that the course of action, just enumerated, taken by the new and the old State constituted an agreement between them that was binding.<sup>100</sup> Reverdy Johnson was of counsel for West Virginia. This decision has already been cited in connection with the general question of jurisdiction over boundary disputes.

From this time up until the year 1905, various efforts were made by Virginia, through her constituted authorities, to effect an adjustment and settlement with West Virginia for an equitable portion of the public debt of the undivided State, proper to be borne and paid by West Virginia, but all these efforts proved unavailing, and it was charged that West Virginia refused or failed to take any action or do anything for the purpose of bringing about a settlement or adjustment with Virginia. Therefore, in February, 1906, Virginia invoked the original jurisdiction of the Supreme Court to procure a decree for an accounting. A demurrer by West Virginia to the bill was overruled in March, 1907, the Court deciding practically what had been decided in 1870 (without prejudice, however, to any question) in an opinion delivered by Chief Justice Fuller.<sup>101</sup> After an answer had been filed, the cause was directed to be referred to a master (March 4, 1908).<sup>102</sup> Mr. Charles E. Littlefield was appointed Master on June 1, 1908. Testimony was taken between November 16, 1908, and July 2, 1909. The case was argued before the Master in November and December, 1909. His report was filed March 17, 1910.

On March 6, 1911,<sup>103</sup> the Court fixed West Virginia's share of the principal debt at \$7,182,507.46. The total amount of the debt which was to be apportioned was \$33,897,073.82, represented mainly by interest-bearing bonds. Just how the proportion to be borne by West Virginia was arrived at is beside our present discussion. Suffice it to say that the Court adopted a ratio deter-

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<sup>100</sup> 11 Wall. 39.

<sup>102</sup> 209 U. S. 514.

<sup>101</sup> 206 U. S. 290.

<sup>103</sup> 220 U. S. 1.

mined by the Master's estimated valuation of the real and personal property of the two States on the date of separation, June 20, 1863.

The question of interest and the adjustment of any clerical errors was left open. In closing its opinion the Court said, speaking through Mr. Justice Holmes:

"As this is no ordinary commercial suit, but, as we have said, a *quasi* international difference referred to this Court in reliance upon the honor and constitutional obligations of the States concerned, rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties which, whatever the outcome, must take place. If the cause should be presented contentiously to the end, it would be referred to a Master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. *But this case is one that calls for forbearance on both sides.* Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end." <sup>104</sup>

However, efforts on the part of the Virginia Debt Commission to reach an agreement in conference with West Virginia failed, and on October 9, 1911, Virginia moved to proceed with the cause, but on objection of West Virginia, the Court denied the application, saying:

"A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private business man; it is enough if it proceeds, in the language of the English Chancery, with all deliberate speed. Assuming, as we do, that the Attorney General is correct in saying that only the Legislature of the defendant State can act, we are of opinion that the time has not come for granting the present motion. If the authorities of West Virginia see fit to await the regular session of the Legislature, that fact is not sufficient to prove that when the voice of the State is heard it will proclaim unwillingness to make a rational effort for peace." <sup>105</sup>

On October 13, 1913, Virginia again moved to proceed with the cause, her motion being virtually a reiteration of her former motion and was based upon the ground that certain negotiations which had taken place between the Virginia Debt Commission and

<sup>104</sup> 220 U. S. 36. (Italics inserted.)

<sup>105</sup> 222 U. S. 17, 20-21.



a Commission representing West Virginia, indicated that no hope of an adjustment out of Court existed. But West Virginia denied this, and asked for six months' extension for the purpose of having its Commission complete its labors and agree upon a basis of settlement with the Virginia Commission. Whereupon the Court again yielded to West Virginia and said through the Chief Justice:

"Having regard to these representations (of West Virginia) we think we ought not to grant the motion to proceed at once to consider and determine the cause, but should, as near as we can do so, consistently with justice, comply with the request made for further time to enable the Commissioners of West Virginia to complete the work which we are assured they are now engaged in performing for the purpose of effecting a settlement of the controversy. As, however, the granting of six months delay would necessitate carrying the case possibly over to the next term, and therefore be in all probability an extension of time of more than a year, we shall reduce somewhat the time asked and direct that the case be assigned for final hearing on the thirteenth day of April next, at the head of the call for that day."<sup>106</sup>

When that day came, West Virginia prayed leave to be permitted to file a supplemental answer asserting the existence of certain credits, heretofore alleged not to have been properly considered, and asserting various grounds why interest should not be allowed against West Virginia on the sum due. Without passing on the merits of these contentions, the Court nevertheless granted the motion of West Virginia, and referred the subject matter of the supplemental answer to the same Master, with directions to report at the commencement of the next term of Court. In closing its opinion, the Court said (White, C. J.):

"As we have pointed out, in acting in this case from first to last, the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between States involving grave questions of public law determinable by this Court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed had been controlled. And we are of the opinion that this guiding principle should not now be lost sight of to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must in the absence of agreement between the

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<sup>106</sup> 231 U. S. 89, 91.

parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice after the amplest opportunity to be heard has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing State, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.”<sup>107</sup>

A great mass of testimony was taken under this reference to the Master, which ended in his filing his final report; exceptions were argued and a decision rendered, on June 14, 1915,<sup>108</sup> whereby the following sums were allowed to Virginia, and a decree entered accordingly:

Principal . . . . .	\$4,215,622.28
Interest . . . . .	8,178,307.22
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Total . . . . .	\$12,393,929.50

with interest thereon from July 1, 1915, until paid, at the rate of 5 per cent per annum, costs to be equally divided between the two States.

The State of Virginia, acting through its Commission, endeavored to obtain an amicable payment of the money, or some arrangement for payment which would be mutually satisfactory. These efforts brought about nothing in the way of a payment or agreement to pay, or arrangement for payment. Therefore, Virginia filed a motion for leave to issue an execution. But this was denied,<sup>109</sup> West Virginia having filed an answer setting forth:

1. That she had no power to pay such a judgment except through the legislative department of her government, and she should be allowed to wait until January, 1917, when her legislature would next meet in regular session.

2. That presumptively she had no property subject to execution, and

3. That the Court had no authority whatever to enforce a money judgment against a State, although in the exercise of jurisdiction such a judgment had been entered.

<sup>107</sup> 234 U. S. 117, 121.

<sup>108</sup> 238 U. S. 202.

<sup>109</sup> 241 U. S. 531.



The Court said:

"Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time. The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the Legislature of the State of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment."<sup>110</sup>

The day for the biennial convening of the West Virginia Legislature was January 10, 1917. So, instead of renewing her prayer for a writ of execution, Virginia moved for leave to file a petition for a writ of mandamus, commanding the West Virginia Legislature to levy a tax wherewith to liquidate the decree, and the motion was granted February 5, 1917.

That motion was made only after the legislature, though it had been in session for some considerable time and was approaching its time for adjournment, had done nothing in the way of providing for the liquidation of the indebtedness. None of the recommendations of the Governor to the legislature, looked to the payment of the debt.

A resolution by the Senate of West Virginia, in which the House of Delegates concurred, was enacted on the twenty-first day of February, 1917, in these words:

"First. — That the Attorney General of the State, with the assistance of special counsel retained by the New Virginia Debt Commission for the purpose, be authorized and directed to appear to and make appropriate defense against said rule for and on behalf of the State of West Virginia, the Legislature thereof, and the several senators and delegates constituting the membership of its respective bodies.

"Second. — That in the event the Legislature should not be in session at the time of the rendition of the Court's judgment upon the mandamus, the Governor is requested, whether that judgment be for or against the State of West Virginia, to convene the Legislature in special session as soon as may be, for the purpose of doing without delay what should be done in the premises."

In the answer on behalf of the Legislature of West Virginia was embodied a motion to quash the rule which had been awarded against the defendants herein to show cause why a writ of man-

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<sup>110</sup> 241 U. S. 532.

damus should not be issued. This motion rests upon an assertion in effect that (1) the Court has no power to compel the legislature to levy a tax for the purpose of liquidating said decree; that (2) the Court has no power to enforce the judgment by it rendered; and that (3) the issuance of a writ of mandamus would be contrary to the principles and usages of law.

No fact was averred in the motion which had not been the subject of consideration by the Court antecedently to its entry of its final decree, excepting an averment that on the first of March, 1784, a deed to Congress, ceding all the territory of Virginia northward of the Ohio River in the United States, had been delivered upon the following conditions:

"That all the lands within the territory so ceded to the United States, and not reserved for, or appropriated to, any of the before-mentioned purposes, or disposed of in bounties to the officers and soldiers of the American Army, shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditures, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

It was not averred that any claim of this nature had been presented to the State of Virginia antecedently to the entry of the final decree, nor that any money on account thereof had ever been received, or would be received by the State of Virginia; but it was asserted that "Congress seems to have donated many of these lands and much of the proceeds thereof to purely local purposes not contemplated by the deed of cession, but actually contrary to its terms;" and that a large sum was due and payable from the Government of the United States to the State of Virginia "in which West Virginia should share in the same ratio that she is compelled to contribute to the payment of Virginia's debt, that is to say, she should receive  $23\frac{1}{2}$  per cent thereof." The claim is stated to be "based upon information and belief," and whether or not it amounts to more than another dilatory plea on the part of West Virginia, is entirely apart from the subject here under consideration, and therefore will not be analyzed.

In view of the answer of West Virginia, which stated that it



had no property subject to execution, and of its claim that the Court cannot bring about a payment of its decree by the issuance of writ of mandamus or of any other process, the record as it now stands, awaiting the decision of the Supreme Court, presents this question:

"If, as the result of a controversy between two States, a decree is entered by the Supreme Court against one, in favor of the other, is the Court unable, despite the pecuniary ability of the debtor, to compel payment?"

From the study which we have just made of the Federal Judicial Power under the Constitution and the decisions of the Supreme Court construing this power, there can be no doubt as to how this question must be answered. It must be answered in the negative. The Court has proceeded thus far because judicial power so to do has been expressly vested in it by the Constitution. It was necessary for it to enter its decree in favor of the plaintiff or of the defendant State. The decree which was entered was in performance by the Court of a duty imposed upon it. The matter of compelling a State to do its duty is a judicial one. As such it was expressly conferred upon the Court. The duty of the State of West Virginia is to liquidate the decree. It can do this by the exercise, through its Legislature, of its power to levy a tax, or to create a bonded indebtedness. The exercise of this power, so far as regards the Court and its decree, is a duty, and it is fundamental to distinguish between a discretion to do or not to do a particular act, with no compulsion to do one thing or the other, and a discretion to do one of two things, with a duty to select. The remedy by which the duty can be compelled to be performed is an ordinary judicial remedy. The sum and substance of West Virginia's attempts to refute this fundamental principle of the law is that the same final writs lie against States that lie against individuals, and they may fail of their object in the one case as well as in the other, but in each the limit of judicial power is the same. West Virginia asserts that the soundness of this contention is borne out by the fact that no decision has done more than effectuate — not invade or coerce — the legislative will.

"Parliamentary duties," she declares, "have never been interfered with by the judicial department of the government of any English

speaking people; and, although our dual government presents a peculiar situation, yet we are a people with a written Constitution, and the duality of that government has been hedged about by express provisions. A State that seeks a judgment against another and the enforcement thereof must not only keep within the terms of the Constitution, but must keep as well within the theory of our government, and any writ that destroys the integrity of the States is just as much *anathema* as any failure of the writ would be the other way. The whole world is in a state of ferment, and the only people therein who have any hope at all are those who have a written Constitution, lived up to. Implications are not well understood by common folks, and the stretch of the letter by implication, to the end that delegated power may swell its bounds beyond the rights reserved, would, we fear, be not only violative of the letter, but destructive of the spirit, and disastrous in the end."<sup>111</sup>

There is, of course, in a sense, a distinction between enforcing a decree against a State for the payment of money, and one for the performance of an act of such other nature, the coercion of which might be said to attain the sovereignty of the State. But even this distinction is political, not legal, and in spite of all that has been said to the contrary on behalf of West Virginia, there is no judicial precedent except the Dennison Case, which controverts the supreme power of our highest Court to *enforce* obedience to its order in the present situation. As has been demonstrated, Chief Justice Taney's reasoning in the Dennison Case is also political, not legal, and therefore it is believed that should the Supreme Court allow it to control in the Virginia-West Virginia controversy, if West Virginia persists longer in her resistance, such admission of impotence would be not merely unreasonable and unfortunate from a practical point of view, but unwarranted under the Constitution. The cloak of judicial immunity would be cast upon a State's repudiation of its debts.

*William C. Coleman.*

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<sup>111</sup> Reply Brief of West Virginia, March 23, 1917, 6-7.



## MONOPOLIZING AT COMMON LAW AND UNDER SECTION TWO OF THE SHERMAN ACT

SECTION two of the Sherman Act, the section dealing with monopolizing and attempts to monopolize, has had an unfortunate history. Although in terms it applies to individual offenses, and to *any part* of the commerce among the States, in practice it is seldom used as the basis of action except in connection with a general charge of combination or conspiracy, or in cases where a relatively large proportion of, or widely ramified commerce among the States is involved. This situation is unfortunate in two respects: In the first place it restrains the Government from proceeding against evils as such where they may be found to exist, and in the second place it furnishes a constant temptation to resolve into conspiracies, subject to punishment or dissolution, combinations or associations which in some respects at least may be performing a distinct service. It is the object of this paper to explain how this situation has arisen and to show that the difficulty results from a too narrow construction of the section rather than as a necessary consequence from its language; and it will be helpful to direct attention at the outset to certain peculiarities in the structure of the act.

Let it be observed that section one deals with every contract, combination, etc., in restraint of trade or commerce among the several States or with foreign nations, and that the precise language of section two is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section three extends the provisions of section one to the territories and the District of Columbia, but makes no reference to

the provisions of section two. Again, section six subjects to condemnation property which is subject to section one, and in course of transportation, but like section three makes no reference to the provisions of section two or to property held thereunder.

While these apparent discrepancies, resulting from the failure in any part of the act to prohibit monopolization or attempts to monopolize in the territories and the District of Columbia, and the failure to provide for the seizure of property which has been monopolized not only in the territories and the District of Columbia, but also among the states and with foreign nations, have not entirely escaped remark, no definite attempt, so far as the writer is aware, has ever been made to explain them. An interpretation of section two to be acceptable must meet this difficulty, and its soundness may be judged by the degree in which it does so.

*Section Two was Designed to Incorporate the Provisions of the Common Law Protecting the Freedom of Trade into the Law of the United States*

"The great thing that this bill does," declared Senator Hoar in discussing this provision in the Senate, "except affording a remedy, is to extend the common law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."

The occasion for this remark appears from the following extract from the record:<sup>1</sup>

"MR. GRAY. Before the Senator from West Virginia arose I had the bill before me and was about to offer an amendment which was directed precisely to the point he has raised, and I shall offer that amendment now. It is to strike out of section 2, in lines 1 and 2, the words 'monopolize, or attempt to monopolize or,' so that the section shall read:

"Every person who shall combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, . . . ."

"We will avoid by that amendment the objection which I think the Senator from West Virginia has very pertinently raised. I do not know what definition the courts of the United States have ever given to the word 'monopoly' or 'monopolize.' It is true that, because I

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<sup>1</sup> CONG. RECORD, vol. 21, 3152.



do not know it, it does not follow that they may not have defined those terms; but we avoid the danger by this amendment of incorporating in the bill words that are not susceptible of exact legal interpretation, and we confine the provisions of this bill to an inhibition of the combination or conspiracy to monopolize, which we all agree should be the object of its denunciation.

"MR. HOAR. I put in the committee, if I may be permitted to say so (I suppose there is no impropriety in it), the precise question which has been put by the Senator from West Virginia, and I had that precise difficulty in the first place with this bill, but I was answered, and I think all the other members of the committee agreed in the answer, that 'monopoly' is a technical term known to the common law, and that it signifies — I do not mean to say that they stated what the signification was, but I became satisfied that they were right and that the word 'monopoly' is a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.

"Of course a monopoly granted by the king was a direct inhibition of all other persons to engage in that business or calling or to acquire that particular article, except the man who had a monopoly granted him by the sovereign power. I suppose, therefore, that the courts of the United States would say in the case put by the Senator from West Virginia that a man who merely by superior skill and intelligence, a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.

"MR. KENNA. If the Senator will permit me, I should like to ask him whether a monopoly such as he defines is prohibited at common law. I ask the Senator from Massachusetts whether a monopoly coming within the definition which he gives is prohibited at common law.

"MR. HOAR. I so understand it.

"MR. KENNA. Then why should this bill proceed to denounce that very monopoly?

"MR. HOAR. Because there is not any common law of the United States.

"MR. KENNA. There is a common law in nearly every State in the Union.

"MR. HOAR. I know. The common law in the States of the Union of course extends over citizens and subjects over which the State itself

has jurisdiction. Now we are dealing with an offense against interstate or international commerce, which the State cannot regulate by penal enactment, and we find the United States without any common law. The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.

"MR. EDMUNDS. I have only to say, in regard to the amendment suggested by my friend from Delaware and the suggestions of the Senator from West Virginia, that this subject was not lightly considered in the committee, and that we studied it with whatever little ability we had, and the best answer I can make to both my friends is to read from Webster's Dictionary the definition of the verb 'to monopolize.'

"'1. To purchase or obtain possession of the whole of, as a commodity or goods in market, with the view to appropriate or control the exclusive sale of; as, to monopolize sugar or tea.'

"Like the sugar trust. One man, if he had capital enough, could do it just as well as two.

"'2. To engross or obtain by any means the exclusive right of, especially the right of trading to any place, or with any country or district; as, to monopolize the India or Levant trade.'

"The old definition. So I assure my friends that although we may be mistaken (we do not pretend to know all the law) we were not blind to the very suggestions which have been made, and we thought we had done the right thing in providing, in the very phrase we did, that if one person alone instead of two, by a combination, if one person alone, as we have heard about the wheat market in Chicago, for instance, did it, it was just as offensive and injurious to the public interest as if two had combined to do it."

In a later discussion in the House,<sup>2</sup> Mr. Culberson explained the section as follows:

"It is provided by the bill that any person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. This is a very important and far-reaching provision. I will read to the House what appears to be Webster's definition of a monopoly:

"'To engross, to obtain by any means exclusive right of trade to any place or within any country or district, as to monopolize the trade.'

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<sup>2</sup> CONG. RECORD, vol. 21, 4090.



"That is the definition as given by Webster. Every person, therefore, who shall attempt to monopolize, to engross, or to obtain by any means exclusive control of interstate trade to any place, or within any country or district, will be guilty of a misdemeanor under the provisions of the bill. I need only say that there are many cases within our observation in which combinations have succeeded in monopolizing, in part at least, trade between localities in different States. It is to be hoped that if this measure becomes a law an end may be put to such practices and the people relieved of extortion which the destruction of competition always produces."

In the light of the remark of Senator Hoar and the surrounding discussion, as set forth above, it will readily be seen that the discrepancies noted in the structure of the Act are apparent rather than real when it is once perceived that the purpose of the section was not to create new crimes, not to announce new doctrines, but simply to give the old doctrines as wide an application as was possible and consistent with the limited jurisdiction of the United States.

It is well known that as a general rule the common law has been expressly adopted as the rule of decision in the courts of the territories of the United States, except in so far as it is inapplicable or inconsistent with Acts of Congress, or of the territorial legislature.<sup>3</sup> The provisions of one of the fundamental laws of the Territory of Arizona is probably typical of similar laws in the other territories; declaring that

"The common law of England so far as it is consistent with and adapted to the natural and physical condition of this Territory and the necessities thereof, and not repugnant to, or inconsistent with, the Constitution of the United States, or bill of rights, or laws of this Territory, or established customs of the people of this Territory, is hereby adopted and shall be the rule of decision in all the courts of the Territory."<sup>4</sup>

Similar remarks apply to the District of Columbia. The common law and early English statutes, which were adopted by the Constitution of Maryland, are in force in the District of Columbia, except in so far as they have been expressly or impliedly abrogated by Act of Congress.<sup>5</sup>

<sup>3</sup> *Pyeatt v. Powell*, 51 Fed. 551; *Browning v. Browning*, 3 N. M. 659; *First National Bank v. Kinner*, 1 Utah 100.

<sup>4</sup> Act 68, Laws of Territory; *Luhrs v. Hancock*, 181 U. S. 567, 570.

<sup>5</sup> *Kendall v. United States*, 12 Pet. 524, 614.

The territories and the District of Columbia, therefore, were already subject to the common law. Every person who monopolized or attempted to monopolize trade or commerce in those jurisdictions was, in the conception of the framers of the Sherman Act, already subject to punishment under the ancient principles.

The situation with reference to the provisions of section one was different. Congress was under the impression that by that section it was making illegal certain contracts, etc., which theretofore had not been considered illegal under the common law. Consequently, if such contracts, etc., were to be made illegal in the territories, and in the District of Columbia, it was necessary expressly so to provide.

This purpose the act as framed was adapted to achieve. Sections one and two apply to that commerce which is within the scope of the commerce clause of the Constitution, and section three to that commerce over which the Federal Government has jurisdiction by virtue of its sovereignty.

*The Freedom of Trade at Common Law was Protected by the Provisions against Engrossing, Forestalling, and Regrating*

"Trade and commerce have ever been deemed by legislators, objects of the highest importance, those branches thereof especially, which concern articles necessary for the sustenance of man. Attempts to interrupt or impede commerce of this kind, have in all ages and in all nations, by common consent, been resisted and guarded against."<sup>6</sup>

A brief sketch of the nature and history of the law against engrossing, forestalling and regrating must make it evident that these were the provisions above all others which "protected fair competition in trade in old times in England." Much confusion has surrounded the use of these terms from the failure to perceive that they do not describe separate offenses, but merely different phases of one offence, *i. e.*, violation of the freedom of trade, while engrossing is the term that has survived in modern usage and that was employed by Congress.

Forestalling is the term that has the longest history, having done service for a considerable period to designate what was later described by the three words together.

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<sup>6</sup> ILLINGWORTH, AN INQUIRY INTO THE LAWS, ANTIENT AND MODERN, RESPECTING FORESTALLING, REGRATING, AND INGROSSING (London, 1800), 1.



"In ancient time," says Coke, "both an ingrosser and regrator were comprehended under forestaller."<sup>7</sup>

This broad use of the word is well illustrated by the Lombard's case, printed below,<sup>8</sup> "whereby it appeareth, that the attempt by words to inhaunce the price of merchandise was punishable at law and did sound in forestalment,"<sup>9</sup> and by the proceedings of the Leet in the ancient town of Norwich in the thirteenth and fourteenth centuries where John Janne is amerced

"because he forbars the men of the city from the purchase of tallow, whereby the market is diminished;" Ranulph, the fish-monger, "because he went outside the town by Carrow to meet a boat full of fish and there he bought it contrary to the proclamation against the heighening<sup>10</sup> of the market of Norwich;" John de Gaywood, taverner, because he "fore-stalled so many eggs in the market that he filled 28 barrels at divers times and sent them out of the kingdom to foreign parts, and likewise forestalled butter and cheese to a large amount, whereby there accrued great dearness of victuals in the city and that for four years;" and Roger Calf because he was "wont to buy oysters by forestalment in divers boats, so that when one boat is at the Staith for the sale of (oysters) another boat or two shall be at Thorpe until the first boat is emptied and sold, and then the rest of the boats come up for sale; and whereas the common people<sup>11</sup> (were wont) to have 100 oysters for 1½d. Roger sells them for 2d. or 3d. (elsewhere)."<sup>12</sup>

In the earliest statute on the subject, forestalling only is mentioned:

<sup>7</sup> 3 INST. 195, 196.

<sup>8</sup> LIB. ASSIS. 276, pl. 38 (1368); BEALE, CASES ON CRIMINAL LAW, 3 ed., 1079. A Lombard was indicted in London for concealing the customs of our Lord the King, and for divers other things; and presentment was also made against him, that he had procured and promoted the enhancing of the price of merchandise. And judgment for him was prayed because this was not forestalling, nor could it sound in forestalling; and since it did not appear from the presentment that any wrong was actually done, he should not be held to answer. And *non allocatur*; for KNIVET said, that certain persons (whom he named) came into the neighborhood of Coteswold, and in deceit of the people said that no wool could cross the sea in the next year, there were so many wars in those parts; by which they depressed the price of wool. And they were brought before the King's Council, and could not deny it; wherefore they were put to fine and ransom before the King. And so in this case. Wherefore he pleaded not guilty, &c.

<sup>9</sup> COKE, 3 INST. 196.

<sup>10</sup> A local word, pronounced "haining," and meaning "raising the price."

<sup>11</sup> The original word is *communitas*, better translated, "the public."

<sup>12</sup> LEET JURISDICTION IN NORWICH (Selden Society), 30, 47, 63, 65.

"But especially be it commanded on Behalf of our Lord the King, that no Forestaller be suffered to dwell in any Town, which is an open Oppressor of poor People, and of all the Commonalty and an Enemy of the whole Shire and Country, which for Greediness of his private Gain doth prevent others in buying Grain, Fish, Herring, or other Things to be sold coming by Land or Water, oppressing the Poor, and deceiving the Rich, which carrieth away such things, intending to sell them more dear; (2) the which come to Merchants Strangers that bring Merchandise, offering them to buy, and informing them that their goods might be dearer sold than they intended to sell, and an whole Town or a Country is deceived by such Craft and Subtely; (3) He that is convict thereof, the first Time shall be amerced, and shall lose the Thing so bought, and that according to the Custom and Ordinance of the Town; (4) he that is convict the second Time shall have Judgement of the Pillory; (5) at the third Time he shall be imprisoned and make Fine; (6) the fourth Time he shall abjure the town. And this Judgement shall be given upon all Manner of Fore-stallers, and likewise upon them that have given them Counsel, Help or Favour." <sup>13</sup>

The ancient ordinances and by-laws of London, as recorded in the *Liber Albus*, many of which ante-date *Magna Carta*, contain numerous provisions in condemnation of forestalling, but engrossing, as such, is not mentioned.

The modern learning concerning regrating, forestalling and engrossing dates from a much later period — the enactment of 5 and 6 Edw. VI, c. 14 (1552), repealed in 1772 by 12 Geo. III, c. 71. The statute bears internal evidence of a growing confusion as to the nature of the crime of forestalling, a confusion probably due to the changing economic structure following the discovery of America, and the absence of an enlightened analysis and statement of legal principles. It begins with a recital that:

"Albeit divers good statutes heretofore have been made against forestallers of merchandises and victuals yet for that good laws and statutes against regrators and ingrossers of the same things, have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what person should be taken for a forestaller, regrator, or ingrosser, the said statutes have not taken good effect, according to the minds of the makers thereof; Therefore be it enacted, etc. . . ."

<sup>13</sup> As printed in 1 STAT. AT LARGE (Ruffhead ed.), 188, chap. 10. Referred to period HEN. III (1216)–EDW. II (1307), but probably a mere codification of long practice.



The statute then continued at great length in an attempt to define the particular circumstances under which forestalling, regrating, and engrossing should constitute offenses. The frame of the act was unscientific, and there were provisions and exceptions without number. The wonder is not that the law was eventually repealed, but that it remained on the statute books and was enforced for more than two hundred years.

Very few writers have gone back of this statute in their study of engrossing, forestalling, and regrating, and because of the repealing Act it is assumed by many that these terms have no significance or application under modern conditions. They are assumed to refer to buying at wholesale and selling at retail, or to the commonplace operations of middlemen. The following summary probably represents the view which is currently accepted:

"The Three Offences. — The three offences of regrating, forestalling and engrossing attempt to cover broadly:

"1. The purchase by middlemen of certain necessities of life on their way to market.

"2. The purchase by middlemen of certain necessities of life which have already arrived in market, and the selling of the same again in the same market or within four miles thereof.

"3. The buying or contracting for by middlemen of certain necessities of life while in the hands of the producers with the intent to sell the same again.

"In short, the statute makes it a criminal offence for any person to either buy or contract for certain necessities of life while the same are in the hands of the producers with the intent to sell the same again, or while said necessities of life are on the way to market, or after they have reached the market."<sup>14</sup>

Blackstone's statement as to the nature of the offenses is of particular interest because of its influence upon American legislation and legal thought, and the fact that it was written about the time that the old statutes were repealed:

"The offence of *forestalling* the market is also an offence against public peace. This, which (as well as the two following) is also an offence at common law (2 Hawk. P. C. 235) is described by statute 5 and 6 Edw. VI, c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from

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<sup>14</sup> EDDY, COMBINATIONS, vol. 1, 48.

bringing their goods or provisions there; or persuading them to enhance the price, when there; any of which practices make the market dearer to the fair trader.

"Regrating is described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

"Engrossing was also described to be the getting into one's possession, or buying up large quantities of corn, or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it into the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law. (Cro. Car. 232.) And the general penalty for these three offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment. (1 Hawk. P. C. 234.) Among the Romans these offences and other malpractices to raise the price of provisions, were punished by a pecuniary mulct. '*Pœna viginti aureorum statuitur adversus eum, qui contraccannonam fecerit, societatemve coierit quo annona carior fiat.*'"<sup>15</sup>

Based upon the data before them, the editors of the records of Norwich, cited above, define the offenses and the less well-known term, "forbarring," as follows:

"Forbarring was stopping goods from entering or from being exposed in, the market, with a view to selling them outside the city, thus diminishing the supply. Forestalling was intercepting goods outside the city in order to sell them at a higher price in the market, thus raising the market price. Regrating was buying in the market to re-sell in smaller quantities. This was permitted under certain conditions."<sup>16</sup>

Useful for the purposes of comparison is the statement of Gras:

"One of the commonest of early offences on the part of those dealing in corn was engrossing. This term has often been defined, but its meaning was never clear because it had no single technical application. It referred to monopolizing the supply of a commodity in any way, whether by forestalling or by regrating. It also had a particular meaning, given it by statute, to get into one's hands, 'any Corne growinge in the feildes.' This seems to have been the nearest approach to a technical definition.

<sup>15</sup> COMMENTARIES, Book 2, chap. 12.

<sup>16</sup> *Supra*, note 12.



Finally, to engross was to deal in many kinds of commodities instead of only one.

"To forestall was to go out beyond the borough or market town to buy goods coming to market. This was prohibited in the Anglo-Saxon period, and, indeed, seems to have been the earliest form of market monopolizing, or engrossing in the general sense, that was put under the ban of the law. The corn trade, however, is not specified in this early law which was perfectly general in application. But in thirteenth century laws the forestalling of corn is specifically mentioned. The objection to forestalling was that it undermined the public and open market and tended to raise prices, and also that it resulted in a loss of local revenue when the forestaller was a burgess and the seller of the goods a stranger, for while the latter was subject to town tolls, the former was not.

"Akin to forestalling, and at times confused with it, was regrating. This was the purchase of goods for sale in the same or a nearby market. It was prohibited locally from at least the thirteenth century onward.

"For centuries such attempts to monopolize the local market were met by local regulations and national legislation, which continued down to modern times."<sup>17</sup>

The foregoing attempts at definition show the difficulty of drawing any hard and fast line between the three terms, and the reason is self-evident. The words are in reality different terms for the same offense looked at from different angles. The essence of the offence consisted in the deliberate manipulation of prices and markets by practices outside the due course of trade, and whether engrossing, forestalling, and regrating constituted an offence could only be determined from a consideration of all the surrounding circumstances.

Forestalling could be accomplished by engrossing and regrating, regrating by forestalling and engrossing, and engrossing by forestalling and regrating. The words, or at least two of them, were used together more frequently than otherwise in describing an offence.<sup>18</sup> Engrossing directed attention to the quantity, forestalling to the diversion or interruption of goods in the course of transit to the market, and regrating to buying to sell again in the

<sup>17</sup> EVOLUTION OF THE ENGLISH CORN MARKET (Harv. Univ. Press, 1915), 130.

<sup>18</sup> SELECT PLEAS IN THE STAR CHAMBER (Selden Society), vol. 2, 218, note: "'In-grossing and regrating' which are always coupled together, appear to describe two steps of what was substantially the same transaction. The ingrosser bought goods wholesale with a view to regrating, that is, selling them again wholesale, 'Regrator denotes him that buys or sells anywhere the victuals in the same market or fair.'"

same market — conduct which was unprofessional and unfair when the purpose of the market was taken into account.

Blackstone is evidently right in emphasizing the common feature of enhancement of prices, Gras in laying stress upon monopolizing, and Stephens in describing the three things as one offense. As the latter says:

“Forestalling, ingrossing and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up, so as to be able to command what price he chose when he got to the market. The ingrosser or regrator — for the two words had much the same meaning — was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime.”<sup>19</sup>

*Engrossing, Forestalling and Regrating Constitute Offenses under the Common Law at the Present Time*

The statute of 5 and 6 Edw. VI, says Wharton:

“was brought with them by the English colonists who settled in North America, and though in its details, *e. g.*, in prohibiting purchase by middlemen in the cheapest market and selling in the dearest, it is in conflict with the sound and healthy system of political economy, it is in one point a recognition of common law principle which it is important here specifically to enunciate.

“While one must regard the provisions of the Roman and English statutes against middlemen and commission merchants as obsolete; and while in England the statute of 5 and 6 Edw. VI has been repealed by 12 Geo. III, c. 71, yet, entirely apart from these statutes, we must hold it to be indictable, on general principles of common law, to engross and absorb any particular necessary staple or constituent of life so as to impoverish and distress the mass of the community for the purpose of extorting, by terror or other coercive means, prices greatly above the real value. Questions of this kind have usually come before the courts on indictments for conspiracy; for it is by conspiracies that extortions of this kind are generally wrought. But on an indictment against an individual for buying up all the grain or other necessary staple so as to produce a famine in the market, and thus to obtain grossly extortionate prices, wrung through a sense of misery from the community, the offence may be held indictable at common law. For not merely is the extortion

<sup>19</sup> HISTORY OF THE CRIMINAL LAW OF ENGLAND, chap. 10, 199.



to be taken into account, but the terror as to the future, and the misery at the present, which are thus inflicted on a community at large. But to sustain such a prosecution, the commodity must be a necessity, it must be absorbed by the monopolizer, and the prices must be unjustly extortionate." <sup>20</sup>

Even in England where the repealing statute of 12 Geo. III was operative, the courts continued to punish engrossing, forestalling, and regrating under the common law until the passage of 7 and 8 Vict., c. 24 (1844), whereby prosecutions under the common law were expressly prohibited, but as recently as the Adelaide Steamship Company, Ltd., case <sup>21</sup> the court took occasion to observe that even the Victorian statute did not apply to the Colonies.

The decisions of a number of American state courts, including Rhode Island and Texas, expressly recognize engrossing and regrating as existing offenses, and the Mississippi Antitrust Act refers to combinations, etc. "To engross or forestall a commodity," while forestalling, engrossing, and regrating are in terms still prohibited by the Georgia Code.

*Congress used Language Adapted to Describe the Common-Law Offenses, and Section Two ought to be Construed to Include Them*

The word "monopoly" does not occur in the text of the Sherman Act, and as Chief Justice White noted in the Standard Oil case, <sup>22</sup> it is not "monopoly" but "monopolizing" that is prohibited. There is not now and never was a common-law offense known as "monopoly" apart from all considerations of subject-matter and means employed. The statute of 21 James I, which is often erroneously assumed to have prohibited monopolies was of a political nature and was aimed at abuses of the royal prerogative. The Act itself expressly provides that it shall not be prejudicial to any grant of privilege, power or authority whatsoever theretofore made or confirmed by an act of Parliament, nor was it to be prejudicial to the grants, charters or customs of the City of London or any town: "or unto any corporations, companies or fellowships of any art, trade, occupation or mystery, or to any companies or

<sup>20</sup> CRIMINAL LAW, 11 ed., §§ 2210, 2211.

<sup>21</sup> 1913, A. C. 781.

<sup>22</sup> United States v. Standard Oil Co. of N. J., 221 U. S. 1, 62.

societies of merchants within this realm, erected for the maintenance, enlargement or ordering of any trade or merchandize," nor to the fellowship and guild of Newcastle "for or concerning the selling, carrying, lading, disposing, shipping, vending or trading of or for any sea-coals, stone-coals, or pit-coals, etc. . . ."

Had Congress intended to deal with monopoly in the concrete, the failure to extend the provisions of section two to section six, as above noted, would be wholly inexplicable. On the other hand, if it be assumed that Congress intended to deal with the common-law offenses, the reason for the apparent omission in section six becomes evident. In this view a person to be guilty under section two need not acquire property.

It is the practice or practices of monopolizing that are condemned, and those practices might or might not result in the acquisition of property which could safely be condemned and seized. For example, in the course of monopolizing, a person may acquire property at a fair price and in the regular course of trade, but with the illegal intent to protect the price of property already in the market which he has previously acquired in a legal manner, and likewise for a fair price.

Had Congress wished to extend section six to the property of persons within the scope of section two, it would have had great difficulty in determining or specifying which parcel of property should in a given case be condemned and seized. On the other hand, if section two were construed to mean acquiring a monopoly or attempting to acquire a monopoly, this difficulty would not exist, and the failure to extend the provisions of section two to section six could only be regarded as a mistake and an oversight in draftsmanship.

The word "monopolize" was a suitable term for describing the common-law offenses. The term "engrossing" alone was not satisfactory, for, as has been noted, the circumstances had to be taken into account in determining whether mere forestalling, engrossing and regrating should be held to violate the common law. "Monopolize," on the other hand, indicated the evil as such, not the mere possession of a monopoly, but the commission of those acts of extortion and oppression which brought the monopolists of Elizabeth into disrepute, by the enhancement of prices and the interference with the freedom and due course of trade.



As shown below,<sup>23</sup> this use of the words, "monopolizer," and "monopolizing," as synonymous with the manipulation of prices

<sup>23</sup> MURRAY'S ENGLISH DICTIONARY in its definition of "Monopolizer" gives the following illustration of usage in the year 1651: "Monopolizers, who were called engrossers, forestallers and regrators, and many others who were punishable by imprisonment and the pillory."

In the Appendix to ILLINGWORTH'S STUDY ON FORESTALLING, etc., *supra*, note 6, are to be found numerous petitions addressed to the House of Commons in the second half of the eighteenth century, wherein engrossers, forestallers and regrators are referred to as monopolizers.

In the town of Boston during the Revolutionary period there is the like usage, and we find the phrases, "monopolizing and forestalling," "monopolizers and forestallers," "forestallers, engrossers and monopolizers," etc. The Massachusetts statute referred to by Chief Justice White in the Standard Oil case, wherein as he points out monopoly and forestalling are spoken of as the same thing, is described in these records as the "Monopolizing Act." The report of the committee appointed by the Town of Boston in 1779 to investigate is of peculiar interest in this connection because of its definite statement of fact.

"The Committee of seven appointed, to Enquire into the Conduct of Forestallers Engrossers and Monopolizers, and to ascertain Facts — Reported in part

"That on or about the fourteenth of January last, Matthew Fairservice purchased a quantity of Rum and Sugar at Salem and Marblehead that he gave forty Pounds for the Sugar p. Hundred, and thirteen Dollars p. Gallon for the Rum

"That about the same time John Fairservice purchased a large quantity of Sugar, for which he says he gave £45.- and £47. 10/p hundred, and sold them for £58.-p hundred which gave him an extravagant Profit of £10:10/ and £13.-p hundred; which obliges the Poor Consumer to pay a still Greater price to the Retailer, by means of which engrossing your Committee look upon the Town greatly injured

"That one Sampson Reed a Stranger is suspected of Engrossing and Forestalling the Necessaries of Life — that in a particular Manner he has monopolized a great quantity of Glass, for a Considerable quantity of which he did not give £30.-p Box and sold it for £100.-p Box — that he has had twenty four Boxes of Window Glass in halves, some of which he has sold for ten Shillings a Square, to the great detriment of the Community

"That your Committee are seeking proof against Sundry others and shall be ready to Report at an Adjournment or some future Meeting.'" Boston Town Records (1779), 44.

Malynes in his *LEX MERCATORIA*, published in 1622, draws attention to the relation between "displeasing" monopolies and engrossing, forestalling, and regrating. He says:

"Monopolies are somewhat displeasing, because the property of them is commonly to ingross things to an ill end, increasing the price thereof disorderly, drawing a general benefit to a particular, diverting the course of Traffick. . . .

"The Civilians have made the *Latine* word *Monopolium* borrowed from the Greek, to be less understood, because of their many definitions thereof; which made me to treat of Associations, Monopolies, Ingrossings, and Forestalling, as having affinity one with another, and to describe them in divided manner, as also to note their coherence, as followeth. For an Association, Company, or Society may become a Monopoly in effect; when some few Merchants have the whole managing of a Trade,

by practices outside the due course of trade, and with the old offenses of engrossing, forestalling, and regrating was wide-spread in the seventeenth and eighteenth centuries and represents, it is submitted, the sense in which "monopolize" is employed in the Sherman Act.

In *King v. Waddington*,<sup>24</sup> which was an indictment under the common law, Lord Kenyon, in sustaining a conviction makes no distinction between engrossing, monopolizing, and the raising of prices, as the following extract indicates:

"Again, it is urged that the quantity purchased cannot constitute the offence of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me; but if the opinions of Lord Mansfield, Mr. Justice Dennison, and Mr. Justice Foster are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at Droitwich. They had no doubt of its constituting an offence, although it was not pretended that these persons had endeavoured to engross all or any considerable part of the salt in the Kingdom. Nor was it questioned but that the monopolizing of salt was an offence at common law. If, then, hops are become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the

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to the hurt of a Commonwealth, when other merchants are excluded to negotiate with their stocks to vent the Commodities of the realm with reputation, according to the word *Movos Solus*, and *Πολτο Vendo*, to sell alone. And as this is done many times by one Merchant, for one kind of Commodity, be it Corn, Salt, Oil, Wools, and the like; so may it be done by a Society of Merchants continually, under the colour of Authority. Albeit that there be no combination to limit any certain prices for the sale of Commodities in the particular of one Merchant or more Merchants agreed together to buy up a Commodity, it may be called a Forestalling. As one *Dardanus* did, whereof (as we have said) the name *Dardanarli* was used by the said Civilians, who define them to be *Qui omnia praeumeunt, ut carius vendant*, That Forestall or buy up things, to the end that they should sell them dearer. . . .

"The truest definition of a Monopoly therefore is, A kind of Commerce in Buying, Selling, Changing, or Bartering, Usurped by a few, and sometimes but by one person, and Forestalled from all others, to his or their private gain, and to the hurt and detriment of other men; whereby of course, or by Authority, the Liberty of Trade, is restrained from others, whereby the Monopolist is inabled to set a Price of Commodities at his pleasure."

MALYNES' *LEX MERCATORIA* seems to have been a common possession of business lawyers in the time of Marshall. BEVERIDGE, *LIFE OF MARSHALL*. Vol. I, p. 185, note 2.

<sup>24</sup> 1 East, 143 (1800).



engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law."

If, as the Chief Justice says in the *Standard Oil* case,<sup>25</sup> the words "to monopolize," and "monopolize" as used in section two reach every act, bringing about the prohibited results, and the principal wrong which it was deemed would result from monopoly was the enhancement of prices, then it must follow that this section includes engrossing, forestalling, and regrating at common law, since it was this evil that led to the enactment of the old statutes, and that lay at the root of the common-law offense of engrossing.

"The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense," says the court in *Attorney General of the Commonwealth of Australia v. The Adelaide Steamship Co.*, "was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. III, c. 71. It also lay at the root of the common law offence of engrossing, which according to Hawkins' *Pleas of the Crown*, vol. 11, bk. 1, chap. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, L.JJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent."<sup>26</sup>

Finally, the concluding remarks of the Chief Justice in the *Standard Oil* case in his discussion of monopoly leave little doubt that section two ought to be construed to embrace the common-law offenses. He says:<sup>25</sup>

"But as it was considered, at least so far as the necessities of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offences such as forestalling, regrating and engrossing by which

<sup>25</sup> 221 U. S. 1, 61.

<sup>26</sup> 1913, A. C. 781.

prohibitions were placed upon the power of individuals to deal under such circumstances and conditions, as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. . . .

"As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or approximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize."<sup>27</sup>

*Present Day Application of Section Two in the Light of the  
Common Law*

Since section two applies to individuals and to "any part" of the trade or commerce among the States, and the words "any part" have been held to have both a geographical and a distributive sense, adoption of the views herein advanced would make it possible to greatly extend the usefulness of the Sherman Act, and to apply it to many if not most of the evils as such, quite apart from the question which has so largely engrossed the attention of the courts, namely, whether the wrongs complained of could in some manner be associated with a combination or conspiracy. Especially would this be true if supplemented by closer attention to the relation between business and commerce under modern conditions and to the scope of the commerce clause.<sup>28</sup>

The establishment of conditions under which the forces of supply and demand may freely operate must be one of the chief reasons for the existence of the Sherman Act, and it would be strange indeed if, after these conditions were produced, their

<sup>27</sup> 221 U. S. 1, 52, 53.

<sup>28</sup> See the writer's NOTES ON THE FEDERAL POWER TO REGULATE COMMODITY PRICES UNDER THE COMMERCE CLAUSE, 55 CONG. RECORD, 4008 (June 16, 1917).



continued existence were not guaranteed by any of the prohibitions of the statute. The case would be analogous to the contradictory state of the law illustrated by the failure of the courts to recognize and enforce the common-law duty of service as against ordinary businesses until a condition has grown up requiring prosecution under the Sherman Act, in contrast with the uniform reliance placed upon refusal to serve to sustain such prosecution and upon the enforcement of service as a fundamental form of relief. In both cases the simple enforcement of the common law from day to day would in most cases remedy the evils at their inception and the "problem of the Trusts" could never arise or having arisen would be no longer formidable.<sup>29</sup>

The public injury resulting from regrating, forestalling and engrossing is as great today as at any time of history, and it is a great mistake to suppose because the marketing and distributing system has become more complex, and because under modern conditions certain persons now render a real service to the community who in former times rendered none, that therefore every sort of trade practice is to be tolerated, regardless of whether it is or is not in the due course of trade, and of service or detriment to the community, as the case may be. For many centuries and not improbably for several thousand years, the *Ta Tsing Leu Lee*<sup>30</sup> or Penal Code of China—a code which has been described as the most comprehensive, uniform, and suited to the genius of the people for whom it is designed, perhaps of any that ever existed—has dealt with these problems in the manner indicated by the following excerpts:

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<sup>29</sup> See the writer's "Business Jurisprudence," 38 HARV. L. REV. 135, and "Labor, Capital and Business at Common Law," 39 HARV. L. REV. 241.

<sup>30</sup> Translated, though not completely, by Staunton London (1810), and as to the chapter relating to Markets by A. Lind, Jr. (Leiden, 1887). As its name indicates the *Ta Tsing Leu Lee* was the code of the Manchu dynasty (whose accession took place in 1644). According to Lind this code was for the greatest part taken from the code of the preceding dynasty, that of the Ming, who, in their turn borrowed it from their predecessors, and so on through many dynasties till we reach the Tsin dynasty (third century before Christ), when the first regular code of penal laws is reported to have been compiled. More ancient codes are still mentioned in the books of history, like in that of the Han, translated partly by Andreozzi, from which we learn that already the Hia-dynasty (B. C. 2205) had promulgated a penal code.

The Annamese of French Indo-China adopted the Chinese code almost verbatim and have added numerous commentaries. This has been translated into French by Philastre in a monumental work of two volumes (new ed., Paris, 1876).

*"Monopolizers and Unfair Traders."*<sup>31</sup> When the parties to the purchase and sale of goods do not amicably agree respecting the terms, if one of them, monopolizing, or otherwise using undue influence in the market, obliges the other to allow him an exorbitant profit; or if artful speculators in trade, by entering into a private understanding with the commercial agent, and by employing other unwarrantable contrivances, raise the price of their own goods, although of low value, and depress the prices of those of others, although of high value,<sup>32</sup> in all such cases the offending parties shall be severally punished with 80 blows each for their misconduct.

"When a trader, observing the nature of the commercial business carrying on by his neighbour, contrives to suit or manage the disposal or appreciation of his own goods in such a manner, as to derange and excite distrust against, the proceedings of the other, and thereby draws unfairly a greater proportion of profit to himself than usual, he shall be punished with 40 blows.

"The exorbitant profit derived from any one of the foregoing unlawful practices, shall, as far as it exceeds a fair proportion, be esteemed a theft, and the offender punished accordingly, whenever the amount renders the punishment provided by the law against theft more severe than that hereby established and provided. The offender shall not however be branded as in other cases of theft."

*"Extortion of Loans and Unfair Sales."* When any superintending officers of government, or any other persons in official situations, avail themselves of the influence of their authority, or any private individuals, of their personal strength and resources and by means thereof extort loans of the goods or money of the inhabitants of their districts, they shall be punished proportionately to the estimated value of the goods or money borrowed, according to the law against bribery to do an act which is in itself lawful; but when actual force and violence is used, the offenders shall be punished proportionately to the amount according to the law against bribery for unlawful purposes. In each case, the punishment of persons without salaries shall be less by one degree. The articles borrowed shall be restored without reserve or delay to the owners.

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<sup>31</sup> The literal meaning of this title, translated by Lind as "Monopolizing" of the Market, is according to that author, "To put a constraint-upon" the Market. Philastre translates it, "Des Manoeuvres ou Pressions dans des Actes de Commerce."

<sup>32</sup> Compare section 198 of the constitution of Kentucky requiring the legislature to enact laws to prevent trusts, etc., from combining "to depreciate" below its "real value," any article, or "to enhance" the cost of any article above its "real value." Dealing with this provision and statutes passed thereunder in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223 (1914) and *Collins v. Kentucky*, 234 U. S. 634, 638 (1914), the Supreme Court declared that the "elements necessary to determine



"When persons in authority as aforesaid lend their own money or goods to the inhabitants of their districts upon exorbitant interest, or buy or sell goods upon an unfair valuation, the unlawful advantage accruing from such transactions, whether by excessive interest, or buying at a lower rate, and selling at an higher rate, than the market allows,<sup>33</sup> shall be estimated, and the offender punished as in the cases of bribery for a lawful object; but if the influence exerted amounted to compulsion, the punishment shall be rated as in cases of bribery for unlawful objects.<sup>34</sup>

"The articles lent or sold by the offenders shall be forfeited to government, and the articles borrowed or bought by them shall be restored to the owners."

"... No shopkeeper is allowed to have in store more than 160 picols of rice, wheat or any other species of grain. He who keeps more than that quantity, with a view to raise prices, shall be tried according to the law against 'Infringing the edicts.'

"When a person sells and exports grain, but does not keep it in store with a view to raise prices, the number of picols is not to be taken into account, but he will be at liberty to suit himself, heedless of the 160 picols stipulated in this clause. Whoever buys inferior rice or black-beans from whatever store, is not subject to this clause."

Correct appreciation of the problems associated with business in occidental civilization has been slow, but the time for their solution

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the imaginary ideal (real value) are uncertain both in nature and degree of effect to the acutest commercial mind," and that the term "real value" expressed "no standard of conduct that it was possible to know."

<sup>33</sup> Cf. note 32, *supra*.

<sup>34</sup> Dealing with the corresponding section in the Code of Annam on the question whether private individuals fall within its terms, the official commentary to that section as translated by Philastre explains that:

"Ce paragraphe et les quatre paragraphes suivants parlent tous des personnes du peuple, placées dans le ressort de l'autorité, ou de ce qui a lieu dans le ressort où s'exerce l'autorité des coupables, cela désigne donc réellement les fonctionnaires et employés chargés du service de surveillance ou de direction, et les personnes influentes et puissantes sont encore comprises parmi eux, parce que ces paragraphes sont la continuation du premier paragraphe qui les mentionne avec les fonctionnaires et les employés. Si tous prennent leur propres denrées ou marchandises et les écoulent en les vendant au peuple dans le ressort de leur autorité ou de leur influence, faisant valoir comme précieux et rare ce qui est vil et commun et en exigeant un prix trop élevé; ou bien s'ils avilissent les prix pour acheter des objets, ne donnant pour ce qui est précieux que la valeur de ce qui est commun et s'attribuant un bénéfice trop considérable, par ces deux sortes de moyens, ils prélèvent un bénéfice trop élevé sur les prix; on retranche le prix convenable des marchandises écoulées ou achetées et l'augmentation de prix, ou la quotité du déficit que n'a pas été payé, est appelé excédent de bénéfice. . . ."

is at hand, and because of its traditions, its opportunities for observation and study, and the vast legal machinery ready to answer to its will, a grave responsibility rests upon the American bar if, as we must believe, these problems are to be solved by law. In accepting this responsibility we cannot afford to disregard those time tried principles that protected "fair competition in old times in England," the need for the reassertion of which became so evident at the time of the passage of the Sherman Act. Once the analogies are perceived the old principles imbedded in the common law will be found to be as applicable to the conditions of the present as they were to those that have passed.

When one views the subject in this way any doubt as to the soundness of the views of the court in the case of *King v. Waddington*,<sup>35</sup> seems impossible.

"Here is a person going into the market," said Lord Kenyon, C. J., "who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity; to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude? . . . Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price . . . I am perfectly satisfied that the common law remains in force with respect to offences of this nature. . . ."

"The freedom of trade, like the liberty of the press," declared Grose, J., in passing sentence, "is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this court should do anything that should interfere with the legal freedom of trade. In support of it the law was declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities in their way to market, taking them from the owner by

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<sup>35</sup> 1 East, 157.



force, or, which is the same thing, obliging him to accept a less price than he demands, and carrying them away against his will, or committing the like violation upon him in the market, is a capital offence, for which men have forfeited their lives to the law; for the law so far protects the freedom of trade as to encourage men to bring their goods to market, by punishing those who by acts of violence deter others from so doing. But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offence against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessities of life, for the purpose of enriching an individual. The freedom of trade has its legal limits. . . ."

Replying to certain contentions of the defendant he answered:

"That the offence of which the defendant has been convicted is a direct violation of the rules of just and honourable trade, which encourages every one to bring his goods to market and dispose of them to the best bidder. That the defendant has been guilty of using the undue means stated in the information for the purpose of obtaining an excessive and exorbitant price, higher than any that was demanded at the market, which he attended, for the commodity in which he dealt; by which means a temporary fictitious scarcity was likely to be produced, and the price of the commodity unnecessarily and unreasonably raised upon the public.

"And in truth it must have occurred to any person considering the effect of the statute, 12 Geo. III, how improbable if not impossible it was that the legislature of a great and populous kingdom, ever anxious to provide for the most necessitous objects in it, should have intended by this statute to have taken from the lower and middling classes of men that security against the unnecessary high price of provisions, which the common law intended to give them; and not only to open a door, but throw out a temptation to rich men to speculate upon the price of the necessities of life at the risk and expense of the poor."

That conditions have changed need not be disputed, but it should not be forgotten that that fact has a two-fold application. Upon the one hand it makes permissible certain practices, which in earlier times would have been detrimental to the public interest. On the other hand it renders detrimental to the public interest other practices which in earlier times would have been wholly unrelated to the public interest. For example, the need of storage,

transportation, and complex marketing facilities under modern conditions cannot be denied. Yet it must be recognized that the trader under modern conditions may have great advantages over the people with whom and for whom he trades, in the way of access to information and contact with marketing machinery — not because of his superior intelligence and greater exertion, but largely because of the function which it has fallen to his lot to perform. He occupies, in a sense, the position of a trustee, and may well be held to be under a greater and higher duty than if his activities bore a different relation to the public interest.

The argument of Solicitor General Lehmann in his brief in the Patten case<sup>36</sup> is of interest in this connection and gains added force when we understand that the common law has not been repealed, and that section two of the Sherman Act was designed to give expression to a fundamental principle of business jurisprudence, and one long familiar to our inherited legal system.

"These statutes were repealed," he argued, "and the common law upon the subject abrogated, not because what was then apprehended as evil was now approved as good, but because it had come to be seen that the evil apprehended did not result from the acts condemned. The middleman whose intervention as to certain commodities had been prohibited as entirely mischievous, it was found, had a useful function to perform which facilitated rather than restrained trade. With improved means of communication and transportation this was undoubtedly true. The middleman secured his place in commerce as a result of the specialization of functions which marked the development of modern industry and trade.

"The thing apprehended as an evil by the ancient statutes and the common law — that is, the arbitrary enhancement of prices — has never ceased to be regarded as an evil and as a restraint of trade. A commodity price abnormally high, too high in its relation to the value of human effort, is in itself a restraint of trade. As the price goes upward fewer people can afford to buy, and trade in the commodity languishes. The law contemplates a free course of trade as the means of securing prices which shall bear a proper relation to each other and of conducing to a prosperous business in every branch of commerce. Give sanction and efficiency to corners in cotton, and in more than one household an old dress will be patched where otherwise a new one would be bought. . . .

"The corner of a commodity does what it was feared forestalling, re-

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<sup>36</sup> United States v. Patten, 226 U. S. 525.



grating, and engrossing would do. Indeed it employs forestalling, regrating, and engrossing and carries them to the extent of monopolizing the commodity. It is therefore a restraint of trade and not mere gambling and so the authorities hold."

*Edward A. Adler.*

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SOME PROBLEMS IN SPECIFIC PERFORMANCE<sup>1</sup>

## I. IS THERE A POSITIVE RULE OF MUTUALITY?

WHERE a buyer asks specific performance of a contract to sell land or unique chattels it is usually quite easy to see that damages are not an adequate remedy. But suppose it is the seller who asks for specific performance — *i. e.*, asks that the buyer be compelled to pay the full purchase price and take the property — cannot the buyer properly insist that damages at law will be adequate? May he not plausibly argue that although there is no exact duplicate of the property there are other persons to whom the vendor may sell? The answer to this is that in perhaps the large majority of cases damages would not be adequate because there being no open market for such property it may be very difficult for the vendor to find other buyers.<sup>2</sup> But this question is seldom considered;<sup>3</sup> it is a hard and fast rule that if the property is such that the court would have given specific performance to the buyer if he had sued for it, the seller may have specific performance.<sup>4</sup> This is usually referred to as the doctrine of mutuality,<sup>5</sup> but it is to be noted that it is mutuality as a basis for *giving* relief and must be carefully distinguished from the doctrine of lack of mutuality as a ground for *denying* relief.

The two rules are sometimes so stated as to be destructive of each other; *e. g.*, it is sometimes said that “if one party to a contract

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<sup>1</sup> The substance of this article will appear in a forthcoming book on Equity.

<sup>2</sup> In reply to this it might be suggested that the vendor of land might sell it at public auction and collect the deficiency from the purchaser; but it might well happen that the buyer could raise the money to take the land and yet not be able to meet a judgment for damages for the deficiency.

<sup>3</sup> In a few states the vendor of land must show that damages would be inadequate. *Porter v. Frenchman's Bay & Mt. Desert Land & Water Co.*, 84 Me. 195 (1892); 36 Cyc. 566, note 53.

<sup>4</sup> *Adams v. Messinger*, 147 Mass. 185 (1888); *Adderley v. Dixon*, 1 Simons & Stuart 607 (1824); *Cheale v. Kenward*, 3 De Gex & J. 27 (1858).

<sup>5</sup> *Kenney v. Wexham*, 6 Maddock, 355 (1822): “I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a bill for specific performance.”



may have specific performance, the other may." While it is still more common to find statements that "if for any reason one party to a contract cannot obtain specific performance the other party cannot." Somewhat like the famous cats of Kilkenny it is obvious that each rule, as thus stated, is capable of eating the other up. The solution to this enigma is that the two rules have each a separate place and function. The affirmative rule, apparently, has been invoked successfully only in favor of vendors or lessors against vendees or lessees and in only two classes of cases. If the subject-matter of the contract is such that damages would be inadequate to the purchaser, so that he could ordinarily have obtained specific performance if he had sued for it, the vendor may have specific performance; that is, if the buyer's or lessee's common-law remedy would have been inadequate, the court will not inquire into the adequacy of the seller's or lessor's common-law remedy. The other application of the rule is to the doctrine of part-performance as taking a case out of the operation of the Statute of Frauds; if a purchaser is held to have made a sufficient part-performance by the taking of possession so that he would have escaped the bar of the statute if he had sued for specific performance, the vendor may likewise take advantage of such part-performance. On the other hand apparently no one has attempted to apply the lack of mutuality rule to these two classes of cases; so that there has never been any conflict in the application of the two rules.

On principle the doctrine of mutuality is difficult to justify.<sup>6</sup> It seems to be an illustration of the tendency of equity courts to limit the scope of discretion and to widen the field of fixed rule.<sup>7</sup> Historically it is perhaps traceable to a notion on the part of the courts that in thus giving the vendor specific performance they were following out the principle that equality is equity;<sup>8</sup> it seems, however, a misapplication of the maxim, because that maxim properly applies only to members of a class, such as creditors, children, etc. It cannot reasonably be contended that the vendor and purchaser are members of a class.

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<sup>6</sup> It is sometimes suggested that the vendor of land is entitled to specific performance because of the doctrine of "equitable conversion." But this is putting the cart before the horse — a mistaking of cause for effect. *Pooley v. Budd*, 14 Beav. 34, 44 (1851).

<sup>7</sup> See "The Decadence of Equity," by ROSCOE POUND, 5 COL. LAW REV. 20.

<sup>8</sup> *Lewis v. Lechmere*, 10 Modern, 503 (1721).

It has been argued by Professor Ames that the vendor's right to get specific performance without inquiring into the adequacy of his common-law remedy "has nothing to do with any question of mutuality. The vendor, from the time of the bargain, holds the legal title as security for the payment of the purchase money and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption."<sup>9</sup> It is not clear whether this refers to the vendor's *right* to hold as security or to his *obligation* so to hold. If it is the former that is meant, then it may be answered that in case of contracts to sell ordinary chattels without provision for credit, it is equally true that the vendor cannot be compelled to part with the title or possession of the goods till he has been paid; but this does not mean that he can recover the price in equity.<sup>10</sup> But if the argument refers to the vendor's *obligation* to hold the property it amounts substantially to the following argument by Professor Cook:<sup>11</sup>

"The seller's action for specific performance is really in the nature of an action to foreclose the equitable right of the buyer to specific performance. In other words, whether the seller asks for specific performance or seeks to foreclose the equity by a sale, the object of the suit is the same, to put an end to the situation created by equity in making the seller a trustee<sup>12</sup> for the buyer and permitting this relation to continue even after the time set for performance in the contract itself."

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<sup>9</sup> JAMES BARR AMES, "Mutuality in Specific Performance," 3 COL. LAW REV. 1, 12.

<sup>10</sup> In some jurisdictions he may, under some circumstances, recover the price at law. WILLISTON ON SALES, § 562.

<sup>11</sup> Prof. WALTER WHEELER COOK in 6 AMERICAN LAW AND PROCEDURE, 183, arguing that the doctrine of mutuality is unnecessary.

<sup>12</sup> Where a vendor has been fully paid the purchase price, he ceases to have any beneficial interest in the land and is substantially in the position of a trustee, but in such a case he does not stand in need of any remedy against the purchaser. If he has not been fully paid, it is inaccurate to refer to him as a trustee because he has an interest in the land which he may properly transfer by conveying to anyone but a *bonâ fide* purchaser for value without notice, while the trustee is under an obligation not to transfer the property to anyone, even though he may have loaned money to the *cestui que trust* upon the security of the trust property. And it is not accurate to call him a constructive trustee, because his obligation to hold the property for the purchaser and then to convey to him is consensual, not constructive. Because of his obligation not to convey to a *bonâ fide* purchaser, he may properly be called a fiduciary.



There seem to be three defects in this argument. If for some reason<sup>13</sup> the purchaser could not enforce specific performance against the vendor the latter is not a "trustee" or fiduciary and therefore there is no "situation" to put an end to, and yet the vendor may get specific performance. Secondly, in any case, if all that the vendor wishes is to get rid of his fiduciary obligation with reference to the land, it would seem that he can do that just as effectually by getting a common-law judgment for damages, as he can by obtaining a decree for specific performance, because such a judgment would apparently merge the cause of action not only of the vendor but also of the purchaser. After the vendor acquires a valid judgment at law for breach it is difficult to see how the purchaser could win a suit for specific performance. Furthermore, there seems to be some confusion as to causation. The argument seems to assume that the vendor's right to have the property sold in order to satisfy his claim is dependent upon the purchaser having the right to specific performance; but if for some reason the vendor could not enforce specific performance against the purchaser, but the purchaser could enforce against the vendor, could it be seriously contended that the vendor could foreclose the purchaser's equity by such a sale? The truth about the situation is that the right of the vendor to have the land sold to satisfy his claim is dependent not upon the purchaser's right to specific performance but upon the vendor's right to specific performance; in fact, it is a substitute given by equity in cases where specific performance is defeated by the inability of the purchaser to complete the contract. This is made even clearer by the further fact that if for some reason the purchaser cannot, but the vendor can enforce specific performance, the vendor may have the property sold to satisfy his claim, though there is of course no equity to foreclose. Of course the mere fact that the vendor's remedy of specific performance is somewhat similar to a mortgagee's bill for foreclosure is no reason in itself why the vendor should be given such a remedy. The vendor's right to specific performance is a cause and not a result of the analogy<sup>14</sup>

<sup>13</sup> For example, if the purchaser has been guilty of fraud on the vendor, or if only the purchaser signed the memorandum required by the Statute of Frauds.

<sup>14</sup> Though this analogy is closer than the trust analogy because the mortgagee has a beneficial interest which he may freely transfer, it is not perfect. One important difference is that while a mortgage can be foreclosed only by judicial proceedings, the vendor may foreclose the equitable right of a defaulting purchaser outside of

between the relation of mortgagee and mortgagor and that of vendor and purchaser.

Professor Ames' argument continues:

"This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor, just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common-law creditor. No case has been found in which a bill has been sustained under such circumstances. The case of *Jones v. Newhall*<sup>15</sup> is a solid decision against such a bill."

It would seem that the fact just mentioned does not tend to show that there is no positive rule of mutuality, but merely that the rule is not applied where the vendor can get a judgment for the purchase money at law, because the procedure peculiar to equity is here unnecessary. When the purchaser of land sues for specific performance he must do so in equity because he wants a decree *in personam* that the vendor convey — something he cannot get at law. If the vendor sues without having conveyed, the suit must be in equity, because, *inter alia*, the common law does not regard the unaccepted tender of a deed of land as entitling the vendor to the purchase price; and a decree in equity is necessary to protect both parties by making the performance of each conditional upon the simultaneous performance by the other. No such conditional decree is necessary if the vendor has conveyed, and the remedy at law is quite adequate.

It would seem, therefore, that although it is difficult to justify the positive rule of mutuality, it is still more difficult to explain away its existence.

## II. FINANCIAL CONDITION OF A DEFENDANT VENDOR AS A BASIS FOR SPECIFIC PERFORMANCE

Where specific relief has been sought against the commission of a tort the financial irresponsibility of the defendant has frequently been made the basis of equity jurisdiction.<sup>16</sup> It is obvious that the enjoining of a tort does not infringe upon the rights of the

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court by giving him notice of his intention to rescind the contract unless the purchaser completes within a reasonable time.

<sup>15</sup> 115 Mass. 244 (1874).

<sup>16</sup> *Nichols v. Jones*, 19 Fed. 855 (1884), injunction against trespass.



defendant's creditors, because even if the threatened tort would result in a benefit to the defendant's estate, the creditors could not plausibly argue that they should profit from it.

Where one who has made a contract to sell ordinary chattels, and a large part or all of the purchase price has been paid, it is clear that damages are an inadequate remedy to the purchaser in any case where the vendor's financial condition is such that a judgment at law<sup>17</sup> cannot be collected in full; and if the rights of other creditors are not infringed it would seem that the purchaser ought usually<sup>18</sup> to be entitled to have the chattel transferred to him or to have declared thereon an equitable lien for the amount paid. Other creditors may properly object if decreeing such specific performance would result in giving to the purchaser property which should be distributed ratably among all the creditors. Whether this result would be accomplished in any particular case would seem to depend upon whether the defendant's financial irresponsibility consisted in his being: (1) execution-proof but not insolvent, (2) insolvent but not execution-proof, (3) both execution-proof and insolvent.

1. Suppose that the defendant has agreed to sell some cattle to the plaintiff who has paid the purchase price of \$800; suppose further that by statute the defendant is entitled to an exemption of \$3,000 worth of property and has altogether only \$2,000 worth of property with total liabilities of \$1,500, in which case he would obviously be execution-proof but not insolvent.<sup>19</sup> In such a case there would seem to be no valid objection on the part of other creditors to giving specific performance to the plaintiff because they are unable to enforce payment whether the purchaser does or does not get the equitable relief; if they can object validly, it would be only if there were reasonable grounds for supposing that the defendant's assets would later be so increased that he would no longer be execution-proof and that their chances of future

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<sup>17</sup> The appropriate remedy at law would be either an action for breach of contract in not delivering the chattel or an action in *quasi*-contract to recover back the amount of money paid.

<sup>18</sup> In one instance the defendant himself may probably raise a valid objection on the ground that specific performance would subject him to proceedings in involuntary bankruptcy.

<sup>19</sup> In determining solvency under the Bankruptcy Act, the test is whether the debtor's assets — both exempt and not exempt — are sufficient to pay his debts.

recovery were thus being infringed. Since the defendant is solvent, giving specific performance to the purchaser would not amount to ordering a preference and therefore the defendant cannot validly object on that ground. But it might be urged that giving specific performance against one who is execution-proof would violate the spirit though not the letter of the exemption statutes. The answer to this is that since the exemption statute does not prevent a debtor from selling, mortgaging or giving away exempt property, he cannot be heard to object if equity compels him to perform a contract to sell specific chattels.

2. If the defendant has property worth \$10,000 and owes a larger amount, say \$15,000, he is insolvent; but he is not execution-proof if the statutory exemption is \$3,000. In such a case the other creditors may properly object to the purchaser getting specific performance because it would reduce the *pro rata* payment<sup>20</sup> which they would otherwise get, and they should be allowed to voice their objections by intervening in the specific performance suit. While the present Federal Bankruptcy Act is in force, the defendant himself may properly be allowed to object on the ground that such a decree is an order to compel him to commit a preference<sup>21</sup> and thus subject him to being thrown involuntarily into bankruptcy.

3. Assuming the same exemption statute, if the defendant has property worth \$2,800 and owes debts amounting to \$4,000 he is both execution-proof and insolvent. In such a case no creditor is able to enforce payment and it is doubtful whether the creditors should be allowed to object to the purchaser getting specific performance; if they can do so, the objection must be based upon the ground that although they are unable to enforce payment now, they might be able to do so later, and that giving specific performance would tend to decrease their chances of future recovery. It is doubtful whether the defendant himself could properly object since the chances of his being thrown into involuntary bankruptcy are extremely small, because there are no assets that are non-exempt.

The distinctions above suggested between a defendant being execution-proof, being insolvent, and being both execution-proof and insolvent seem to have been overlooked entirely. Apparently

<sup>20</sup> Under the influence of the equitable maxim that equality is equity, it is the spirit of modern bankruptcy and insolvency laws that creditors should share equally.

<sup>21</sup> WILLISTON ON SALES, § 144.



the only case on the subject using the phrase "execution-proof" is *Hendry v. Whidden*,<sup>22</sup> and in that case relief was denied. The failure of the courts to grasp the distinctions is probably the reason for the uncertainty of the law on the subject. There are many dicta and a few decisions in favor of giving the purchaser relief upon the ground of the defendant's financial irresponsibility, but they have been vigorously assailed.<sup>23</sup> It is believed that the distinctions suggested above offer the true solution of the problem which is briefly as follows: If the defendant is insolvent but not execution-proof, either the defendant or his creditors can validly object to the purchaser getting specific performance; if the defendant is execution-proof, whether insolvent or not, neither the defendant nor his creditors can validly object.

### III. MAY THE HEIR GET SPECIFIC PERFORMANCE OF CONTRACTS TO BUILD?

Where the defendant, having land in the vicinity of land owned by the plaintiff, has contracted with the plaintiff to erect a building on his own land, equity will usually grant specific performance.<sup>24</sup> The inadequacy of the common-law remedy is apparent; the amount of damage suffered by the plaintiff is difficult to estimate because the loss is that suffered by not obtaining the increase in value to the plaintiff's property in the neighborhood;<sup>25</sup> furthermore, it is of course impossible for the plaintiff to have anyone else erect the building because it would be a trespass to go on the defendant's land without his consent; and even if the defendant should consent to the erection of the buildings by the plaintiff, the plaintiff could not ordinarily afford to do so unless the consent also amounts to an agreement to pay therefor, because the building would become the property of the defendant. Still further, since what the plaintiff wants is the general result of increase in the value of his own land, much less supervision is required of the court than when the building is for the plaintiff's own use. In

<sup>22</sup> 48 Fla. 268 (1904).

<sup>23</sup> WILLISTON ON SALES, §§ 143 and 144; 18 HARV. L. REV. 454; 1 COL. LAW REV. 267.

<sup>24</sup> *Mayor of Wolverhampton v. Emmons*, [1901] 1 K. B. 515.

<sup>25</sup> If the plaintiff had no property in the vicinity to be benefited, may he get specific performance? In the somewhat analogous case of *VanSant v. Rose*, 170 Ill. App. 572 (1912); 260 Ill. 401, a plaintiff who had sold property to the defendant with a restriction on its use was allowed to enforce the restriction though he no longer owned any land in the vicinity. But that decision is difficult to justify.

case the plaintiff were to die before the erection of the building it seems probable, at least, that the right to specific performance would descend to his heir and not go to his executor, because the result of specific performance would benefit the heir's land. And if the plaintiff by deed or will were to convey the property, which would be benefited by the erection, to different persons, it would seem that any one of them should be entitled to enforce specific performance, the right being analogous to the right to enforce an equitable servitude.<sup>26</sup>

Where the defendant has agreed to erect a building on the plaintiff's land, damages at law are usually adequate; in fact, the remedy at law may be even more satisfactory than specific performance<sup>27</sup> because the plaintiff can usually find someone else who will do the work substantially as well, and it is more agreeable to have a builder who works willingly than one who works under compulsion.<sup>28</sup> Hence the recent decisions refuse specific performance; but the early English case of *Holt v. Holt*<sup>29</sup> held that if the owner dies before the house is built, "the heir may compel the builder to build it and the father's executor to pay for it." It is at least likely that at that time<sup>30</sup> the father himself could have obtained specific performance, so that the court did not place the builder in a different position from that which he occupied before the father's death. Assuming that the father could have had specific performance, it is obvious that such a right would not pass to his executor but to his heir, because the performance of the contract would result in a benefit to the land which would, of course, pass to the heir. The giving of the remedy of specific performance to the ancestor by equity, therefore, created in the ancestor an equitable real property right to have a house built upon the land out of materials furnished by the builder; and this

<sup>26</sup> There seem to be no cases.

<sup>27</sup> *Flint v. Brandon*, 8 Ves. 159 (1803).

<sup>28</sup> It may happen, however, that it is impossible or very difficult for the plaintiff to get another builder; in such a case, if the hardship on the plaintiff would be very great, specific performance should be decreed.

<sup>29</sup> 1 EQ. ABRIDGMENT, 274, *placitum*, 11 (1694).

<sup>30</sup> In early times Chancery was quite liberal in granting specific performance of contracts to build on the plaintiff's land; the buildings involved were probably much simpler than those required by the average modern contract, and the task of supervision was therefore not so great. See 10 COL. LAW. REV. 574; 1 AMES EQ. CAS. 68, note 4. If the ancestor could not have obtained specific performance, it is difficult indeed to see any possible ground for the heir to get it.



equitable real property right passed to the heir along with other real property rights. It is to be observed that this right is the converse of a profit in gross in fee; the latter is an inheritable right to get a benefit *from* land but not appurtenant to other land; the former is a right to have a benefit *added to* land by the labor and materials of a builder, but not in any way connected with the builder's land.

Now that such contracts are not usually specifically enforceable against the builder by the ancestor for the reasons already given, it would seem clear that the accident of the ancestor's death should not take away the builder's defense. But has the change in the rule entirely wiped out the equitable property right of the ancestor and heir, or does it still exist but with other means of enforcement? It is at least arguable that the change by the equity courts in the way in which they exercise their discretion ought not to have the effect of destroying an equitable property right even though the right does, of course, owe its existence to the fact that at an earlier date courts of equity did give specific performance in such cases. At any rate, there are two fairly modern cases which are difficult to explain except on this assumption. In *Cooper v. Jarman*<sup>31</sup> the administrator had paid the builder for the finishing of the house after the intestate's death and it was held to be a proper payment. The chief argument of the court was, that to hold otherwise would place the administrator in an embarrassing position.

"The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit should exceed the amount to be paid for the completion of the contract, could the legal representative be allowed to deduct this from his accounts?"

And in *Sprake v. Day*<sup>32</sup> it was held that the devisee could insist that the administrator pay for finishing the house. If the builder were unwilling to finish it, this should not affect the substantial rights of the devisee; he should be entitled to have the sum paid

<sup>31</sup> L. R. 3 Eq. 98 (1866).

<sup>32</sup> [1898] 2 Ch. 510. These seem to be the only modern English cases and there seem to be no American cases.

to any other builder<sup>33</sup> whom he chooses, to finish it. And while in *Sprake v. Day* the work had already been begun by the builder, it would seem that that fact should be held immaterial.

That the real explanation is the one suggested and not the explanation of the court in *Cooper v. Jarman* is shown by the other part of *Sprake v. Day*. The testator had also contracted with the same builder to build some houses on other land already belonging to the devisee; it was held that the devisee, being a volunteer, was not entitled to have the contract carried out by the administrator. Since the devisee did not obtain from the will any property right to this land or to these houses, and since in England a sole beneficiary of a contract has no right, either at law or in equity, to complain of its non-performance, the decision seems the only logical one. But it is to be observed that the administrator may be compelled by the builder to pay damages for breach unless the beneficiary is willing to assume the burdens of the contract by paying for the houses.

If the modern decisions denying specific performance should be construed as having destroyed the property right which had come into existence because of the earlier decisions, or if equity had never given specific performance to the ancestor, there would, of course, be no equitable property right to descend to the heir; but since the contract is to erect a house on land which is now his, there would seem to be no objection to allowing him to insist upon the benefit of this contract. But if he should decline to assume its burdens and the builder wishes to go on, there seems to be no way of rescuing the executor from his embarrassing position. Such an *impassé* is of course a strong argument for abolishing the distinction between the devolution of real and of personal property.

#### IV. DEVOLUTION OF OPTION HOLDER'S RIGHTS

Where the holder of a specifically enforceable option to buy land dies before exercising his option and also before the period for exercising the option has elapsed, does the right to exercise it go to his heir or to his executor?

There are two plausible<sup>34</sup> solutions: (1) Let the heir exercise the

<sup>33</sup> Or to himself, if he prefers to have the money rather than the building, according to what is usually called the doctrine of equitable reconversion.

<sup>34</sup> There are two other possible solutions, neither of which can be called plausible. If the heir were allowed to exercise the option and compel the executor to pay the



option and, if he accepts, let him get the land upon his paying the purchase price. (2) Let the executor exercise the option and, if he accepts, let him get the land upon his paying the purchase price. Since the option holder at the time of his death had just as much right<sup>35</sup> to get the land as if he had already exercised the option by acceptance, it would seem that the right should pass to the heir. If it is worth accepting, it is in substance a right to get land at a desirable price; and such a right seems to savor just as much of realty as if the option holder had accepted the option before his death.<sup>36</sup>

There seem to be very few decisions on the subject. In *Guston v. Union School District*<sup>37</sup> and *In re Adams*<sup>38</sup> the option holder was also the lessee of the land; it was held in each case that the option passed to the executor and not to the heir, but the reasoning is far from conclusive. In the first case the court seems to rely partly on the fact that the option accompanied a lease<sup>39</sup> which of course went to the executor, and partly on the argument that the option gave no interest in the land to the option holder. The only case cited for the latter proposition is *Richardson v. Hardwick*,<sup>40</sup> which merely held that after the time for the exercise of the option had expired without acceptance, the option holder had no right. In *In re Adams*, each of the judges was careful to rest his decision

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purchase-price, such a holding would be open to two objections: (1) he would practically always exercise the option by acceptance and hence it would really cease to be an option; (2) the decedent never having become liable for the purchase money, it would be difficult to see how the executor could be made liable. If the executor were allowed to exercise the option and required in case of accepting to pay the money, but the heir to get the land, such a holding would be open to the objection that the executor would practically never exercise it by acceptance and it would therefore cease to be an option.

<sup>35</sup> Though, of course, under no *obligation* with respect thereto. To be sure, if the option holder accepts, his right to get the land is likely to be of longer duration than is the right given by the option, but the right itself is no greater.

<sup>36</sup> If the heir does not wish to accept the option but the executor does and the heir will not assign the option to him, it is arguable that the executor should be allowed in such a case to have it; but it is difficult to see any principle upon which such a tandem succession could be worked out.

<sup>37</sup> 94 Mich. 502 (1883).

<sup>38</sup> 27 Ch. Div. 394 (1883).

<sup>39</sup> It is difficult to see how this fact is at all significant; if the lessee had before his death exercised the option by acceptance no one would seriously contend that in such a case the equitable right to get the fee would go to the executor; and as before suggested, the acceptance of the option does not increase the option holder's right but merely makes him liable. The mere fact that the option is provided for in the lease does not make the option in any way incidental to the lease. It merely provides consideration for the option.

<sup>40</sup> 106 U. S. 252 (1882).

upon the peculiar words of the contract which provided for acceptance by the lessee, "his executors, administrators and assigns." While the court is probably right in assuming that the parties may effectually stipulate by their contract that in case of the death of the option holder the option shall be exercised by his executor and not by his heir; yet considering the formal character of the phrase, "executors, administrators, and assigns," it seems to be a very narrow basis for a decision. In *Newton v. Newton*<sup>41</sup> the court said that the administrator could not exercise the option except for the heir.

Where a vendor fails to make a good title to all the land which he contracted to sell, the buyer is frequently held to have an option to take specific performance with compensation for defects.<sup>42</sup> Such an option should devolve in the same way as express options. It is well settled that in such a case the executor cannot be compelled to pay the purchase money.<sup>43</sup>

While specifically enforceable options to sell are rare, they are not unknown. If the option holder should die before having exercised the option by acceptance, it should pass with the land to his heir or devisee.<sup>44</sup>

#### V. THE PURCHASER'S PROPERTY RIGHT AND THE RISK OF LOSS

Juridical rights<sup>45</sup> are deductions from juridical remedies; hence, as soon as it became the settled rule that a purchaser of land could get the remedy of specific performance, the inference or deduction was that there was already a specifically enforceable right to the property and that such right was the basis of his suit.<sup>46</sup> When does this equitable property right come into existence? At first glance it seems plausible that it should be regarded as

<sup>41</sup> 11 R. I. 390, 393 (1826).

<sup>42</sup> The same reasoning ought to apply to any other fact which makes a contract specifically enforceable by the purchaser but not against him.

<sup>43</sup> *Green v. Smith*, 1 Atk. 572 (1738); *Broome v. Monck*, 10 Ves. 597, 612 (1805).

<sup>44</sup> *Watts v. Kellar*, 56 Fed. 1 (1893).

<sup>45</sup> *I. e.*, legal and equitable.

<sup>46</sup> Before a remedy is once given in any particular class of cases there may be an *interest* which should be protected, but no *right* can be said to arise until such protection is given. After the remedy is once given we infer the existence of a right before the suit was brought; and if the decision is acquiesced in as representing the probable future action of the courts in such cases, the right in similar cases is then thought of as existing before any remedy is sought to enforce it and even though no remedy is ever sought. Where a right is given by a statute the inference above indicated is unnecessary.



coming into existence at the time of performance, because it is not till then that the purchaser can properly ask for a conveyance; *i. e.*, since rights depend upon remedies for the beginning of their existence, the right should not be regarded as coming into existence until the purchaser can get the remedy of specific performance.

This view was strongly urged by Professor Langdell<sup>47</sup> in discussing the equity rule as to risk of loss:

"What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, *i. e.*, the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee; *i. e.*, the vendor will be able to throw the loss upon the vendee by enforcing specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. *The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened.*"<sup>48</sup>

It seems to be settled, however, that equity regards the purchaser as having a property right from the moment of making a contract which he is entitled to enforce specifically, without regard to the time for performance. There are two reasons for this rule: (1) If no time is set for performance, a purchaser is entitled to ask for a conveyance after a reasonable time has elapsed. It would be highly inconvenient to have the time of coming into existence of important property rights subject to such an uncertainty. In the field of property law generally, it is of great importance that the rules be certain. Since it is fairly easy to determine the date of the completion of a contract, the advantage of having the

<sup>47</sup> "A Brief Survey of Equity Jurisdiction," 1 HARV. L. REV. 355, 374.

<sup>48</sup> The italics are the present writer's.

equitable property right date from this time is obvious. (2) If a time is set for performance, and the vendor keeps the property until that time, it might not be objectionable to regard the purchaser as having only a common-law contract right before that time, and to regard the equitable property right as coming into existence at that time if the vendor fails to convey the legal title. But to hold that the purchaser has only a common-law contract right till the time for performance, would make it possible for the vendor to prevent the purchaser from ever getting any property right by merely conveying away the land before the time came. In order, therefore, to give the purchaser adequate protection the equity courts were forced — consciously or unconsciously — to regard the purchaser as having a property right from the moment of contract.<sup>49</sup>

Part of the development of constructive obligation seems to have been brought about by the same practical necessity. When equity courts first gave a remedy to the *cestui que trust* against his trustee they created in the *cestui que trust* an equitable property right. Even though it was enforceable against only one person, it can hardly be regarded otherwise than as a property right. But a property right which is enforceable against only one person is of relatively little value because it can be so easily destroyed; therefore the courts were forced, in order to give adequate protection to the *cestui que trust*, to give a remedy against all transferees except *bonâ fide* purchasers for value without notice. A similar development took place in the rules relating to vendor<sup>50</sup> and

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<sup>49</sup> There seems to be no hint of this in the early decisions. If the courts attempt to give any reason it is usually the maxim that equity regards that as done which ought to be done; a more complete and accurate statement of the maxim is that equity regards that as done which was agreed or directed to be done. If this were followed literally it would result in Professor Langdell's view because the conveyance was not "agreed to be done" till the time for performance. Sometimes the courts refer to the doctrine of equitable conversion as a reason for the rule, but this is not a reason for anything but merely the name for the result of the granting of specific performance by equity. The nearest analogy to the purchaser's property right is the shifting use or executory devise. For example, a devise to X in fee but if Y pays X \$1000 then over to Y in fee. Y has a property right which he may protect before the contingency happens. In a somewhat similar way the purchaser has an equitable property right from the moment of contract for which he may demand protection, and he may require the transfer of the legal title upon his paying the purchase price and thereby cut off the vendor's fee. The devolution of the rents and profits after the vendor's death and before performance fits in with this analogy because they go to the heir and not to the executor.

<sup>50</sup> It is usually said that a transferee from a vendor may be declared a constructive



purchaser, and also in the rules relating to other equitable rights.<sup>51</sup> When it is said that constructive obligations are imposed upon the transferees of a trustee or vendor because it would otherwise result in unjust enrichment, the reasoning is incomplete. It is unjust enrichment only because the *cestui* or purchaser has an equitable property right which is enforceable against such transferees; and it is enforceable against such transferees for the reason that otherwise the equitable property right of the *cestui* or purchaser would be of too little value.

Professor Langdell seemed to assume in the argument already quoted that the risk of accidental loss necessarily followed the equitable property right of the purchaser; that is, that the moment his equitable property right came into existence, the risk of loss was necessarily thrown upon him. That this is a misconception is shown by the fact that if in a particular case the purchaser can enforce specific performance, but the vendor cannot, the risk is not on the purchaser though he has an equitable property right; and if only the vendor can enforce specific performance and the purchaser consequently has no property right, the risk is nevertheless on the purchaser in the sense that the vendor may compel him to pay the full purchase price. In other words, the risk of loss is a result of the vendor's right to get specific performance and is not a necessary incident of the purchaser's property right.

In determining when, if at all, the vendor should first be able to throw the loss upon the purchaser in the manner above indicated, the most important consideration should have been the adequate protection of the vendor. The prevailing view<sup>52</sup> as to risk of loss is that it passes at the moment a contract is made which is specifically enforceable by the vendor. Is this reasonably essential to his trustee for the purchaser. But since it is not accurate to call an unpaid vendor a trustee it is also inaccurate to call his transferee a constructive trustee. If the claim to the purchase money has been expressly or impliedly transferred to him along with the legal title to the property, he succeeds to the rights and obligations of his transferor, and it would be much more accurate to call his constructive obligation the obligation of a constructive vendor.

<sup>51</sup> In the subject of equitable servitudes this development has taken place within the last century. Before *Tulk v. Moxhay*, 2 Phillips, 774 (1848), was decided, a plaintiff was able to enforce specifically a restriction on the use of land against his covenantor; but it was not till the court in that case decided that the plaintiff might also get an injunction against the transferees of the covenantor that this right to control the property of another assumed its present importance.

<sup>52</sup> *Paine v. Meller* 6 Ves. 349 (1801).

protection? Since he usually continues his fire<sup>53</sup> insurance after making the contract to sell, it is seldom that he really needs the protection of the prevailing rule. And when we consider that purchasers are not likely to insure before title passes, the rule is also open to the objection of working a hardship on the purchaser in many cases. This hardship could have been lessened and the vendor given reasonably adequate protection, if the courts had held the risk to pass at the time the vendor puts the purchaser in default, by a proper offer of performance. That such a rule would be workable is indicated by the fact that in determining some other questions this point of time has been made the criterion.<sup>54</sup> And since the general understanding of laymen is that the risk does not pass till title is transferred it would have eliminated the hardship on the purchaser and still given the vendor reasonably adequate protection if the equitable rule had been settled in harmony with such understanding.

To have the risk pass to the purchaser at the time of performance, as advocated by Professor Langdell, is open to the objection that if no time is set for performance, it would be quite inconvenient to have the risk determined by such an uncertain test as the lapse of a reasonable time. Hence, even though the prevailing rule is unnecessary for the adequate protection of the vendor, it is to be preferred to Professor Langdell's view because the time of the completion of the contract is usually easy to ascertain.<sup>55</sup>

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<sup>53</sup> Most of the cases of accidental loss are those caused by fire. Where the cause of the loss is one which is not usually insured against and the vendor has not in fact insured, the above argument does not apply. In such cases, where the ultimate loss must fall upon either the vendor or the purchaser and can not be shifted to an insurance company, it makes very little difference which rule as to risk of loss is applied provided that it gives a certain workable test.

<sup>54</sup> In *Carrodus v. Sharp*, 20 Beav., 56 (1855), the subject-matter of sale was the lease of a mill which bound the lessee to keep in repair; it was held that the burden of complying with the covenant to repair did not pass till the vendor had made out a good title. And in the converse case of *Liggett v. Metropolitan Ry. Co.*, L. R. 5 Ch. App. 716 (1870), the court held that although ordinarily the purchaser was entitled to the rents and profits from the time set for performance, yet if he defaulted in the payment of the purchase money he was not so entitled.

<sup>55</sup> The rule of *Paine v. Meller* is rendered less surprising when we consider the strong inclination of courts to assimilate the rules applying to the vendor to those applying to the purchaser. See *ante*, 52.



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THE LAW SCHOOL. — The registration in the School on November 15 of each of the last twelve years is shown in the following table:

	1906-07	1907-08	1908-09	1909-10	1910-11	1911-12
Res. Grad. . . .	—	2	—	—	2	3
Third year . . .	190	171	169	187	178	219
Second year . .	199	198	207	191	238	217
First year . . .	243	280	244	311	296	289
Unclassified . .	—	—	—	—	82	76
Specials . . . .	62	63	64	70	3	4
	694	714	684	759	799	808
	1912-13	1913-14	1914-15	1915-16	1916-17	1917-18
Res. Grad. . . .	6	4	5	8	10	5
Third year . . .	176	169	167	177	213	73
Second year . .	186	197	197	226	234	87
First year . . .	287	260	288	308	335	96
Unclassified . .	84	64	68	66	64	31
Specials . . . .	5	1	5	1	2	0
	744	695	730	786	858	292

The above figures show that the registration in the School this year is only a little over one third of what it was last year. A large falling off was to be expected and was foreshadowed by the fact that before the end of last year over four hundred men left the School to enter training camps or some branch of the service. The loss in numbers should be cause for pride rather than regret.

On the Faculty there have been several changes. Professor Kales, unfortunately for the School, has given up teaching and engaged in practice

in Chicago. Professor Wambaugh and Professor Frankfurter are on leave of absence, the former being a Judge Advocate in Washington, the latter being an assistant to the Secretary of War. Under these circumstances the School is particularly fortunate in having secured the services of Prof. Henry M. Bates. Mr. Bates received the degree of Ph.B. from the University of Michigan in 1890 and LL.B. from Northwestern University in 1892. From 1892 to 1903 he practiced law in Chicago. From 1903 until his present appointment he was a member of the Faculty of the University of Michigan Law School, as a professor for seven years and since 1910 as Dean.

The changes in the Faculty have made necessary the following adjustment of the curriculum: Professor Wambaugh's course in Constitutional Law is being given by Professor Bates, Agency by Prof. Joseph Warren and Insurance by Assistant Professor Chafee. Professor Kales's course in Property II is being given by Prof. Joseph Warren and Property III by Professor Westengard. Professor Frankfurter's course in Public Utilities is being given by Dean Pound, Partnership by Professor Bates, and Municipal Corporations by Professor Beale.

**THE LEGALITY OF ATHEISM.** — Is the promotion of atheism a criminal offense at common law?<sup>1</sup> There are four possible grounds for holding that it is, or that under some circumstances it may be.

1. That a denial of the very existence of God is an offense against God, and that in order to vindicate the majesty of God the state should punish it. This view has been distinctly rejected by the courts, both in England<sup>2</sup> and in the United States.<sup>3</sup> In so far as the offense is an offense against God, it is left for God or the Church to deal with it.

2. That the civil order is based on religion and in particular on Christianity, and that to attack religion or the fundamental doctrines of Christianity is to loosen the bonds of society and to endanger the state. This was the view taken by Lord Hale in a famous case in which he said: "To say religion is a cheat is to dissolve all those obligations whereby the civil societies are preserved; Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."<sup>4</sup> Under this view any attack upon the

<sup>1</sup> For a summary of the English statutes on this and related matters, see 1 HAWKINS, *PLEAS OF THE CROWN* (6 ed.), 11 *et seq.*; [1917] A. C. 409.

In England bequests for the saying of masses for the soul of the testator or of other persons are still held to be illegal as superstitious uses. The law is otherwise in Ireland and in Canada. But in Ireland as well as in England bequests to or for the benefit of monastic bodies are illegal. *Ellard v. Phelan*, [1914] 1 I. R. 76.

Strangely enough the Blasphemy Act of 1697 (9 & 10 WILL. III, c. 32) is still on the English statute book. By this act persons who have been educated in or have made profession of the Christian religion, who are convicted of denying the Trinity or the truth of Christianity or the authority of the Bible, are subjected to heavy penalties and disabilities. Of course the act is not actually enforced today.

<sup>2</sup> 4 BL. COMM. 41 *et seq.*; STARKIE, *SLANDER AND LIBEL* (Am. ed., 1877), § 772.

<sup>3</sup> *State v. Chandler*, 2 Harr. (Del.) 553 (1837).

<sup>4</sup> *Taylor's Case*, 1 Vent. 293, 3 Keb. 607, 621 (1675). The actual decision was undoubtedly right, for the defendant's words were indecent.

In a number of the cases special stress is laid on the religious sanction of a judicial



fundamental doctrines of the Christian religion is criminal and the motive and manner of the attack are immaterial.<sup>5</sup> This view is now repudiated by the courts.<sup>6</sup> It is no longer felt that it can be said that the decay of the Christian religion would mean the dissolution of the state, nor that a decorous discussion of the merits of Christianity would mean its decay.

3. That since the majority of the members of the community are Christians, an attack upon Christianity has a tendency to cause a breach of the peace.<sup>7</sup> Certainly the tendency to cause a breach of the peace may make conduct criminal which would otherwise be innocent.<sup>8</sup> But today it can hardly be said that a decorous argument against Christianity tends to cause a breach of the peace. Moreover, even conduct which tends to cause a breach of the peace is sometimes justified on grounds of public policy,<sup>9</sup> and surely the policy in favor of freedom of discussion of matters of vital interest to humanity is sufficient justification. But if the words are scurrilous or spoken in an insulting way or for the purpose of stirring up trouble, then indeed a justification is quite lacking.<sup>10</sup>

4. That an attack upon religion constitutes a public nuisance. It is a criminal offense to disturb the community by thrusting upon it something disgusting and nasty, whether that thing be a smell, a sight or an idea.<sup>11</sup> Hence, indecorous or contumelious language in regard to things generally regarded by the community as sacred constitutes a public nuisance.<sup>12</sup> But a decorous discussion of such things is no nuisance.<sup>13</sup>

oath. See STARKIE, SLANDER AND LIBEL (Am. ed., 1877), § 772. This argument of course loses all its force when atheists are allowed to be sworn. See STAT. 1 & 2 VICT. c. 105, § 1, and acts amendatory thereof.

<sup>5</sup> *Regina v. Moxon*, 4 St. Tr. (N. S.) 694 (1841) (publishing Shelley's "Queen Mab"); *Reg. v. Petcherini*, 7 Cox C. C. 79 (1856) (burning an authorized version of the Bible); *Rex v. Williams*, 26 How. St. Tr. 653 (1797) (publishing Paine's "Age of Reason"); *Rex v. Woolston*, 2 Str. 820, Fitzg. 64, 1 Barnard. 162, 266 (1779) (denial of miracles of Christ); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206 (1838) (promulgation of pantheistic ideas); *Updegraph v. Commonwealth*, 11 S. & R. (Pa.) 394 (1824) (denial of infallibility of the Bible). This view is accepted by STEPHEN, DIGEST OF CRIMINAL LAW (6 ed., 1904), 125.

<sup>6</sup> *Regina v. Bradlaugh*, 15 Cox C. C. 217 (1883); *Regina v. Ramsay*, 15 Cox C. C. 231 (1883); *Rex v. Boulter*, 72 J. P. 188 (1908). See *Shore v. Wilson*, 9 Cl. & Fin. 355, 524, 539; ODGERS, LIBEL AND SLANDER (5 ed., 1911) ch. xvii, which has a full collection of English cases; 3 WHARTON, CRIMINAL LAW (11 ed., 1912), 2121.

<sup>7</sup> Of course true disciples of Christ would not resort to the illegal use of force. "The professing and devout Christian would indeed look on the scene more in sorrow than in anger, but his relatives and friends, who are not strictly professors of Christianity or members of any church or sect, and the great mass who have been educated in the Christian's belief, though not professing to act up to it, would probably do as outraged and insulted men have in all ages been accustomed to do." *State v. Chandler*, 2 Harr. (Del.) 552.

<sup>8</sup> *Wise v. Dunning*, [1902] 1 K. B. 167.

<sup>9</sup> *Beatty v. Gillbanks*, 15 Cox C. C. 138 (1882).

<sup>10</sup> *Rex v. Boulter*, 72 J. P. 188 (1908); *State v. Chandler*, 2 Harr. (Del.) 553 (1837); *People v. Ruggles*, 8 Johns. (N. Y.) 290 (1811). It is an indictable offense to ridicule the religious views of a minority of the community. *Commonwealth v. Haines*, 4 Pa. L. J. 17 (1824).

<sup>11</sup> BEALE, CASES ON CRIMINAL LAW (3 ed.), 81-102.

<sup>12</sup> *People v. Ruggles*, 8 Johns. (N. Y.) 291 (1811); 2 BISHOP, NEW CRIMINAL LAW, § 74.

<sup>13</sup> *Regina v. Bradlaugh*, 15 Cox C. C. 217 (1883); *Rex v. Boulter*, 72 J. P. 188 (1908).

It may therefore be concluded that today the promotion of atheism in decorous ways is not a crime. To this even Lord Finlay agrees.<sup>14</sup>

Granting that the promotion of atheism is not a criminal offense, is it illegal in any sense? In 1850, in *Briggs v. Hartley*,<sup>15</sup> the court held illegal as inconsistent with Christianity a legacy "for the best original essay on natural theology, treating it as a science, and demonstrating its adequacy and sufficiency when so treated and taught to constitute a true, perfect, and philosophical system of universal religion." In 1867, in *Cowan v. Milbourn*,<sup>16</sup> the court held illegal a contract to let rooms for the purpose of the delivery of lectures on such subjects as "The Character and Teachings of Christ: the former defective, the latter misleading."<sup>17</sup> Similarly in a Canadian case, decided in 1878, a contract to let a hall for the delivery of lectures containing an attack upon the fundamental doctrines of Christianity was held illegal.<sup>18</sup> In the well-known Pennsylvania case of *Zeisweiss v. James*,<sup>19</sup> decided in 1870, Sharswood, J., was of the opinion that a legacy to the "Infidel Society of Philadelphia hereafter to be incorporated . . . for the purpose of building a hall for the free discussion of religion, politics, etc.," was illegal. In *Lawrence v. Smith*<sup>20</sup> Lord Eldon refused to enjoin a pirated edition of a medical book because it seemed to throw some doubt on the doctrine of the immortality of the soul. It shows a remarkable openness of mind that in spite of these decisions the House of Lords was able to reach the result it did reach in *Bowman v. Secular Society, Limited*, [1907] A. C. 406, upholding a bequest to a registered company organized to promote atheistic doctrines, and for the first time establishing in the English law a real freedom of decorous religious discussion.

One interesting and more doubtful question yet remains. Granting that the promotion of atheism is not criminal or in any way illegal, is it a charitable object? That point it was not necessary to decide in the Bowman Case where the fund bequeathed was to be paid to a registered company. If, however, the fund had been given to trustees to be expended in the promotion of atheism, the question whether such an object is charitable would have been presented. For unless it were held to be a charitable trust, it would be invalid under the doctrine of *Morice v. Bishop of Durham*,<sup>21</sup> which requires a definite beneficiary in non-charitable trusts, and also as violating the principle of the rule against perpetuities. Lord Parker touching on this question in the Bowman Case came to the conclusion that such a trust is not char-

<sup>14</sup> *Bowman v. Secular Society, Limited*, [1917] A. C. 406, 423. See Recent Cases, page 313.

<sup>15</sup> 19 L. J. Ch. 416. See also *Kinsey v. Kinsey*, 26 Ont. 99 (1894).

<sup>16</sup> L. R. 2 Ex. 230, 36 L. J. Exch. (N. S.) 124, 16 L. T. (N. S.) 290, 15 Week. Rep. 750.

<sup>17</sup> Lord Parker suggests that possibly *Cowan v. Milbourn* may be upheld on the ground that the lectures had a tendency to cause a breach of the peace. *Bowman v. Secular Society, Limited*, [1917] A. C. 406, 447.

<sup>18</sup> *Pringle v. Napanee*, 43 U. C. Q. B. 285.

<sup>19</sup> 63 Pa. 465. Compare *Manners v. Philadelphia Library Co.*, 93 Pa. 165.

<sup>20</sup> Jac. 471 (1822). See also *Murray v. Benbow*, 4 St. Tr. (N. S.) 1410 (1822), where Lord Eldon refused to restrain the defendant from publishing a pirated edition of Lord Byron's "Cain."

<sup>21</sup> 10 Ves. 521.



itable.<sup>22</sup> It was expressly so decided a few years ago in an Australian case.<sup>23</sup> A bequest was there made to the "Incorporated Body of Free-thinkers of South Australia." The chief doctrine of that society was "that science provides for life, and that materialism can be relied upon in all phases of society." The corporation had ceased to exist at the time of the death of the testator, and the question was whether the legacy could be applied *cy pres*. The court held that the purposes of the society were not charitable and that it could not be so applied. It may be difficult, though perhaps not impossible,<sup>24</sup> to say that the promotion of atheism is the advancement of religion. Certainly, however, it may well be held to be the promotion of education, for education is not confined to matters taught and learned in the school-room. At any rate, it may be held to fall within that broad class of cases where the purpose is "beneficial to the community."<sup>25</sup> Of course the fact that the testator sincerely believes that the community will be benefited by his scheme is not enough to make the scheme charitable. On the other hand, the fact that the members of the court and the great majority of the members of the community think that the community will not be benefited is not enough to prevent the scheme from being charitable. The courts have upheld as charitable, bequests for the promotion of vegetarianism,<sup>26</sup> for the suppression of vivisection,<sup>27</sup> for the spread of woman's suffrage,<sup>28</sup> for the publication of the doctrines of Henry George,<sup>29</sup> for the furtherance of Conservative principles when accompanied by religious and mental improvement,<sup>30</sup> for the propagation of the writings of Joanna Southcote<sup>31</sup> (who claimed that she would give birth to a new Messiah and whose writings the court thought not "inconsistent with Christianity"), for the promotion of Unitarianism,<sup>32</sup> for the promotion of Christian Science,<sup>33</sup> for the advancement of spiritualism,<sup>34</sup> and for the furtherance of "the broadest interpretation of metaphysical thought."<sup>35</sup> Surely if all these objects, whether wise or unwise, are charitable, the furtherance of earnest inquiry into the fundamental questions of religion is likewise

<sup>22</sup> *Bowman v. Secular Society, Limited*, [1917] A. C. 406, 440 *et seq.*

<sup>23</sup> *In re Jones*, [1907] S. Aust. L. R. 190. A provision in a bequest for the founding of a college that ecclesiastics should be kept off the premises does not invalidate the bequest. *Vidal v. Philadelphia*, 2 How. (U. S.) 127, 198 (1844).

<sup>24</sup> In *Knight's Estate*, 159 Pa. 500 (1855), the court was of the opinion that a legacy for such a purpose was so far a bequest for the promotion of religion as to be void under a statute invalidating bequests made less than one month before the testator's death.

<sup>25</sup> See *Commissioners of Income Tax v. Pemsell*, [1891] A. C. 531, 583.

<sup>26</sup> *In re Cranston*, [1898] 1 I. R. 431.

<sup>27</sup> *In re Foveaux*, [1895] 2 Ch. 501.

<sup>28</sup> *Garrison v. Little*, 75 Ill. App. 402. But see *Jackson v. Phillips*, 14 Allen (Mass.)

539.

<sup>29</sup> *George v. Braddock*, 45 N. J. Eq. 757, reversing 44 N. J. Eq. 124.

<sup>30</sup> *In re Scowcroft*, [1898] 2 Ch. 638.

<sup>31</sup> 31 Beav. 14, 31 L. J. Ch. (N. S.) 767, 8 Jur. (N. S.) 663, 6 L. T. (N. S.) 525, 10 Week. Rep. 642.

<sup>32</sup> *Shore v. Wilson*, 9 Cl. & Fin. 355 (1842).

<sup>33</sup> *Chase v. Dickey*, 212 Mass. 555, 99 N. E. 410; *Glover v. Baker*, 76 N. H. 393, 83 Atl. 916.

<sup>34</sup> *Jones v. Watford*, 62 N. J. Eq. 339, 50 Atl. 180, affirmed in 64 N. J. Eq. 785, 53 Atl. 397.

<sup>35</sup> *Vineland Trust Co. v. Westendorf*, 86 N. J. Eq. 343, 98 Atl. 314 (1916).

such. It makes no difference that the object is to present only one side of the question; innumerable religious trusts have been established to present other sides. It makes no difference that most people regard that side as the wrong side, if rational persons can and do regard it as the right side and can and do believe that its advancement will benefit mankind. At the end of the eighteenth century a learned writer said that no person in a Christian country can complain of the prohibiting of a denial of Christianity, for "even an infidel must acknowledge that no benefit can be derived from the subversion of a religion which enforces the best system of morality."<sup>36</sup> But the sincere disbeliever does not acknowledge this. On the contrary, he believes that the spread of what he regards as truth and the removal of what he regards as superstition would conduce to the benefit of mankind. Surely the truth will prevail though the courts do not attempt to decide *a priori* what is the truth.

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LIABILITY OF OCCUPIERS OF PREMISES TOWARD TRESPASSERS. — In his last written utterance Dean Thayer spoke of the "powerful weapon" which "the modern law of negligence places in the hands of the injured person and how little its full scope has been realized until recently,"<sup>1</sup> and he showed how many questions of which we have been seeking arbitrary solutions under the doctrine of *Rylands v. Fletcher*, or by setting up special categories of carrier and passenger, were really to be dealt with on a broad simple principle of liability.<sup>2</sup> Decisions on the liability of occupiers of premises toward trespassers are affording another example.

A person who comes upon premises in the control of another may be injured by the latter's negligent management of an active force, or he may be injured by reason of the condition of the premises upon which he comes. If the former, it ought not to matter in what capacity he comes. It should be a question whether a reasonable man managing the force which the occupier of the premises was operating would have anticipated injury to the person in question under the circumstances. If so the ordinary principle of liability should hold him to repair the injury following from his want of due care. Whether the person injured was invitee, licensee,<sup>3</sup> perceived trespasser,<sup>4</sup> anticipated but not perceived trespasser<sup>5</sup> or

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<sup>36</sup> SWIFT, SYSTEM OF LAWS OF CONN., vol. 2, 323.

<sup>1</sup> "Liability Without Fault," 29 HARV. L. REV. 801, 805.

<sup>2</sup> *Ibid.*, 805, 813.

<sup>3</sup> *Gallagher v. Humphrey*, 6 L. T. R. (N. S.) 684; *De Haven v. Hennessey*, 137 Fed. 472; *Pomponio v. New York R. Co.*, 66 Conn. 528, 34 Atl. 491; *Schmidt v. Coal Co.*, 159 Mich. 308, 123 N. W. 1122; *Hyatt v. Murray*, 101 Minn. 507, 112 N. W. 881; *Knowles v. Exeter Mfg. Co.*, 77 N. H. 268, 90 Atl. 970; *Hoadley v. Int. Paper Co.*, 72 Vt. 79, 47 Atl. 169.

<sup>4</sup> *Rome Furnace Co. v. Patterson*, 120 Ga. 521, 48 S. E. 166; *Fields v. Louisville R. Co.*, 163 Ky. 673, 174 S. W. 41; *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333; *Hobbs v. Blanchard*, 74 N. H. 116, 65 Atl. 382.

<sup>5</sup> *Schmidt v. Coal Co.*, 159 Mich. 308, 123 N. W. 1122; *Brown v. Boston R. Co.*, 73 N. H. 568, 64 Atl. 194; *Magar v. Hammond*, 171 N. Y. 377, 64 N. E. 150; *Cincinnati R. Co. v. Smith*, 22 Ohio St. 227; *O'Leary v. Elevator Co.*, 7 N. D. 568, 75 N. W. 919.



unanticipated trespasser,<sup>6</sup> should go only to the question whether there was due care in not looking out for him. On the other hand, if the occupier of the premises is not doing anything active, but the injury results from the condition of the premises upon which the injured person comes, the question at once arises, why should the occupier, who is doing nothing, bestir himself to look out for the safety of those who come upon his premises? Why should they not look out for themselves, as they would do anywhere else, except as to negligence of those pursuing an active course of conduct? These considerations have required differentiation between trespassers, licensees and business guests or invitees. Control of his premises by the occupier must be balanced against the interest of personality of the person coming on the premises. Therefore, so far as condition of the premises goes, he who comes thereon takes the risk<sup>7</sup> unless he comes on as business guest or invitee, that is, upon the business of the occupier. In the latter case there is a relation to which the law may properly attach a duty of due care.<sup>8</sup> But a distinction is to be made. No one may call upon the law to secure him in any claim of wilful aggression upon another. Accordingly, if the occupier, without management of any active force, intends injury to those who come on his premises, in whatever capacity, he comes within another general principle that requires one to respond for all injuries which he causes wilfully. Hence the universal holding that the occupier is liable to trespassers for wilful aggression or its equivalent.<sup>9</sup>

Looking back over the development of the law the foregoing lines are evident. But, to use the classical words of Mr. Justice Holmes, they have had to be "pricked out by the gradual approach and contact of decisions on the opposing sides."<sup>10</sup> In this process many strong courts started out to treat the first situation along the lines of the second. Some denied liability for negligent management of an active force to the injury of trespassers, perceived or unperceived, while admitting a liability to licensees.<sup>11</sup> Others denied liability therefor except in case of business guests or invitees.<sup>12</sup> In either event liability for wilful injury was admitted, thus more or less completely assimilating the first situation to the second.

As always happens in such cases, the courts that refused to apply the general principle of negligence to negligent management of an active force by an occupier of premises causing injury to a trespasser or licensee were presently called upon to warp other legal doctrines to avoid unhappy

<sup>6</sup> See the remarks of SEAMAN, J., in *Sheehan v. St. Paul R. Co.*, 76 Fed. 201, 205.

<sup>7</sup> *Ponting v. Noakes*, [1894] 2 Q. B. 281.

<sup>8</sup> *Indermaur v. Dames*, L. R. 1 C. P. 274.

<sup>9</sup> *Bird v. Holbrook*, 4 Bing. 628.

<sup>10</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 112, 31 Sup. Ct. Rep. 186.

<sup>11</sup> *Grand Trunk R. Co. v. Barnett*, [1911] A. C. 361; *Gallagher v. Humphrey*, 6 L. T. R. (N. S.) 684; *Jordan v. Grand Rapids R. Co.*, 162 Ind. 464, 70 N. E. 524; *Rink v. Lowry*, 38 Ind. App. 132, 77 N. E. 967; *Lando v. Chicago R. Co.*, 81 Minn. 279, 83 N. W. 1089; *Hyatt v. Murray*, 101 Minn. 507, 112 N. W. 881; *Koegel v. Missouri R. Co.*, 181 Mo. 379, 80 S. W. 905; *Schaaf v. St. Louis Basket Co.*, 151 Mo. App. 55, 131 S. W. 936.

<sup>12</sup> *Neice v. Chicago R. Co.*, 254 Ill. 595, 98 N. E. 989; *Cunningham v. Toledo R. Co.*, 260 Ill. 589, 103 N. E. 594; *Maynard v. Boston R. Co.*, 115 Mass. 458; *O'Brien v. Union R. Co.*, 209 Mass. 449, 95 N. E. 861; *Hoberg v. Collins*, 80 N. J. L. 425, 78 Atl. 166.

consequences. For one thing, they were called upon to create a special category of passengers to whom duties of due care were owing as such.<sup>13</sup> For another, they actually did for a season warp the conception of business guest or invitee, by a strained doctrine of implied invitation, so as, in effect, to allow recovery by licensees or unmolested trespassers injured by negligent active operations of the occupier.<sup>14</sup>

It is not to be wondered at, then, that we now find one of these courts warping the idea of wilful injury and leaving it to the jury to find in effect that there is a trap for trespassers in something put on the land, not for the purpose of injuring them, but maintained for wholly proper ends and negligently suffered to become and remain dangerous.<sup>15</sup> The court says offhand that there is "nothing in" the proposition that suffering the defect in the condition of the premises must amount to an intention to injure trespassers in order to give rise to liability.<sup>16</sup> But the distinction between suffering premises to become unsafe for trespassers by inaction and actively providing means of injuring anticipated trespassers has always been drawn,<sup>17</sup> and in the case of injurious devices actively provided the distinction has been drawn between those provided for legitimate purposes which are incidentally dangerous to trespassers and those provided immediately because they are dangerous to trespassers.<sup>18</sup> To say that a dangerous condition into which the premises have fallen may be maintained wilfully so as to create a liability to trespassers is to say that occupiers of premises are bound to furnish trespassers a safe place in which to trespass. Hence, unless our notions of property are to break down utterly, this extension of the idea of wilful or wanton injury is not likely to have more utility than the attempt to extend the idea of "invitation" to endured trespassers. For while the latter was to some extent justified as an attempt to plow round the limitation of liability for negligence in the management of active force by occupiers of premises, the former, with all its possibilities for that situation, is actually applied to a case of a trespasser injured by the condition of the premises which the law was already treating on rational lines.

<sup>13</sup> It is significant that of eleven cases on this subject in BEALE, CASES ON CARRIERS, 119-136, all but one are from Illinois and Massachusetts. In those jurisdictions plaintiff's only hope of showing a duty of due care was to induce the court to hold that a duty was owing to him as a passenger. So the question came to the court as one of whether, although not an invitee, he was a passenger.

<sup>14</sup> *Sweeny v. Old Colony R. Co.*, 10 All. 368. See the argument of counsel in *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, reported in AMES & SMITH, CASES ON TORTS, 2 ed., 443.

<sup>15</sup> *Romana v. Boston Elevated R.*, 226 Mass. 533, 116 N. E. 218. See RECENT CASES, p. 313.

<sup>16</sup> 226 Mass. 537, 116 N. E. 218.

<sup>17</sup> See, for example, *Cleveland R. Co. v. Ballentine* (C. C. A.) 84 Fed. 935, 938; *Gibson v. Leonard*, 143 Ill. 182, 192, 32 N. E. 182; *Lary v. Cleveland R.*, 78 Ind. 323, 328; *Quigley v. Clough*, 173 Mass. 429, 430, 53 N. E. 884; *Gramlich v. Wurst*, 86 Pa. St. 74, 80; *Pittsburgh R. Co. v. Brigham*, 29 Ohio St. 364.

<sup>18</sup> *Bird v. Holbrook*, 4 Bing. 628; *Hooker v. Miller*, 37 Ia. 613; *Quigley v. Clough*, *supra*; *Loomis v. Terry*, 17 Wend. 497, 501. Compare also the rule that contributory negligence is no bar in case of a wilful or wanton injury. Here something more than a gross negligence is meant; there must be aggression or its equivalent. *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594; *Birmingham R. Co. v. Pinckard*, 124 Ala. 372, 26 So. 880; *Lary v. Cleveland R. Co.*, 78 Ind. 323, 328; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.



THE FUNDAMENTAL LAW IN ENGLAND. — That the sovereignty of the King in Parliament is absolute is a commonplace about which there can today be no question; and it is a sovereignty at every point strengthened by the absence in England of the usual American distinction between constitutional and ordinary legislation. But while sovereignty thus attaches to the supreme legislative authority its administration is a matter open at every point to judicial inquiry. The King's ministers are below the law; and whatever they attempt outside the common law must somewhere find its sanction within the four corners of a statute. The significance of this distinction has arisen in an interesting way in *R. v. Halliday*,<sup>1</sup> recently decided by the House of Lords. By the Defense of the Realm Consolidation Act<sup>2</sup> the King in Council was empowered, during the continuance of the war, "to issue regulations for securing the public safety and the defense of the realm."<sup>3</sup> Under this general power *Reg. 14 b* empowered the secretary of state to order the internment of any person "of hostile origin or association" where, upon the opinion of a competent naval or military authority, it appears to him expedient to do so in accordance with the purpose of the authorizing statute. Under this regulation a naturalized German named Zadig was interned. He appealed against regulation *14 b* as unauthorized by the act and thus *ultra vires*. The majority of the House seems to have had no difficulty in sustaining the opinion of the court below which had upheld the regulation. The case, however, is remarkable for a very able and vigorous dissenting opinion by Lord Shaw of Dunfermline which raises an issue of immense importance. He argues, in the first place, that certain English statutes, and notably Magna Charta and the Habeas Corpus Act, are so fundamental to the English Constitution as to be incapable of repeal except by the definite and declared purpose of the King in Parliament;<sup>4</sup> and, as a corollary to this first proposition, he insists that any administrative regulation which, in the absence of such declared purpose, tends towards this end, is by that fact *ultra vires*.<sup>5</sup> It is at least an interesting attitude; and though there is a sense in which it has about it a certain antiquarian character, it is also an antiquarianism with a significantly modern implication. It in nowise denies the sovereignty of Parliament; and in this sense it differs from those legal conceptions of early English law which seem to have postulated certain fundamentals which even Parliament was powerless to alter.<sup>6</sup> But it suggests that what Dean Pound<sup>7</sup> has aptly termed "executive justice" must at every point show express authority for its institution. It cannot change the common law unless it can definitely show that such was the intention of Parliament; an enabling act, in fact, must give evidence of having been reasonably construed.<sup>8</sup> It is, of course, a common-

<sup>1</sup> [1917] A. C. 261.

<sup>2</sup> 5 GEO. V, c. 8.

<sup>3</sup> *Ibid.*, sec. 1, sub-sec. 1.

<sup>4</sup> [1917] A. C. 261, 294.

<sup>5</sup> *Ibid.*, 298.

<sup>6</sup> Cf. C. H. McILWAIN, THE HIGH COURT OF PARLIAMENT, especially ch. II.

<sup>7</sup> Cf. his paper in 55 AMERICAN LAW REGISTER, 137.

<sup>8</sup> LORD SHAW in *H. of L.*, page 288. Cf. (on a very different issue) *Re Dudley corporation* (1881), 8 Q. B. D. 86, 93, C. A. The earlier cases make this issue perfectly clear. Cf. *Chudleigh's Case* (1595); 1 Coke Rep. 113 b; *Delamere v. Barnard* (1567), Plowd. 346, 532; *Herbert's Case* (1584), 3 Co. Rep. 11 b, 13 b; *Fermor's Case* (1602), 3 Co. Rep. 77 a.

place of statutory construction that judicial interpretation should be directed to the avoidance of consequences which are inconvenient and unjust, so long as this can be achieved without violence to the act concerned.<sup>9</sup> Clearly enough there was inconvenience in the regulation; and the matter of injustice may perhaps be settled by the fact that since Mr. Zadig complied with the regulation he suffered internment without trial; whereas, had he disobeyed it, he would at least have had the opportunity of going before the courts.<sup>10</sup> But this is surely to show either the unnecessary character of the original regulation or its stupidity in that it puts a premium on disobedience to the executive. It is, moreover, significant that high authorities have viewed with concern the growing extent of this administrative justice;<sup>11</sup> and the opinion that it is not warranted by the facts is fairly widespread.<sup>12</sup> Certainly the "irresistible clearness" of which Lord Justice Swinfen Eady spoke in the Court of Appeal seems nowhere justified by the facts. Everyone is, of course, willing to give government a latitude in time of war different both quantitatively and in kind from its powers in time of peace; but in the absence of an express delegation of the immense powers contained in *Reg. 14 b* the desire of Parliament to grant them is at least a matter for doubt. This is, of course, simply a matter of opinion. The whole question is a psychological one, and the facts at issue may be differently interpreted. The only point of importance here is that if a complete power of general regulation was thus conceded, an energetic secretary of state may make the courts superfluous. We come, in fact, to the vital question that is involved in the whole problem of administrative law — the conference of such powers as render efficiency a certainty with the adequate retention of complete official responsibility. Here, at least, the argument in the Lords suggests that Lord Shaw has made out a case against the assumption of a balance. The theoretical assumption is even more important. It is historically indubitable that England does not know fundamental laws. But when the courts begin to feel that the spirit of the Constitution is not adequately protected by its literal statement in terms of legislation, there is the opportunity at least of wide-spread change. There is little or no adequate evidence that the courts have ever declared an English statute unconstitutional.<sup>13</sup> What Lord Shaw demanded in his opinion was that an administrative regulation should be declared unconstitutional because its results would fail to harmonize with the spirit of English law. It is, in fact, an appeal to due process of law; and "due process" — already made sacred by an English statute<sup>14</sup> — is, in theory at least, connected with the idea of a law so fundamental that men cannot change it. The resemblance between such a conception and M. Duguit's "objective" law is, of course, obvious enough. It is flexible in that it admits that the objective law

<sup>9</sup> *York v. Middleburgh* (1828), 12 Y. & J. 196, 215.

<sup>10</sup> LORD SHAW in H. of L., 277.

<sup>11</sup> Cf. for a typical instance HOUSE OF LORDS DEBATES, November 8, 1915, the speech of Lord Loveburn, page 182, and of Lord Courtney. Cf. PENWITH, 194.

<sup>12</sup> Cf. LONDON NATION, Feb. 12, 1916.

<sup>13</sup> Cf. POUND, 21 HARV. L. REV. 383.

<sup>14</sup> 5 EDW. III, c. 9; 25 EDW. III. stat. 5, c. 4; 37 EDW. III. c. 18. Cf. McKECHNIE, MAGNA CARTA, 2 ed., 390.



may change with the facts at issue;<sup>15</sup> were England invaded, its content would be different from the situation involved in a continental war. The whole point involved is the disappearance of the Roman notion of sovereignty and its replacement by the idea of a service to which the state itself, no less than its members, are bound. In *Rex v. Halliday* the court mistook these implications by its determination to regard the issue as a purely administrative question. Its result, as Lord Shaw, perhaps somewhat dramatically, asserted, is to make the government "a Committee of Public Safety . . . the analogy is with a practice more silent, more sinister, the *lettres de cachet* of Louis Quatorze. . . . It . . . is the negation of public safety or defense. It is poison to the commonwealth."<sup>16</sup> No one who considers the problem involved can doubt that we are here at the beginning of an evolution which may result in giving a new significance to the notion of the supremacy of law.

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RIGHT OF A PATENTEE TO RESTRICT THE PRICE AND THE USE OF A PATENTED ARTICLE. — At common law any attempt to restrict the use or price of a chattel by notice to the purchaser or sub-purchaser was held void<sup>1</sup> as contravening the public policy in favor of the free alienation of chattels.<sup>2</sup>

The Patent Act grants to the patentee the exclusive right to "make, use, and vend" the article patented.<sup>3</sup> It has been contended that this monopoly granted to the patentee takes the patented article out of the general common law rule, and that the exclusive right to use and to vend enables the patentee, indirectly, by a license arrangement to restrict the use and the price of his patented article by a mere notice attached thereto, and that any use or sale of the article in violation of the license constitutes an infringement of the patent. Since a suit for infringement of a patent right is a suit arising under the patent laws of

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<sup>15</sup> Cf. DUGUIT, *DROIT SOCIAL, DROIT INDIVIDUEL*, lect. 1, and cf. Cohen, "Jus Naturale Redivivum," 25 *PHILOSOPH. REV.* 761 f.

<sup>16</sup> [1917], A. C. 292.

<sup>1</sup> *Appollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Garst v. Hall and Lyon Co.*, 179 Mass. 588, 61 N. E. 219; *Spencer's Case*, 5 Coke, 16 a.

<sup>2</sup> See *Park v. Hartman*, 153 Fed. Rep. 24, 39, where Lurton, J., speaking for the court, said: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints on alienation have generally been regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in *COKE ON LITTLETON*, § 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.'" This passage is quoted with approval by Mr. Justice Hughes in *Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U. S. 373, 404; 31 Sup. Ct. Rep. 376, 383. See also GRAY, *RESTRAINTS ON ALIENATION*, 2 ed., §§ 27, 28.

<sup>3</sup> U. S. COMP. STAT. 1913, § 9428; U. S. REV. STAT. § 4884.

the United States the federal courts have exclusive jurisdiction in these cases.<sup>4</sup>

Several decisions in the lower federal courts upheld this position as to price restrictions,<sup>5</sup> and the United States Supreme Court in *Bement v. National Harrow Co.*<sup>6</sup> seemed also to commit itself to this view. But that court definitely decided in *Bower v. O'Donnel*<sup>7</sup> that the mere fact that an article is patented does not give to the patentee the right to restrict its price on resale.

As to use two general types of restrictions have been submitted to the courts for consideration. The first is a restriction which regards the use of the patented article only. Such restrictions have been upheld in the lower federal courts,<sup>8</sup> and at least in one case by the Supreme Court.<sup>9</sup> The second type is a restriction on the article primarily with reference to its use with non-patented accessories and seeks to confine its use to accessories specified by the patentee. This sort of restriction was first upheld in the lower federal courts in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*,<sup>10</sup> which was followed by a long line of decisions in accord.<sup>11</sup> The rule of the Button-Fastener Case was affirmed by the Supreme Court in *Henry v. A. B. Dick & Co.*,<sup>12</sup> but this decision has recently been overruled in *Motion-Picture Patents Co. v. Universal Film Manufacturing Co.*,<sup>13</sup> where the court refused to enforce a restriction imposed by the patentee on his patented motion-picture projecting machine to the effect that it should be used only with films of the patentee's manufacture. It is not clear that the Motion-Picture Case also overrules the cases upholding restrictions of the first type.

In neither the first nor the second type is the restriction as to use expressly warranted by the patent law. So if there is a warrant it must be implied. The argument in favor of restrictions of the first type is based on the theory that since the patent law gives to the patentee the

<sup>4</sup> *DeWitt v. Elmira Nobles Mfg. Co.*, 66 N. Y. 459; *Rice v. Garnhart*, 34 Wis. 453; *Kendall v. Windsor*, 6 R. I. 453; *Elmer v. Pennel*, 40 Me. 430. See ROBINSON ON PATENTS, §§ 855, 861.

<sup>5</sup> *Edison Phonograph Co. v. Pike*, 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960.

<sup>6</sup> 186 U. S. 70, 22 Sup. Ct. Rep. 747.

<sup>7</sup> 229 U. S. 1, 33 Sup. Ct. Rep. 616. Affirmed, *Straus v. Victor Talking Machine Co.*, 37 Sup. Ct. Rep. 412.

<sup>8</sup> *Dickerson v. Matheson*, 57 Fed. 524; *Commercial Acetylene Co. v. Autolux Co.*, 181 Fed. 387; *International Pavement Co. v. Richardson*, 75 Fed. 590; *New York Bank Note Co. v. Hamilton Bank Note Engraving and Printing Co.*, 83 Hun 593, 31 N. Y. Supp. 1060.

<sup>9</sup> *Mitchell v. Hawley*, 16 Wall. 544.

<sup>10</sup> 77 Fed. 288.

<sup>11</sup> *Tubular Rivet and Stud Co. v. O'Brien*, 93 Fed. 200; *Cortelyou et al. v. Lowe*, 111 Fed. 1005; *Rupp and Wittgenfeld Co. v. Elliott*, 131 Fed. 730; *A. B. Dick Co. v. Milwaukee Specialty Co.*, 168 Fed. 930; *Crown Cork and Seal Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225.

<sup>12</sup> 224 U. S. 1, 32 Sup. Ct. Rep. 364. The same result has been reached by the English court under a similar statute. *Incandescent Gas Light Co. v. Cantelo*, 12 Pat. L. R. 262; *Incandescent Gas Light Co. v. Brogden*, 16 Pat. L. R. 179.

<sup>13</sup> *Advance Sheets*, 37 Sup. Ct. Rep. 416.



sole right to use the article for all purposes, the patentee-vendor may grant this plenary right of use to the vendee or he may grant only a partial right to use, for example, to use only in a particular manner, even though title passes. The validity of such a restriction thus rests fundamentally on the rule that the measure of the grantee's right is the extent of the grant.<sup>14</sup> In the second type of restriction the reasoning is somewhat different. There the argument proceeds upon the proposition that, since the patentee may withhold his patent altogether from public use,<sup>15</sup> he must logically be permitted to impose any condition he sees fit upon such use as he may allow. Or as Mr. Justice Holmes puts it in his dissenting opinion in the Motion-Picture Case, "the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event."<sup>16</sup>

Both of these arguments are predicated upon the position that even after title to a patented article has passed, the patentee's monopoly as to use still clings to it. A more accurate application of the patent law, however, leads to the conclusion that once an absolute title to the patented article is passed by the patentee the veil of monopoly is shorn from the article, and that thereafter its use and control are regulated not by the special rules of the patent law but by the general rules of the law governing property. The bare fact that an article is patented does not render it immune from the police power of the several states,<sup>17</sup> or enable the patentee to make a hard bargain respecting it,<sup>18</sup> nor does it warrant the imposition of a condition which necessitates the abridgment of a public duty.<sup>19</sup> If the monopoly granted by the patent law is insufficient to defeat these greater public policies, it is difficult to understand on what compulsion it is permitted to defeat a lesser public policy. It is true that an assignment of a patent right may be subject to such conditions and control as the patentee may choose to impose, for the assignee enjoys his rights directly under the patent law. But when a patented article is sold the vendee's rights therein are not fixed by the patent law but by the common law rules of ownership in property.<sup>20</sup> The cases which hold that an assignment of a patent may be subject to restrictions are no authority, then, for restricting the use of a patented article after an absolute title thereto has passed.

It is submitted, therefore, that there is nothing in the patent law which peculiarly enables a patentee to restrict the use or the price of a patented article, or justifies a restraint on the alienation of a patented

<sup>14</sup> See Mr. Justice Clifford's opinion in *Mitchell v. Hawley*, note 8, *supra*.

<sup>15</sup> *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. Rep. 748.

<sup>16</sup> See also the argument of Mr. Justice Lurton in *Henry v. A. B. Dick Co.*, note 12, *supra*.

<sup>17</sup> *Patterson v. Kentucky*, 97 U. S. 501; *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. Rep. 95.

<sup>18</sup> *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, 12 Sup. Ct. Rep. 632.

<sup>19</sup> *Missouri ex rel. Baltimore and O. Tel. Co. v. Bell Telephone Co.*, 23 Fed. 539; *Delaware and Atlantic Tel. and Tel. Co. v. Delaware ex rel. Postal Telegraph-Cable Co.*, 3 U. S. App. 30.

<sup>20</sup> This distinction is indicated by Mr. Chief Justice Taney in *Bloomer v. McQuewan*, 14 How. 539, 549.

article which would not be permitted if the article were not patented. And it is much better on principle to discard the alleged distinction between patented and non-patented articles in this connection, since it will lead to greater uniformity and simplicity in the law. The Motion-Picture Case is a far-reaching step in this direction and is to be welcomed as such. Nor does this result lack legislative sanction. Congress in expressly providing that the Clayton Act shall apply as well to patented as to non-patented articles<sup>21</sup> has quite obliterated the last vestige of this distinction so far as the legality of monopolies is concerned.

If it is true that patented articles are to be treated alike with non-patented articles so far as restrictions as to price and use are concerned, it is not untimely to inquire whether after all, in view of modern commercial development in methods of marketing and distribution, the common-law rule against such restrictions is really a wise one in the light of the whole policy of the law. Free alienation of chattels is only one of the many policies of the law. The protection of the rights of ownership in property is a policy equally as potent and equally as important. An ideal rule as to price and use restrictions would be based on neither one to the exclusion of the other, but would rather meet both. A similar conflict of equal policies is encountered in the consideration of the validity of contracts not to engage in a certain trade entered into by the vendor on the sale of a business. In early times all such contracts were probably bad,<sup>22</sup> but in *Mitchell v. Reynolds*,<sup>23</sup> the leading case on this subject, Lord Macclesfield held that a contract of this sort is valid, provided it is made to extend to a limited area only. But the House of Lords, in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.*,<sup>24</sup> realizing that a rule of law that depends on the balancing of two contrary policies cannot be settled adequately by a fixed and inelastic standard, formulated the principle that the test of the validity of a contract not to engage in a trade is whether or not it is necessary reasonably to protect the property rights of the promisee; and there are decisions in this country which in effect adopt this principle.<sup>25</sup>

<sup>21</sup> 38 STAT. AT L. 730, ch. 323. The section in question makes it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods, . . . machinery, supplies or other commodities, *whether patented or unpatented* [italics supplied], for use, consumption or resale . . . or fix a price charged therefor, . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller where the effect of such lease, sale or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

<sup>22</sup> See YEAR BOOK, 2 HEN. V, fol. 5, pl. 26, which was a suit on a bond given by a dyer not to use his craft within a certain city for half a year. The court reprimanded the plaintiff for securing such a contract and threw him out of court.

<sup>23</sup> 1 P. WMS. 181. The words of the court are: "Wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to the fair contractor, it ought to be maintained; but with this constant diversity, *viz.* where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by."

<sup>24</sup> [1894] A. C. 535.

<sup>25</sup> *National Enameling and Stamping Co. v. Haberman*, 120 Fed. 415; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419.



It is urged that the validity of restrictions on the use and price of chattels should be determined by the principle of the Nordenfelt Case. Wherever such restrictions are necessary reasonably to protect the property rights of the vendor they should be allowed. But even under this test the Motion-Picture Case can be supported. There the vendor sought in his restriction not to protect his property rights in the patent under which he manufactured and sold the machine, but rather to stimulate his business in an independent and separate commodity. The mandate of reasonableness requires that the property right protected must be directly connected with the chattel restricted; that there must be such a relation as that existing between property rights under a patent and the patented article, or property rights in the good-will of a business in proprietary chattels and the proprietary chattel. Where use of an article in connection with accessories other than those prescribed by the vendor is likely to bring the vendor's business in that class of articles into general disrepute, it is only reasonable that the vendor should be permitted to say with what supplies the article may be used. Likewise where the practice of price cutting by retail dealers is likely to destroy the good-will in the business of a manufacturer of a proprietary article built up by an expensive and consistent campaign of advertising, the manufacturer should be permitted to preserve his good-will by enforcing a price restriction and eliminating the dangerous competition among price cutters.<sup>26</sup>

The Clayton Act <sup>27</sup> is essentially declaratory of the common law and should not properly be considered to prohibit such measures as are necessary reasonably to protect vested property rights.

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OFFENSES UNDER SECTION THIRTY-SEVEN OF THE FEDERAL CRIMINAL CODE. — Section thirty-seven of the Criminal Code deals with two distinct crimes — conspiracies to commit an offense against the United States, which, as there is no federal common law, has been held to mean conspiracies to violate any federal penal statute; and conspiracies to defraud the United States, which will be considered more at length.<sup>1</sup> This latter clause of the statute has been construed as covering a wide range of offenses. It is well settled that to constitute this offense it is unnecessary that the intent or natural effect of the confederation be to deprive the United States of property or to cause any direct pecuniary loss. It is enough if its tendency be to cause the subversion or derangement of any governmental function.<sup>2</sup> The theory of these cases seems

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<sup>26</sup> For an illuminating discussion of the reasonableness of price control see E. S. Rogers, "Predatory Price Cutting as Unfair Trade," 27 HARV. L. REV. 139. See also 30 HARV. L. REV. 68.

<sup>27</sup> See note 21, *supra*.

<sup>1</sup> Section THIRTY-SEVEN OF THE CRIMINAL CODE OF THE UNITED STATES; 35 STAT. AT L. 1096, ch. 321. If two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner for any purpose, and any of the parties do any act in pursuance thereof . . . , etc.

<sup>2</sup> *Haas v. Henkle*, 216 U. S. 462. A conspiracy to cause the issuance to the defendants of information as to contents of United States reports of the cotton crops. *United States v. Morse*, 116 Fed. 429. A false report by officers of a bank to the comptroller

to be that even though there be no direct loss, the effect of such conduct is to defraud the government in that it tends to bring the United States into disrepute and disrespect, and that this constitutes a very real loss, or perhaps in that it operates as a fraud on the people as a whole through action on the government, which is practically the same as a fraud on the government. Several of the cases seem to go very far in sustaining indictments on this ground.<sup>3</sup>

This statute has been applied to attempts to commit offenses against the election laws, but, due to the fact that in the cases heretofore arising there has always been a federal statute covering the attempted crime, the indictments have clearly fallen under the clause covering conspiracies to commit an offense against the United States.<sup>4</sup> Where the accused conspired with others to bribe electors in an election of state officials, such bribery being made criminal by state law, it was rightly held that this was no offense under section thirty-seven, inasmuch as no federal statute was violated, and the conspiracy being only relative to state matters could not be one to defraud the United States.<sup>5</sup>

In a recent case in the Supreme Court, however, the question was presented whether an attempt by twenty or more defendants to cause various persons to vote more than once at a primary election of members of Congress was a conspiracy to defraud the United States. *United States v. Gradwell*.<sup>6</sup> The court, after reviewing the federal legislation on this point, all of which was repealed in 1894, whereby the management of such elections was left largely to the states, decided that section thirty-seven was intended to apply only to offenses against the operation of the government, as distinguished from offenses against the processes by which men are elected to perform such operations. But the fact that there was no legislation in effect dealing with such offenses would not be conclusive, as the term "defraud the United States" is obviously intended to cover cases where no specific statute would apply. But the decision may be supported on a different ground. Penal statutes are always to be strictly construed and never to be extended beyond cases where they are clearly to be intended to apply.<sup>7</sup> Where the action of the conspirators is not intended to have any direct effect on the United States, but is only immediately connected with state authorities; where it is not intended to conceal facts from the United States nor make misrepresentations to them, nor to induce any action by the government or its officials, it may well be held that the plot does not come within the meaning of the words "to defraud the United States."

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of the currency, where such report was required by law. *Curley v. United States*, 130 Fed. 1. Impersonating another at a civil service examination. *United States v. Lonabaugh*, 158 Fed. 314, 179 Fed. 476. Conspiracy to obtain land patent from the United States by fraud, where the patent rightfully belonged to a third party, so no direct pecuniary loss to government. See *United States v. Stone*, 135 Fed. 392; but cf. *United States v. Crofton*, 25 Fed. Cas. 680.

<sup>3</sup> *Haas v. Henkle*, 216 U. S. 462; *United States v. Morse*, 116 Fed. 129; cf. note 2. *supra*.

<sup>4</sup> *Ex parte Coy*, 127 U. S. 731; *United States v. Moseley*, 238 U. S. 383; *United States v. Wrape*, 28 Fed. Cas. 780.

<sup>5</sup> *Ex parte Perkins*, 29 Fed. 900.

<sup>6</sup> 37 Sup. Ct. Rep. 407. See Recent Cases, p. 313.

<sup>7</sup> *United States v. Morris*, 14 Pet. 464. See SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 280.



## RECENT CASES

**ADMIRALTY — JURISDICTION — TORT.** — A marine cable resting on the bottom under navigable waters and supported at each end upon the shore was negligently injured by a vessel. *Held*, that a court of admiralty has jurisdiction. *The Toledo*, 242 Fed. 168.

If a tort occurs upon the high seas or navigable waters it is cognizable in admiralty. Locality determines jurisdiction. *The Plymouth*, 3 Wall. (U. S.) 20; *Hermann v. Port Blakeley Mill Co.*, 69 Fed. Rep. 646. This test does not limit admiralty jurisdiction to purely maritime acts. A tort action might be entertained which had no maritime flavor apart from the bare fact of occurring on the water. Such a case has never come before the Supreme Court. See *Atlantic Transport v. Imbrovek*, 234 U. S. 52, 60. But the Circuit Court of Appeals in one instance has denied jurisdiction where the act did not have a maritime character. *Campbell v. Hackfeld*, 125 Fed. 696. Moreover, the established criterion fails to include all maritime torts by excluding injuries by a vessel to things on land. *The Plymouth, supra*; *Cleveland Terminal R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316. This would deny the court jurisdiction in the principal case. Exception to the general rule is made in case of injury to a beacon, as being historically an aid to navigation. *The Blackheath*, 195 U. S. 361. Unless a marine cable is made a further exception, the principal case cannot be supported. A test based solely on the nature of the act would be more satisfactory, at once excluding the non-maritime and including the maritime. See 18 HARV. L. REV. 299.

**BILLS AND NOTES — DOCTRINE OF PRICE v. NEAL — FICTITIOUS PAYEE — FORGERY OF DRAWER'S SIGNATURE AND PAYEE'S INDORSEMENT BY SAME PERSON.** — An employee of an officer authorized to draw on the United States Treasury forged his master's name as drawer, payee, and indorser to a regulation draft and cashed it at a bank, which indorsed it to defendant bank, a holder in due course. The United States having paid the draft, sued to compel repayment. *Held*, the United States cannot recover. *United States v. Chase National Bank*, 241 Fed. 535.

The drawee cannot recover money paid to a holder in due course on a forged draft. *Price v. Neal*, 3 Burr. 1354. The United States, as drawee, is no exception to this rule. *United States v. New York Bank*, 219 Fed. 648. The forged indorsement of a genuine order instrument conveys no title; therefore, the drawee can recover a payment made to a holder in due course who derived his alleged right through the forgery. *Horstman v. Henshaw*, 11 How. (U. S.) 177. This has been supported on the ground that the drawee remains liable to the true owner either on the instrument or for conversion. See James Barr Ames, "The Doctrine of *Price v. Neal*," 4 HARV. L. REV. 297, 307. It follows that, since in case of a forged indorsement of a forged draft there can be no true owner to hold the drawee liable, the drawee cannot compel repayment from the holder in due course. *State Bank v. Cumberland, etc. Trust Co.*, 168 N. C. 605, 85 S. E. 5. In the principal case the court treats the instrument as not existing until the false indorsement and delivery; it is, therefore, similar to the original transfer of a forged draft, and payment to a holder in due course within the *Price v. Neal* doctrine. The pivotal feature of the case is that the same person forged both the drawer's signature and the payee's indorsement, thus proving that as actual drawer he knew and intended the payee to be fictitious. Therefore, the instrument was payable to bearer, and the indorsement immaterial, since the title was not derived through it, but by delivery. See BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, sec. 9, sub-div. 3. It is the intent of the actual

drawer that controls the fictitious character of the payee; not the intent of the drawee, as erroneously stated in this case. *Trust Company of America v. Hamilton Bank*, 127 App. Div. (N. Y.) 515. It follows that payment having been made to the party entitled, the drawee cannot recover. *Bartlett v. Chicago First National Bank*, 156 Ill. App. 415, 247 Ill. 490, 93 N. E. 337.

**CARRIERS — FEDERAL REGULATION — RIGHT OF COUNTERCLAIM IN ACTION FOR CHARGES.** — In an action by an interstate carrier to recover freight charges, the shipper counterclaimed for damages occasioned to the freight during transportation. The plaintiff demurred to the counterclaim on the ground that it was contrary to Section 6 of the Interstate Commerce Act, which provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation . . . than the rates, fares, and charges which are specified" in the published schedule. (34 Stat. at L. 584.) *Held*, demurrer overruled. *Pennsylvania R. Co. v. Bellinger*, 166 N. Y. Supp. 652.

The Supreme Court has interpreted the section referred to to mean that the carrier cannot accept anything but currency in payment for freight. *Louisville, etc. R. Co. v. Mottley*, 219 U. S. 467; *Chicago, etc. Ry. Co. v. U. S.*, 219 U. S. 486. It has been held, therefore, that to allow a counterclaim would be contrary to the intention of the Act and would open the door to a renewal of the old methods of rebate and discrimination. *Illinois Central R. Co. v. Hoopes & Sons*, 233 Fed. 135; *Chicago, etc. Ry. Co. v. Stein*, 233 Fed. 716; *Johnson-Brown Co. v. Delaware, etc. R. Co.*, 239 Fed. 590. These decisions were based on a ruling of the Interstate Commerce Commission, since withdrawn, and on a number of cases involving private agreements. I. C. C. CONFERENCE RULINGS, No. 48, March 10, 1908; No. 323, June 8, 1911; *Louisville, etc. R. Co. v. Mottley*, *supra*; *Chicago, etc. Ry. Co. v. U. S.*, *supra*; *N. Y. Central, etc. R. Co. v. Gray*, 239 U. S. 583. While a compromise out of court is obviously illegal, there is no reason why the court, having all of the parties before it, should not combine their several disputes in one proceeding; for if the parties really intend to evade the Statute they can do so as easily through the medium of two lawsuits as they could by one. The better opinion, therefore, would seem to be that the counterclaim should be allowed. *Wells Fargo & Co. v. Cuneo*, 241 Fed. 727; *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775.

**CARRIERS — LIENS — FREIGHT PAYABLE IN ADVANCE — EFFECT OF ABANDONMENT OF VOYAGE ON LIENS.** — The *Appam*, a British merchant vessel, was captured by a German man-of-war and brought to Hampton Roads. Restitution of ship and cargo was decreed because of a breach of American neutrality. The shipowners bring a libel to enforce a lien on the cargo for freight. By the bill of lading freight was to be considered earned upon shipment, ship or goods lost or not lost, and there was to be a lien for all charges whether payable in advance or not. *Held*, that there is no lien. *The Appam*, 243 Fed. 230 (U. S. Dist. Ct., S. D., N. Y.).

Freight payable in advance is not protected at the common law by a lien as a legal incident thereto. *How v. Kirchner*, 11 Moo. P. C. 21; *Kirchner v. Venus*, 12 Moo. P. C. 361. But see CARVER, CARRIAGE OF GOODS BY SEA, 4 ed., § 663. Hence the only lien arising in this case is a lien by express agreement of the parties. *Kirchner v. Venus*, *supra*. The contract of affreightment is abrogated when the contemplated voyage is abandoned, whatsoever the cause of abandonment. *Sampayo v. Salter*, 1 Mas. (U. S. Circ. Ct.) 43; *Metcalf v. Britannia Ironworks Co.*, 2 Q. B. D. 423. This operates to destroy the lien, and in the usual case would also prevent the accrual of liability. *St. Enoch Shipping Co. v. Phosphate Mining Co.*, [1916] 2 K. B. 624; *Richardson v. Young*, 38 Pa. St. 169. But where payment is to be made as in the principal case, a debt



arises upon shipment which survives whatever the outcome of the voyage. *National, etc. Co. v. International Paper Co.*, 241 Fed. 861. Revival of the lien, however, depends on the existence of a new contract, express or implied from the circumstances, to substitute the carriage effected for that originally agreed upon. *Caze & Richaud v. Baltimore Ins. Co.*, 7 Cranch (U. S.) 358; *St. Enoch Shipping Co. v. Phosphate Mining Co.*, *supra*. As no such agreement can be implied in the principal case, the result seems sound.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — TEMPORARY ABSENCE AS AFFECTING STATUS OF PASSENGERS — DUTY OF CARE. — Plaintiff, a passenger on defendant's train, alighted at a way station to obtain breakfast. Upon attempting to reënter her car, she fell and was injured. The car had not been brought opposite the station platform. *Held*, that a passenger while off the train is owed only reasonable care, although entitled to the highest degree of care while riding, and that plaintiff may recover. *Sellers v. Southern Pacific R. Co.*, 166 Pac. 599 (Cal.).

Persons who alight from the conveyance of a carrier for a temporary and reasonable purpose are frequently said to retain their status as passengers. *Alabama, etc. R. Co. v. Coggins*, 88 Fed. 455; *Tompkins v. Boston El. R. Co.*, 201 Mass. 114, 87 N. E. 488. See 2 HUTCHINSON, CARRIERS, § 1012. The distinction is often drawn, as in the principal case, between the degree of care owed by a carrier to its passengers in course of transportation, and that owed to passengers while off the conveyance. *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. 383; *Moreland v. Boston, etc. R. Co.*, 141 Mass. 31, 6 N. E. 225. Occasionally a carrier has been held to the highest degree of care in all its relations with passengers. *Brackett v. Southern R. Co.*, 88 S. C. 447, 70 S. E. 1026. See *Atchison, etc. R. Co. v. Shean*, 18 Colo. 368, 371, 33 Pac. 108, 109. Opposing these are authoritative statements pronouncing degrees of care unscientific and impractical. *Raymond v. Portland R. Co.*, 100 Me. 529, 62 Atl. 602; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489. See 6 ALB. L. J. 313, 314; 18 HARV. L. REV. 536. The care exacted in any situation should be expressed as that care which a reasonable person would use under those circumstances. The amount of effort required to attain this standard will of course vary with the circumstances, but the result is always reasonable care. The distinction, which the court in the principal case attempts to draw, therefore, seems unsound. It would further seem that the category of passengers that the courts attempt to create in these cases is an unnecessary one, and that the result should be reached on pure tort principles. Where the injury is the result of a condition of the premises, and in some jurisdictions where it is the result of negligent management of an active force, this would involve the question of whether the plaintiff is an invitee or a mere licensee.

CONFLICTS OF LAWS — REMEDIES — RIGHTS OF ACTION — RIGHT OF A CONSIGNEE TO RECOVER FOR MENTAL ANGUISH CAUSED BY CARRIER'S NEGLIGENCE. — The corpse of plaintiff's brother was shipped from Kansas consigned to her in Alabama. Through the negligence of defendant carrier, rain was allowed to fall on it at the place of delivery, and plaintiff sought damages for the mental anguish caused by this. *Held*, that she could not recover. *Deavors v. Southern Express Co.*, 76 So. (Ala.) 288.

The court goes on the theory that the injury resulted from the breach of a contract for interstate shipment, governed by federal laws, and that damages for mental anguish are not recoverable for such a breach. *Western Union Telegraph Co. v. Hawkins*, 73 So. 973; *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 547. But there is no federal rule governing the elements of damages, and no federal common law, so the state law remains in force. *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92. See 30

HARV. L. REV. 391. A person having no property right in the thing shipped may sue on the contract of shipment if he is the person with whom or for whose benefit the contract was made. *Gratiot St. Warehouse Co. v. Missouri, K. & T. R. Co.*, 124 Mo. App. 545, 102 S. W. 11. But a suit in tort is allowed to one having a general or special property right in the thing shipped even though he be a stranger to the contract. *Schlosser v. Great Northern R. Co.*, 20 N. D. 406, 127 N. W. 502. The plaintiff has at least a "quasi-property right." *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238; *Miner v. Canadian Pacific R. Co.*, 15 West. L. Rep. 161. See 28 HARV. L. REV. 322. Such an action is controlled by the law of the place where the cause of action arose, and in Alabama damages for mental anguish are recoverable. *Birmingham Transfer & Traf. Co. v. Still*, 7 Ala. App. 556, 61 So. 611.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — POWER OF ENGLISH COURT TO DECLARE AN ACT OF PARLIAMENT UNCONSTITUTIONAL. — The Defense of the Realm Consolidation Act empowered the King in Council to "issue regulations for securing the public safety and the defense of the realm," 5 GEO. V. c. 8. A regulation passed under this general power empowered the secretary of state to order the internment of any person "of hostile origin or association" where on the opinion of a competent military authority it appears expedient to do so. Reg. 146. Under this regulation a naturalized German was interned. He appealed on the ground that the regulation was unauthorized by the act and thus *ultra vires*. *Held* (Lord Shaw of Dunfermline, dissenting) that the regulation was authorized by the act. *Rex v. Halliday*, [1917] A. C. 261.

For a discussion of this case, see NOTES, p. 296.

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — ACTION TO ENJOIN THE ENFORCEMENT OF TAXATION UNDER AN UNEQUAL ASSESSMENT. — The Constitution of Kentucky provided for the uniform taxation of all property, both corporate and individual, according to its fair cash value. Taxable property in general, however, was assessed at sixty per cent of actual values, while the defendants, constituting the Board of Valuation and Assessment, systematically and intentionally assessed the property of the plaintiff corporation at seventy-five per cent of its actual value. There being no diverse citizenship the jurisdiction of the federal courts was invoked under the equal protection provision of the Fourteenth Amendment. *Held*, that the acts complained of violated the Kentucky Constitution, and that an injunction should be granted. *Greene, Auditor, v. Louisville, etc. R. Co.*, 1917, U. S. Sup. Ct. Off. § 617.

The requirement of the Fourteenth Amendment that the states shall not deny the equal protection of the laws to any persons extends to the levying of taxes. See WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, § 270. A sporadic case of inequality will not constitute a violation of the provision. *Supervisors v. Stanley*, 105 U. S. 305. See *Coulter v. Louisville, etc. R. Co.*, 196 U. S. 599, 609. But if the discrimination is persistent and systematic, though not sanctioned by the courts of the state, it will be reviewable in the federal courts. *Raymond v. Chicago Traction Co.*, 207 U. S. 20; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278. Because the sovereign may not be sued, the suit will be against the administrative officials. See GUTHRIE, THE FOURTEENTH AMENDMENT, 176. For the purposes of jurisdiction under the Fourteenth Amendment, however, their acts are regarded as the acts of the state, whose agents they are. *Chicago, etc. R. v. Chicago*, 166 U. S. 226; *Raymond v. Chicago Traction Co.*, *supra*. Whether the state does not thus become the actual party defendant must be determined by a consideration of the entire record. *Ex parte Young*, 209 U. S. 123. For unless the nominal defendants could be held liable independently and individually the suit could not be maintained.



*Hagood v. Southern*, 117 U. S. 52; *In re Ayres*, 123 U. S. 443. But it is immaterial whether they administer an unconstitutional law, or tortiously administer a valid one. *Truax v. Raich*, 239 U. S. 33; *Raymond v. Chicago Traction Co.*, *supra*. Where the federal question raised is not merely colorable the federal court acquires jurisdiction, and can decide the case on state questions. Nor will it lose its jurisdiction of the case by omitting to decide the federal question, even when upon the state questions relief could be had in the state courts. *Siler v. Louisville, etc. R. Co.*, 213 U. S. 175; *Michigan Central R. v. Vreeland*, 227 U. S. 59; *Louisville Trust Co. v. Stone*, 107 Fed. 305. In the principal case the plaintiff was entitled under the state laws and constitution to the relief sought. *Cummings v. Merchants Nat. Bank*, 101 U. S. 153; *Taylor v. Louisville, etc. R. Co.*, 88 Fed. 350. The jurisdiction of the court being established, therefore, there could be no dispute as to the propriety of the injunction. See 1 FOSTER, FEDERAL PRACTICE, 5 ed., 325, note 25.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE — IMPLIED POWERS — AUTHORIZATION OF NATIONAL BANKS TO ACT AS EXECUTOR. — The Federal Reserve Act provides that the Federal Reserve Board may "grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds" (38 Stat. at L. 251, 253, c. 6). *Held*, that the act is constitutional. *First National Bank v. Fellows*, 37 Sup. Ct. Rep. 734.

The general doctrine that Congress may properly authorize national banks to carry on such functions as are necessary to their existence as efficient governmental agencies must be accepted as firmly established. *Osborn v. Bank*, 9 Wheat. (U. S.) 738. *Cf. Legal Tender Cases*, 12 Wall. (U. S.) 457; *United States v. Marigold*, 9 How. (U. S.) 560. In the principal case the court interprets and extends this doctrine to permit the exercise by national banks, under federal authorization alone, of any functions necessary to enable them "effectively to compete with state banking corporations." And the provision in the statute that such right is to be granted only when not in contravention of state law does not weaken the force of the decision as an authority for the broad principle laid down. For unless such additional powers are necessary and proper for the effective maintenance of this federal agency they cannot constitutionally be granted at all. See *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 326; *McCullough v. Maryland*, 4 Wheat. (U. S.) 316, 405. And if such powers are necessary, state law cannot stand in the way. *M'Cullough v. Maryland*, *supra*; *Easton v. Iowa*, 188 U. S. 220; *Tennessee v. Davis*, 100 U. S. 257. It would seem, however, that some limit must exist to the power of the federal government to invade fields of state control through the gateway of the national bank. And on this ground the courts of Illinois and Michigan held the provision unconstitutional. *People v. Brady*, 271 Ill. 100, 110 N. E. 864; *Fellows v. First Nat. Bank*, 159 N. W. (Mich.) 335. The power to control the distribution of property, to determine the duties and qualifications of executors and administrators, has hitherto been held to lie exclusively within the jurisdiction of the separate states. *United States v. Fox*, 94 U. S. 315; *Brown v. Fletcher's Estate*, 210 U. S. 82. To admit that Congress may grant these new powers to national banks means also that the federal government may, if it pleases, control these activities to the exclusion of the states. For the private, as well as the public, functions of a national bank are potentially free from state taxation or regulation. *Osborn v. Bank*, *supra*; *Farmers' etc. Bank v. Dearing*, 91 U. S. 29; *Davis v. Elmira Savings Bank*, 161 U. S. 275; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664. This seems to be the law in spite of a sound *dictum* by the court in the principal case that state regulations, if not discriminatory, would be controlling in the exercise of such business. See TIFFANY, BANKS AND BANKING, § 93. If these fields can thus be invaded by

the federal government it is doubtful whether any branch of economic life can permanently remain within the control of the states. The doctrine of *Osborn v. Bank* must, then, be applied with caution. Congress should be permitted to authorize federal agencies to engage in incidental private activities only when clearly essential, and not when merely appropriate, to the continued performance of their governmental functions. See *Osborn v. Bank*, *supra*, 861.

**CONSTITUTIONAL LAW — THE RIGHT TO VOTE — STATUTE UNCONSTITUTIONAL IN PART — WHO MAY SET UP UNCONSTITUTIONALITY.** — A statute provided that "all ballots shall be void which do not contain first-choice votes for as many candidates as there are offices to be filled" (1914, NEW JERSEY LAWS, 174). In accordance with this enough ballots were rejected to cause the defeat of the relator and the election of the respondent. The relator brought an information in the nature of *quo warranto*, contending that this provision was a violation of the constitutional guarantee of the right to vote. *Held*, that the court will not decide the question of constitutionality, for if the contested clause is unconstitutional the whole statute must fail and the election will be void, so the relator can have no title to the office in any event. *Daly v. Garven*, 101 Atl. 272 (N. J.).

The clause in question would seem to be a mere regulation of the manner in which the right to vote is to be exercised, and therefore constitutional. *Farrell v. Hicken*, 125 Minn. 407, 147 N. W. 815. *Cf. Adams v. Landsdon*, 18 Idaho 483, 110 Pac. 280. Wherever possible a court will avoid passing on the question of constitutionality. *Sayles v. Walla Walla County*, 30 Wash. 194, 70 Pac. 256. But assuming that the clause is unconstitutional, the question arises whether the remainder of the statute is separable or must fall with it. The proper test is whether the statute with the unconstitutional part excised conforms to the legislature's intent in passing it and may be maintained without that part. *Sprague v. Thompson*, 118 U. S. 90; *Reed v. Omnibus R. R. Co.*, 33 Cal. 212. See 20 HARV. L. REV. 495. When part of an act fails, no presumption exists in favor of the remainder. *South, etc. Alabama R. Co. v. Morris*, 65 Ala. 193. See COOLEY, CONSTITUTIONAL LIMITATIONS, 248 n. But nevertheless the decision on this point seems too strict. *Cf. O'Brien v. Krenz*, 36 Minn. 136. If the whole statute falls, however, the election is void and the relator has no title. He cannot therefore attack the title of the respondent. *Manahan v. Watts*, 64 N. J. L. 465, 45 Atl. 813. But even if the provision is separable the decision of the case is probably right, as the presence on the official ballot of a statement that ballots not complying with an unconstitutional regulation would be thrown out might well be held sufficient cause for avoiding the election, since it would be impossible to determine what the result would have been but for that statement. *Cf. Jones v. Glidewell*, 53 Ark. 161.

**HUSBAND AND WIFE — COMMUNITY PROPERTY — LIABILITY OF COMMUNITY PERSONALTY FOR THE TORT OF THE HUSBAND.** — The plaintiff sought to subject the community personal property to execution in order to satisfy a judgment for the husband's tort, not committed in the management of the community property. *Held*, that the community personal property is not liable. *Schramm v. Steele*, 166 Pac. 634 (Wash.).

The general principle underlying the system of community property, which is recognized in eight American states, is that all acquisitions of a husband and his wife during marriage belong beneficially to both. See BALLINGER, COMMUNITY PROPERTY, chap. 1; 24 HARV. L. REV. 652. In general the community property is liable for the separate debts of the husband, as its management and disposition are vested solely in him. *Davis v. Compton*, 13 La. Ann. 396; *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719; *Lee v. Henderson*, 75 Tex. 190,



12 S. W. 981. But in Washington, where a statute requires joinder by the wife in alienating or encumbering the realty, community real estate is not chargeable with the independent obligations of the husband. 1915 REM. CODE (Wash.), § 5918; *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688. Later decisions have reached the same result on the more logical ground that community realty is not liable for acts committed by the husband without the scope of his authority as agent of the community. *Day v. Henry*, 81 Wash. 61, 142 Pac. 439; *Wilson v. Stone*, 90 Wash. 365, 156 Pac. 12. Prior to the principal case, however, like reasoning was not applied to exempt the community personalty from liability. *Powell v. Pugh*, 13 Wash. 577, 43 Pac. 879. But the principal case puts all common property, real and personal, on the same basis, and rests the liability of the community upon the rule *respondent superior*. Without changing the theory of the system this decision further recognizes the individuality of the married woman, and guarantees her interest more than a theoretical existence.

ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — AGREEMENT FOR RE-EXCHANGE OF NEGOTIABLE PAPER TO EVADE STATUTORY PROHIBITION. — The plaintiff bank, in order to evade the banking laws, contracted with the defendant bank to exchange a customer's note for a note of the same amount held by the defendant. The notes were to be reëxchanged on demand. The note delivered by the defendant was worthless. *Held*, that the plaintiff bank was entitled to the return of the note or its proceeds. *England v. Commercial Bank of New Madrid, Mo.*, 242 Fed. 813.

The general rule is that the law leaves parties to an illegal transaction where it finds them. *Holman v. Johnson*, 1 Cowp. 341; *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 1020. Equity, likewise, refuses to raise a resulting trust in favor of the settlor where an express trust for an illegal purpose has failed. *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616. But *cf. Taylor v. Bowers*, 1 Q. B. D. 291. This rule has been severely criticized. See WOODWARD, QUASI CONTRACTS, § 135. Important exceptions have been recognized. Where the offense is not *malum in se* the plaintiff has sometimes prevailed. *Davies v. London, etc. Ins. Co.*, L. R. 8 Ch. D. 469. See KEENER, QUASI CONTRACTS, 258. Where the defendant's conduct is tainted with fraud the courts have been ready to find that the parties are not *in pari delicto*. *Brown v. McIntosh*, 39 N. J. L. 22; *Thomas v. Richmond*, 12 Wall. (U. S.) 349. See PERRY, TRUSTS AND TRUSTEES, 6 ed., § 214; POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 403. See also 26 HARV. L. REV. 738. It is solely for public authority to assert the illegality of contracts contrary to public policy. See *Union Nat. Bank v. Matthews*, 98 U. S. 621, 629. A defendant, sued by a national bank for money lent, cannot maintain the defense that the bank exceeded the amount permitted by law. *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 96 U. S. 640; *Bank of Middlebury v. Bingham*, 33 Vt. 621. Where illegal contracts have been held void, a quasi-contractual obligation to make restitution has been enforced. *Central Transp. Co. v. Pullman's, etc. Co.*, 139 U. S. 24; *Pullman's, etc. Co. v. Central Transp. Co.*, 171 U. S. 138. But see E. H. Warren, "Executed *Ultra Vires* Transactions," 23 HARV. L. REV. 495. See also 23 HARV. L. REV. 627. Since the statute in the principal case was intended to protect the bank's depositors, the court's decision seems desirable.

MANDAMUS — PROCEEDINGS — TRAVERSE OF RETURN TO ALTERNATIVE WRIT. — An alternative writ of mandamus issued to compel a corporation to permit inspection of its books by a stockholder. In its return the corporation alleged that the inspection was desired for an improper purpose. *Held*, that the return must be accepted as true and the peremptory writ denied. *State ex rel. Linihan v. United Brokerage Co.*, 101 Atl. 433 (Del.).

At common law the court would not try the truth of a return to an alternative writ upon affidavits. *Universal Church v. Columbia Township*, 6 Oh. St. 446. See *Manaton's Case*, T. Raym. 365. The remedy of the prosecutor was by an action on the case for false return or, if the rights of the public were involved, by criminal information. *State v. Wilmington Bridge Co.*, 3 Harr. (Del.) 540. See TAPPING, MANDAMUS, 383. The statute of Anne made the return traversable in cases involving municipal corporations. 9 ANNE, c. 20. A later enactment extended the same rule to all cases for mandamus. 1 WILL. IV. c. 21. The pleadings in mandamus became substantially like those in ordinary actions at law. See *King v. Mayor and Aldermen of London*, 3 Barn. & Ad. 255, 280. The statute of Anne or similar legislation forms a component part of the law of most of the United States. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., § 457 *et seq.* Even where the statute of Anne has not been recognized it has sometimes been held that the modern development of the writ of mandamus and the policy of our law against multiplicity of suits justify an overturning of the dilatory and cumbersome rule of the common law. *Fitzhugh v. Custer*, 4 Tex. 391. The principal case, however, is supported by prior decisions in Delaware and by the weight of early authority elsewhere. *McCoy v. State*, 2 Marv. (Del.) 543, 36 Atl. 81; *Dane v. Derby*, 54 Me. 95; *Police Board v. Grant*, 17 Miss. 77.

MASTER AND SERVANT — ESTOPPEL — LIABILITY FOR TORT OF DEFENDANT REPRESENTING ITSELF AS EMPLOYER. — The defendant corporation turned over a mine which it had operated to its president. A miner employed after the transfer was injured. He brought suit against the defendant, reasonably believing it his employer. *Held*, that the corporation is liable. *Ward v. Liverpool Salt and Coal Co.*, 92 S. E. 92 (W. Va.).

Where the relation of master and servant does not exist in fact, there can be no liability predicated upon that relation unless the defendant is estopped to deny its existence. Estoppel must be taken to be the basis of the court's holding, although the precise term does not appear. See *Solomon R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657. Estoppel raises the question whether the plaintiff acted upon the representation. See BIGELOW, ESTOPPEL, 5 ed., 570 *et seq.* It apparently was a matter of indifference to the plaintiff who his employer was. On the other hand, the expenses of litigation have been held enough to raise an estoppel. *Meister v. Birney*, 24 Mich. 435. This suggests the vexed question whether estoppel constitutes part of the cause of action. See EWART, ESTOPPEL, 187. If it does it would be difficult to say that the plaintiff has a cause of action at the institution of his suit, since there has been no change of position until that moment. However that may be, the better rule is that the plaintiff can recover only for the damage actually sustained. *Campbell v. Nichols*, 33 N. J. L. 81. *Contra*, *Meister v. Birney*, *supra*. See EWART, ESTOPPEL, 191 *et seq.* Under this view the most that plaintiff could recover would be costs and attorney's fees.

PATENTS — INFRINGEMENT — RESTRICTION FORBIDDING USE EXCEPT WITH ACCESSORIES OF PATENTEE'S MANUFACTURE. — Patented motion picture-projecting machines were sold with license restriction that they be used only with films of the patentee's manufacture. The defendant, a rival film concern, with notice of the restriction, leased films to users of the machines. *Held*, that such leases do not constitute contributory infringement. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 37 Sup. Ct. Rep. 416. For a discussion of this case, see Notes, p. 298.

PAYMENT — APPLICATION — PAYMENTS ON RUNNING ACCOUNT, PART OF WHICH IS SECURED. — Plaintiffs and defendant had a running account, on which advances were charged and payments credited without distinctions.



Plaintiffs held defendant's mortgage for a portion of the account, but payments made subsequent to the maturity of the mortgage debt covered a greater amount than the mortgage. *Held*, that the court would apply the payments to the oldest debt, and that the mortgage was therefore paid. *Mayer Bros. v. Gevin*, 76 So. 307 (Ala.).

Failing application of the payment by the debtor at the time of payment, the creditor may apply it to any of several debts that he may choose. *McCurdy v. Middleton*, 82 Ala. 131, 2 So. 721; *In re Lindau*, 183 Fed. 608. In the absence of such application, the court will apply the payment as it sees fit, considering the interests of both the debtor and the creditor. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; see *Barrett v. Sipp*, 50 Ind. App. 304, 311, 98 N. E. 310, 313. In general the application by the court is made to the oldest of several debts. *Kloepfer v. Maher*, 84 N. Y. Supp. 138. And where the question of priority is not raised, the more general rule of application is to the debt least secured. *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746. Where the least secured debt is not the oldest, it would seem that by the better view the application should be to the one least secured. *Schuelenburg v. Martin*, 2 Fed. 747; *Smith v. Lewiston Steam Mill*, 66 N. H. 613, 34 Atl. 153; *Bank of New Roads v. Kentucky Refining Co.*, 27 Ky. L. R. 645, 85 S. W. 1103. But the weight of authority favors application to the earliest debt, on analogy to the rule in Clayton's Case. *Clayton's Case*, 1 Mer. 529, 572. *Moses v. Noble*, 86 Ala. 407, 5 So. 181; *Worthley v. Emerson*, 116 Mass. 374; *Tapper v. New Home Sewing Machine Co.*, 22 Ind. App. 313, 53 N. E. 202. See also 21 HARV. L. REV. 623.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — RIGHT OF PRIVATE PARTIES TO INJUNCTION FOR VIOLATION. — Private individuals brought suit to enjoin concerted action to prevent the use of nonunion-made materials manufactured in other states. *Held*, that the injunction be denied. *Paine Lumber Co. v. Neal*, 37 Sup. Ct. Rep. 718.

Equitable relief against boycotting combinations was well known in the absence of statute. *Temperton v. Russell*, [1893] 1 Q. B. 715; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881. The Sherman Anti-Trust Act being "highly remedial," expressly allows triple damages in such cases. See 26 STAT. AT L. 209, § 7; *Loewe v. Lawler*, 208 U. S. 274. See 21 HARV. L. REV. 450. A boycott in restraint of interstate trade is now a federal question. But triple damages may be inadequate, if the injury is a continuing one requiring a multiplicity of suits. In the absence of statutory prohibition, equitable relief by the federal courts would seem to follow. See *United States v. Detroit Timber and Lumber Co.*, 200 U. S. 321, 339. Because the Sherman Act is silent on the point certain cases have held that by implication injunctive relief is denied to private individuals. *National Fireproofing Co. v. Mason Builders' Assoc.*, 169 Fed. 259. The sounder view is that there was no legislative intention to deny the right to injunction. *Bigelow v. Calumet and Hecla Mining Co.*, 155 Fed. 869, 876; *Delavan v. N. Y., N. H., and Hartford R. Co.*, 154 App. Div. (N. Y.) 8, 137 N. Y. Supp. 207. See THORNTON, THE SHERMAN ANTI-TRUST ACT, §§ 351, 427. See also 26 HARV. L. REV. 179. Nor does the Clayton Act establish a policy inconsistent with injunctions in such cases. See 38 STAT. AT L. 730, 737. Mr. Justice Pitney, in a powerful dissenting opinion, searches in vain for anything in either the Sherman or Clayton acts denying the right of a private party to an injunction against a labor union. The propriety of denying this right in a case like the present seems doubtful, to say the least.

STATUTE OF FRAUDS — PART PERFORMANCE — ACT REFERABLE SOLELY TO CONTRACT — PAYMENT OF PURCHASE-MONEY NOTE BEFORE MATURITY. — A written contract for the sale of land was modified by parol agreement that

upon payment of a sum down and of one of the purchase-money notes before maturity a specific part of the land should be conveyed at once. *Held*, that payment took the case out of the statute. *Segers v. Williams*, 93 S. E. 215 (Ga.).

The decision might rest on statute 1910 GA. CIV. CODE, § 4634. But the same result should be reached apart from statute, since there could be no new taking possession under the parol contract and payment of the purchase-money note before maturity was an act solely referable to a contract as to the land. *Wills v. Stradling*, 3 Ves. Jr. 378; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Spear v. Orendorf*, 26 Md. 37. Cf. *Malins v. Brown*, 4 N. Y. 403. In most of the cases of payment of money niceties of chancery pleading were invoked to show that the payment was solely referable to the contract. Here as the purchase-money note was in substance a part of the written contract to convey, which the parol agreement modified, and the note could not be paid before maturity without a new contract, the payment itself testifies to some new contract. In this respect the case is like *Mundy v. Jolliffe*, *supra*.

**STATUTES — INTERPRETATION — CONSTRUCTION OF STATUTE PUNISHING CONSPIRACIES TO DEFRAUD THE UNITED STATES.** — Defendants conspired to induce voters to vote more than once at a primary election for United States Senator. They were indicted under section thirty-seven of the United States Criminal Code for conspiring to defraud the United States. *Held*, that demurrers to the indictments were rightly sustained. *United States v. Gradwell*, 37 Sup. Ct. 407. See NOTES, p. 303.

**TRUSTS — CREATION AND VALIDITY — VALIDITY OF TRUST FOR PROMOTION OF ATHEISM.** — In 1908 one Charles Bowman died leaving his property to trustees upon trust after the death of his wife for the Secular Society, Limited, of London. This society was a registered company. Its chief object as stated in its memorandum of association was "To promote, in such ways as may from time to time be determined, the principal that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." Subsidiary objects were mentioned in the memorandum, such as the promotion of the secularization of the state and of universal secular education in schools maintained by taxation, the recognition by the state of marriage as a purely civil contract, the repeal of Sabbatarian laws, and, finally, the doing of "all such other lawful things as are conducive or incidental to the attainment of all or any of the above objects." The next of kin disputed the validity of the legacy on the ground that the objects of the society were unlawful. *Held* (Finlay, L. C., dissenting), that the trust was lawful. *Bowman v. Secular Society, Limited*, [1917] A. C. 406. See NOTES, p. 291.

**TORTS — OCCUPIERS OF PREMISES — WILFUL INJURY TO TRESPASSERS.** — A trespasser on premises of a street railway company was injured by coming in contact with an iron pole and loose wires lying on the ground as rubbish which had become charged with electricity. The day of the accident a car-shifter on the premises had been notified of the dangerous condition of the pole and had failed to report it to his superiors. For a long time prior to the accident trespassers had been passing over the company's premises at this point with knowledge of the superintendent, as the car-shifter knew. *Held*, that the jury were warranted in finding wilful and wanton conduct for which defendant would be liable to a trespasser. *Romana v. Boston Elevated Railway*, 226 Mass. 532, 116 N. E. 218.

For a discussion of this case, see NOTES, p. 295.



## BOOK REVIEWS

RESCISSION OF CONTRACTS: A TREATISE ON THE PRINCIPLES GOVERNING THE RESCISSION, DISCHARGE, AVOIDANCE, AND DISSOLUTION OF CONTRACTS. By Charles Bruce Morison, one of His Majesty's Counsel in New Zealand. London: Stevens and Haynes. 1916.

This book is not a collection of cases on rescission, but a discussion of the fundamental principles of the subject. It is "designed more as a tool for the worker than as a supply of material." The author has remarked the surprise of the plain business man that the lawyers of the world's greatest commercial communities are in continual disagreement on such everyday questions, as, for example, the right of a buyer under a contract for delivery by instalments to call off the whole transaction when the first instalment arrives short.<sup>1</sup> Consequently he tries to spell out of the leading cases a definite and satisfactory set of principles to guide the practising lawyer in advising on breaches of contract. Such an attitude is refreshing, and more American textbooks ought to be written in the same spirit rather than as mere digests of decisions.

If the author's purpose were successfully carried out, this would be a valuable book. Unfortunately the statement of his views is much less clear than in his two articles in the *Law Quarterly Review*,<sup>2</sup> of which the book is an expansion. We never quite discover how that instalment question should be decided. And although the book professes to cover the whole field of the termination of unperformed contractual obligations by acts of the parties, such important topics as avoidance for mutual mistake receive very meagre treatment.<sup>3</sup> The book must be judged by its discussion of one problem, how far the default of one party to a contract excuses the other from further performance.

In many respects his suggestions are sound and fruitful, as when he points out that this situation should be sharply distinguished from true "rescission," which requires the consent of both parties;<sup>4</sup> or vigorously attacks the persistent English notion that no matter how serious A.'s default, B. must go on performing unless A. shows an intention to repudiate the contract;<sup>5</sup> or demonstrates that a court in which law and equity are fused should apply the same test in determining if A.'s default bars relief, whether A. seeks damages or specific performance subject to compensation.<sup>6</sup>

What, then, is the true test, whether A.'s default excuses B.? The first theory, historically, was that the promises were independent and B. was never excused. If A. promised a cow and B. promised money, A. could keep the cow and get the money and B. would have only a cross-action for the cow. In later cases B. was excused if by construction of the contract A.'s performance could be regarded as an implied condition of B.'s promise. This doctrine Mr. Morison of course rejects. The question is not of conditions and precedence in time, but of failure of consideration.<sup>7</sup>

For Mr. Morison "consideration" means the consideration which makes B.'s promise binding, *i.e.*, the inducement which led B. to enter the contract. Consequently, he determines whether B. is excused by A.'s breach of promise by considering the situation at the time of the contract, — was that particular promise so important a part of the contract as to have been the inducement to

<sup>1</sup> Contrast *Hoare v. Rennie*, 5 H. & N. 19 with *Simpson v. Crippin*, L. R. 8 Q. B. 14.

<sup>2</sup> "The Rescission of Executory Contracts for Partial Failure in Performance," 28 L. Q. R. 398, 29 L. Q. R. 61.

<sup>3</sup> Pages 154-159.

<sup>5</sup> Pages 38, 39.

<sup>7</sup> Page 55.

<sup>4</sup> Pages 5, 19.

<sup>6</sup> Pages xxix, 71, and note.

B.? If so, a breach of that promise excuses B. It makes no difference how seriously A. failed, why he failed, whether he is likely to perform a little later, etc. The intention of the parties in contracting cannot be learned from matters *ex post facto*.<sup>8</sup> Therefore the nature of the breach is irrelevant.

Here issue must be taken. The situation at the time of the breach is much more decisive of B.'s action as a business man than the past events surrounding the contract. This is not a problem of construction of the contract, but of an equitable defense for B. under the whole circumstances of the case. For example, A., a prima donna, agreed to sing through the season for B., an impresario. She sends word she will not appear the first night. Can B. cancel the contract? For Mr. Morison the result will be the same whether she is ill or sulky or off on a spree; whether she has been faithful or irresponsible in the past; whether a temporary substitute can be easily obtained or a permanent diva must be engaged. Such facts are immaterial for the construction of the original contract, but should justly actuate B.<sup>9</sup> The language of the courts is undoubtedly confused, because they try to combine the succession of inconsistent doctrines which have been in force; but most of the results actually attained by the decisions harmonize with this view that the right to cease performance depends on the materiality of the breach, and not on the intention of the parties when contracting.

Mr. Morison's doctrine that failure of "consideration" means common-law consideration leads him to a still more indefensible position, that if B.'s promise were binding without consideration A.'s default would never excuse B. (unless a condition could be implied). He therefore states that the doctrine of failure of consideration does not exist in the Civil Law<sup>10</sup> or in covenants,<sup>11</sup> and would hardly exist at all if Lord Mansfield had succeeded in making written promises as binding as if under seal.<sup>12</sup> Yet, even when a counter-promise is unnecessary it may exist, and if so, all the problems as to exchange of performances would arise in French or German business as much as in Anglo-Saxon communities. In fact, the doctrine of excuse by breach does prevail on the Continent of Europe;<sup>13</sup> and in the United States it extends to sealed contracts as well as unsealed.<sup>14</sup>

It is to be hoped that Mr. Morrison will at some future time work out his theories in connection with the American cases, which have developed less rigidly than the English. At the same time it would be helpful if he would illustrate his propositions by concrete examples, so that the justice of the result might be easier to determine.

One more question this book raises. Very light to handle, cloth-bound, resembling a history rather than the legal treatise in ponderous buckram, it suggests that there is no reason why law should be written as a thing apart from the general field of serious writing. The prospect of more monographs on legal topics for intelligent men of all classes, such as Odgers' "Libel and Slander," would be indeed alluring.

ZECHARIAH CHAFEE, JR.

<sup>8</sup> Pages 58, 86 ff.

<sup>9</sup> Poussard v. Spiers, 1 Q. B. D. 410; Bettini v. Gye, 1 Q. B. D. 183; decisions which Mr. Morison calls a *reductio ad absurdum*.

<sup>10</sup> Pages 12, 85.

<sup>11</sup> Pages 63, 66, 69.

<sup>12</sup> Page 60, note.

<sup>13</sup> "Dependency of Mutual Promises in the Civil Law," Samuel Williston, 13 HARV. L. REV. 80; French Civil Code, § 1184; German Civil Code, § 325 ff.

<sup>14</sup> Ballou v. Billings, 136 Mass. 307; and see Ellen v. Topp, 6 Ex. 424.



CRIMINAL SOCIOLOGY. By Enrico Ferri. Boston: Little, Brown and Company.

To review this book fairly it is necessary to remember the background against which it was written. The author, the friend, and son-in-law, as well as the intellectual disciple of Lombroso, is above all conscious of the fierce storm of controversy which has gathered about his master's work. It is a controversy in which quarter has been neither given nor taken. Lombroso's opponents, indeed, as Aschaffenberg has well said,<sup>1</sup> judge him rather by his faults than by his virtues; and in their eagerness to remember what he did not do, there is a real tendency to forget his solid achievement.

All of this has left its clear trace not only on Signor Ferri's mind, but also on his heart. When he sits down to write, he sees before him the men whose intellectual inability to appreciate Lombroso's doctrines inspires him with contempt, and whose discourteous treatment of this school has moved him to violent rage with the inevitable result that what he has written is less a scientific discussion than what Burnetière has felicitously termed a "*discours de combat*." Such effort has, indeed, its own value in the present stage of criminological discussion. Criminology is itself so new a science that any vigorous and clear defense of a particular doctrine has its special use. This, at least, Signor Ferri has done. He clearly grasps the tenets of his school. He has a saving commonsense which prevents him from defending the more extreme views into which an over-imaginative enthusiasm sometimes led Lombroso himself. He has a keen, if unsympathetic, eye for the weakness of an opponent's position. But it is not possible at once to attack a special thesis and to give an adequate general exposition of the whole subject. The treatment as a consequence loses proportion and perspective, simply because the spirit of the two inquiries are incompatible.

Still, the book is a useful one. Particularly good are the classification of criminals (in which Signor Ferri clearly restates his former argument), and the statement of the relation between environment and crime, where recent research has led the author very sensibly to modify earlier and more extreme views. The old over-emphasis on such supposed criminal tendencies as tattooing has largely disappeared. The whole atmosphere of the book shows a marked tendency to admit the tentative character of the earlier evidence upon which the Lombrosian theories were based. This is a great step forward. And the measures suggested for the improvement of criminal law and its administration will everywhere command general acceptance. It is a great pity that in this new edition Signor Ferri should not have been led to revise his inadequate treatment of the jury system and his advocacy of free trade as a causal factor in the diminution of crime. Nevertheless, one is glad to have in English dress a book that well represents the attitude of the most enlightened section of the Italian school.

ARTHUR D. HILL.

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LA DÉFINITION DU DROIT. By H. Lévy-Ullman. Paris: Larose.

This book is interesting evidence of the renaissance of legal philosophy in France. When, nearly twenty years ago, M. Geny emphasized in a famous book the need for a critical methodology, all that existed in the way of philosophic interpretation were the few scant paragraphs on the notion of law which every commentator on the Civil Code threw in as a half-reluctant sacrifice to that unrecognized science called jurisprudence. Today the efforts of Geny and Demogue in one field, and Duguit and Hauriou in another, are

<sup>1</sup> CRIME AND REPRESSION, 169.

doing nothing so much as to remake the fundamental conceptions of law; and the noble effort of Saleilles, particularly his great treatise on obligation, points the way to the kind of synthesis that is demanded.

Professor Lévy-Ullman has written what is the introduction to a series of volumes on the nature of jurisprudence. He has rightly understood that the first task in that work is the definition of law. What he has done in the present volume is to pass in critical review the various theories that today hold the field, to demonstrate what appears in them to be inadequate, and then to suggest a definition of his own. Much of this critical work is admirably done. It is always clear and straightforward. It shows at every point wide reading, and a real power of presenting the facts at issue. Particularly effective is the criticism of the sociological school of jurisprudence as represented by philosophers like M. Gaston Richard, and lawyers like M. Tanon. It may, indeed, be doubted whether the work of either in fact possesses the importance attached to it; just as it is legitimate to doubt whether the exercises in civilian logic even of such able men as Aubry and Planiol really go to the root of the matter. It is only with the realistic studies of Geny and Duguit that French lawyers began adequately to realize that the sources of law might be found outside the Civil Code.

But the real complaint against this volume is its total neglect of German work. I do not for one moment doubt that nothing in Germany surpasses the admirable efforts of men like Duguit and Geny and Saleilles; but no one can seriously attempt the study of philosophical jurisprudence and neglect the work of Stammler and Kantorowicz, of Ehrlich and of Gierke. I would hazard the opinion that Ehrlich's discussion of the sociological basis of law is a book that, in the perspective of time, will take its place on the same shelf that we reserve for Montesquieu and Maitland. Not even the war can destroy the comity of science; and M. Geny admirably realized that in the noble essays on Kohler and Stammler and Cathrein which stand at the forefront of the second volume of his "Science et Technique." And, similarly, however much one may sympathize with the contents of his last two pages, it is surely out of place in a scientific discussion of law.

M. Lévy-Ullman's own definition of law seems to me less happy than his criticisms. "Law," he says, on page 146, "is the delimitation of what it is permitted either to do or to refrain from doing, without incurring condemnation or penalty." It is a piece of admirable caution, but it surely neglects the fundamental interests involved. It tells us nothing as to the source of law. It does not say what body is to condemn or penalize. Would M. Lévy-Ullman regard a resolution of condemnation passed by a Ladies' Dorcas Society upon an erring sister as an act of law? Or does he limit the path of law to the action of the courts? It is, of course, impossible to do justice to this volume until we have seen what is to follow. But the hope may be expressed that M. Lévy-Ullman will realize the need for dealing with the legal thought of countries other than his own, and of following out the implications of his theory into the vast field that it lays open before him.

H. J. L.

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**THE QUESTION OF THE BOSPHORUS AND DARDANELLES.** By Coleman Phillipson and Noel Buxton. London: Stevens and Haynes.

To say as we may that a book is "timely" is one way to cover a multitude of sins. The present volume, however, suffers not so much from a multitude of sins as from a lack of any particular virtues. It is a short study of a very important question, yet it might well have been shorter. Apart from the physical consideration of the thick paper, fine large print, generous margins,



and most luxurious space for the index, which make a small book look like a large one, there is much in it that might have been omitted. For instance, the larger half, the historical portion, would have been profitably curtailed if the authors had kept closer to their subject, the Question of the Straits, and had not attempted a sketch of the whole Eastern Question. Such a thing is hard to do well, and it has not been done well here. To be sure, it has been done conscientiously, with frequent reference to reassuring authorities like Herstatt's map of Europe and the Cambridge Modern History, and there are few slips in ordinary detail; but the story as told is neither clear nor illuminating, and it would have been more readable if the texts of treaties had been put together in an appendix. An annoying fault is that the quotations from French sources, which make up much of the work, are given even from the same volume, sometimes in translation, sometimes in the original.

Part III, "Reconstruction," is where the authors have their chance to add something of their own. First, they offer us a little more history mixed with discussion, then suggestions from miscellaneous writers, and in the last chapter of all we have their own view, "Which is the best solution?" Their answer is "Internationalization." Perhaps they are right, provided the Turks can be eliminated, which is not yet certain; but this solution to be successful will demand a great deal of careful thinking and planning. It may be that "to bring about the coöperation of states in this or that undertaking is to promote the habit of association;" (some cynics might cite the "coöperation" of Russia, Austria, and Prussia in the partitions of Poland as having promoted "the habit of association" between them), but rhetorical generalities are not enough here. The advantages of internationalization are indeed obvious and may almost be taken for granted. The thing to do is to face resolutely the many formidable difficulties. To indicate only a few of them: If the Straits are to be left unfortified, the temptation to Russia or to her adversary to seize them at the outbreak, or mere threat of war, might be irresistible for sound military reasons. Who then is to punish the delinquent? If we go on the principle that we are not going to have any wars in the future, the rules for belligerent vessels proposed by Messrs. Phillipson and Buxton are needless; as it is, one is tempted to ask whether they would apply to submarines. Should these be allowed to choose their position just within the three-mile limit and then dive off in the direction they prefer? There are treaty provisions to insure safe passage through the Suez Canal in time of war as well as of peace, but does any one believe that today the *Goeben* and *Breslau*, if they could dodge out and get to the Canal, would be allowed to sail calmly through it and work their will on English shipping in the East? Or again, granting that other powers do not want to have Russia control the Straits, does the fact that in the midst of revolution she has accepted the principle of internationalization guarantee that a few years hence she will not return to what has been a natural ambition for centuries? Her interest in the Straits is as great as our own in the Panama Canal, and not unlike it, as even the Russian revolutionists have realized. Finally, there is the problem of how to handle the considerable population in and about Constantinople. Self-government would doubtless be the ideal plan, but owing to ages of despotic rule, intense national and religious rivalries and other causes, few people in the world are less prepared for it. Some sort of an international commission will be necessary, a cumbrous thing at the best, and at the worst a hotbed for troubles of all sorts. The Danube Commission, so often cited with praise, has to do with questions of far less complication and difficulty. At Tangiers, where the administration is in the hands of only three foreign powers, things run none too smoothly. Each additional country that has a finger in such a pie tends to make matters worse, and in Constantinople a great many would want to have their fingers in. It may be that these and many other difficulties can be, and will have to be, over-

come, but it is futile to ignore them or to waive them away with fine phrases.

Messrs. Phillipson and Buxton mention with some approval Mr. Toynbee's suggestion that the guardianship of the Straits should be entrusted to the United States as a disinterested power. We may appreciate the compliment without accepting the offer, noting incidentally that the same reasoning would apply to a Russian guardianship of the Panama Canal.

ARCHIBALD CARY COOLIDGE.

SATOW, SIR E.: A GUIDE TO DIPLOMATIC PRACTICE. New York: Longmans. 2 vols. [To be reviewed.]

BRUCE, BURNETT (Ed.): UNITED STATES STATUTES ANNOTATED. Vols. 1-4. Chicago: T. H. Flood. [A useful and competent edition.]

NICHOLS, PHILIP: THE LAW OF EMINENT DOMAIN. Albany: Bender. 2 vols. [To be reviewed.]

ROXBURGH, R.: INTERNATIONAL CONVENTIONS AND THIRD STATES. New York: Longmans. [To be reviewed.]

HEALY, W.: MENTAL CONFLICTS AND MISCONDUCT. Boston: Little, Brown and Company. [To be reviewed.]

BEVERIDGE, A. J.: LIFE OF JOHN MARSHALL. Vols. 1, 2. Boston: Houghton Mifflin. [To be reviewed.]

PHILIPPSON, C., and BUXTON, N.: THE QUESTION OF THE BOSPHORUS. London: Stevens and Haynes. [See Review.]

WILLIAMS: JURISDICTION AND PRACTICE OF THE FEDERAL COURTS. St. Louis: F. H. Thompson. [To be reviewed.]

MORISON, C. B.: THE PRINCIPLES OF RESCISSION OF CONTRACTS. London: Stevens and Haynes. [See Review.]

BRUMBAUGH, J. F.: LEGAL REASONING AND BRIEFING. Indianapolis: Bobbs-Merrill. [To be reviewed.]

BOLLAND, W. C. (Ed.): YEAR BOOKS OF EDWARD II. Vol. XII. London: Selden Society. [To be reviewed.]

WOOD, W. A.: MODERN BUSINESS CORPORATIONS. Indianapolis: Bobbs-Merrill. [To be reviewed.]

BIGELOW, H. A.: CASES ON PROPERTY. St. Paul: West Co. [To be reviewed.]

NEW YORK CITY: REPORT OF COMMITTEE ON BUILDING DISTRICTS. New York: Municipal Building.

KNIGHT, AUSTIN M.: INTERNATIONAL LAW TOPICS. Annapolis: Naval College.

KNIGHT, AUSTIN M.: INTERNATIONAL LAW TOPICS. Annapolis: Naval College.

CARNEGIE ENDOWMENT: YEAR BOOK. Washington: Headquarters of the Endowment.

COOLIDGE, A. C.: THE ORIGINS OF THE TRIPLE ALLIANCE. New York: Scribners.

VARIOUS AUTHORS: SCIENCE AND LEARNING IN FRANCE. Society for American Fellowships in French universities.



J. A. LAPP: *IMPORTANT FEDERAL LAWS*. Indianapolis: Bowen.

COLLIN, C.: *THE WAR AGAINST WAR*. New York: Macmillan.

RHODES, J. F.: *WORKMEN'S COMPENSATION*. New York: Macmillan. [To be reviewed.]

Various Authors: *THE SCIENCE OF LEGAL METHOD*. Boston: Boston Book Co. [To be reviewed.]

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## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES

MARSHALL'S familiar *dictum* that "the power to tax involves the power to destroy"<sup>1</sup> has the vice, not uncommon among aphorisms, of being only partly true. It implies that where a state may tax at all, it may tax as it pleases. This would mean that those restrictions on the taxing power of the states which are incident to the federal system of government apply only to the subjects which may be selected for taxation and in no way concern the methods by which the amount of any tax is determined. This seems to be the opinion of Marshall, for, in denying the power of a state to include United States bonds among the kinds of property selected for taxation, he said: "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."<sup>2</sup>

The questions which the great Chief Justice was discussing called for no such statements. His argument in *McCulloch v. Mary-*

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<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 431 (1819).

<sup>2</sup> *Weston v. City Council of Charleston*, 2 Pet. 449, 466 (1829). See also Marshall's statement in *Brown v. Maryland*, 12 Wheat. 419, 439 (1827): "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."



land<sup>3</sup> and *Weston v. City Council of Charleston*<sup>4</sup> was in support of the proposition that a state could levy no tax whatever on an instrumentality of the federal government, even though the particular tax in issue might not appreciably interfere with that government. He was seeking some general rule which would relieve the courts of the necessity of considering the precise economic effect of every tax that came before them. This he found in the doctrine that a state, if it cannot tax a federal instrumentality into impotence, cannot tax it at all. Marshall was designating subject matters which he deemed entirely outside of state authority. He was not considering whether subject matters within the reach of the taxing power of a state could be subjected to whatever methods of assessment the state might choose to apply. His strong federalism, it would seem, would make him loth to assert by explicit decision that, if a state selects a proper subject for taxation, no method of assessment can make the tax an interference with the federal government or an encroachment on any of its powers.

This implication, however, has frequently been drawn from his too terse pronouncement. Many decisions with respect to the taxing power of the states have proceeded on the theory that inquiry need be directed only to the characteristics of the subject matter on which the tax is levied. If the subject is an instrumentality of the federal government, the state tax is invalid as an interference with the necessary effectiveness of that government. If the subject is not an instrumentality of the federal government, the tax cannot be held invalid as an interference with that government. If the subject matter is interstate commerce, the state tax is invalid as a regulation of such commerce. If the subject matter is not interstate commerce, the tax cannot be a regulation of such commerce. Such are the conclusions which find warrant in the language of many of the judges of the Supreme Court. But an examination of the decisions shows that the line of demarcation between valid and invalid state taxes is not so clear and straight as this language implies.

The so-called "subjects" of taxation with which the cases have had to deal have all been within the territorial jurisdiction of the state. They have been privileges granted by the state, or acts

<sup>3</sup> 4 Wheat. 316 (1819).

<sup>4</sup> 2 Pet. 449 (1829).

done, business conducted or property located within the state. The immunity of the subject from state taxation has been urged, not because it was geographically outside the state's jurisdiction, but because it was legally withdrawn from that jurisdiction by the creation of the federal system of government. The act in question might be an act of interstate commerce. The property might be owned by the United States or consist of the bonds of the United States. It is on the ground that the subject on which the tax is imposed is an agency of the United States or is an agency of interstate commerce, that what is within the territorial jurisdiction of the state is held to be nevertheless outside of its legal jurisdiction.<sup>5</sup>

In discussing questions of legal jurisdiction, the use of such spatial terms as "within" and "without" involves possible confusion. It might be better to say "subject to" and "immune from" the jurisdiction of the state. In this connection "jurisdiction" has the connotation of "legal power to deal with," rather than that of "area within which action may be taken." And "power" must be understood not to refer to power in general, to all kinds of power, but to indicate only the specific exercise of authority in question. The same act or business or property may be immune from one exercise of authority by the state, and subject to other exercises of state power. Thus a state may tax goods from other states still in the original package,<sup>6</sup> but may not forbid their sale.<sup>7</sup> Goods originating in other states become subjects of the taxing jurisdiction of the state into which they are brought, before they become subjects of its police jurisdiction. So a state may not tax bonds of the United States, but may punish their theft or determine disputes as to their ownership. The jurisdiction of the state over any given subject matter cannot be predicated generally.

<sup>5</sup> Cf. Marshall's statement in *Brown v. Maryland*, 12 Wheat. 419, 441 (1827):

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise."

<sup>6</sup> *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

<sup>7</sup> *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681 (1890).



The question in each case is a specific one, limited to the particular exercise of state authority in issue.

The determination of the question whether any act or business or privilege or property is a subject of interstate commerce or is an agency of the federal government depends of course on its relation to interstate commerce or to the federal government. This relation may be direct or indirect, remote or immediate. The question is often one of degree. A somewhat arbitrary line has to be drawn. In drawing this line in respect to any mooted subject, economic considerations are always pertinent and frequently controlling. The doctrine of Chief Justice Marshall does not exclude economics from use as a test. His own arguments were frequently economic ones.<sup>8</sup> But his doctrine uses the economic test for the single purpose of determining whether the act or business or privilege or property on which the tax is levied is subject to or immune from the exercise of the state taxing power under consideration. If immunity exists, the immunity is complete. The tax is beyond state authority whether the amount imposed is a million dollars or a cent. If, however, the tax falls on an object within the power of the state, the power may be exercised to any extent that the state pleases. The power to tax at all involves the power to tax as the state wills. It is a power which "in its nature acknowledges no limits."

In spite of Marshall's reiteration of this position, it must be borne in mind that his attention was fixed on its negative aspects. Quite probably he assumed that any tax which in fact interfered with the operations of the federal government or encroached on any of its powers must necessarily be one levied on a subject with-

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<sup>8</sup> See, for example, his argument in *Brown v. Maryland*, 12 Wheat. 419, 439 (1827) to establish that a tax on importers selling at wholesale is a tax on imports: "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer." And on page 440: "A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation."

drawn from the jurisdiction of the state, *i. e.*, that the effect of the tax determined the nature of the subject on which it was levied. It is not to be credited, for example, that Marshall, if confronted with a situation in which domestic commerce was economically integrated with interstate commerce, would have permitted a tax on the domestic commerce which imposed any serious burden on the interstate commerce. The cases presenting this problem did not arise till long after his day. The press of economic facts has forced Marshall's successors to abandon his theory that a state may levy any tribute it pleases on a subject not immune from its taxing power. Taxes on subjects within the power of the state have been held invalid as regulations of interstate commerce, for the reason that the measure adopted for determining their amount took toll from interstate commerce.<sup>9</sup> No longer is the state taxing power an autocrat even in its own bailiwick. The absolute monarch has become a limited monarch. It has been subjected to the restraint of the maxim: *Sic utere tuo ut alienam non laedas*.

This change of doctrine has thus far been confined to the field of interstate commerce. It has not yet been applied to state taxes on proper subjects which nevertheless tap the value contributed by federal securities. But logically the new principle is as relevant to economic burdens on the federal borrowing power as to those on interstate commerce. The recent increase in the volume of federal securities will compel a reconsideration of any doctrine that permits a state to affect their value indirectly to an extent that it is forbidden to do directly. A review of the origin and development and modification of the notion that the power to tax is one which "in its nature acknowledges no limits" is therefore of more than merely historical or speculative interest.

It is readily apparent that a tax on a subject which is not an agency of interstate commerce or of the federal government may burden that commerce or that government more than other taxes levied directly on such an agency. A tax of one one-hundredth of one per cent on receipts from interstate commerce within the state may affect that commerce so slightly as to be inappreciable.

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<sup>9</sup> *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).



A tax on the franchise to be a domestic corporation whose amount is determined by applying the rate of five per cent to the receipts from interstate commerce within the state may impose a serious burden on that commerce. Yet, under the doctrine that the court will regard only the subject taxed and will pay no attention to the amount of the tax or to the measure by which it is determined, the infinitesimal burden will be held invalid and the serious one sustained. Thus taxes on subjects not themselves interstate commerce or an agency of the federal government may in a practical sense be regulations of that commerce and interferences with the operations of that government. Any purely formal division of subject matters of taxation into two mutually exclusive classes may sustain one tax and abate another though the two are identical in results.

Such formal classification, however, has speculative advantages and doubtless some practical ones. It establishes fairly definite rules and thereby simplifies the task of deciding cases and makes somewhat more certain the law.<sup>10</sup> But these gains may be won at the cost of some of the results which the Constitution is deemed to intend. There are competing considerations here, as in most problems of constitutional interpretation. This explains and also excuses the inconsistencies and contradictions which appear in the judicial treatment of the problem under consideration.

With the taxes which have been held to fall directly on interstate commerce or on instrumentalities of the federal government we are only incidentally concerned. The doctrines of the Supreme Court have been consistent and involve only the difficulty of determining whether the particular subject matter on which each tax is levied is or is not interstate commerce or an instrumentality of the federal government. These questions have provoked difference of opinion among the members of the Supreme Court, but

<sup>10</sup> For eulogies on the merits of this method of marking the dividing line between state and federal powers, see Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 429-30 (1819), and Mr. Justice Nelson in *Bank of Commerce v. New York*, 2 Black 620, 634 (1863). The Chief Justice says: "If we measure the power of taxation residing in the State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied." And Mr. Justice Nelson observes that, when the limits between the powers and functions of the state and national governments are ascertained and fixed in accordance with the principles announced by Marshall, "all perplexity and confusion disappear."

all have agreed that a state tax which was levied directly on interstate commerce or on an instrumentality of the federal government was invalid however insignificant its effect.

When, however, we turn to the cases where the subject of taxation has admittedly been within the power of the state, we meet more fundamental differences of attitude. Some have thought that, if the subject taxed was within the zone of state authority, no tax thereon could be a regulation of matters beyond that zone. Others have held that the recognition that the subject was not immune from taxation did not compel the conclusion that the state might devise any method it pleased for determining the amount of the tax. It is the purpose of this article to review these diversities and to indicate as far as possible what considerations at present seem to be regarded by the Supreme Court as controlling.

## I

### INTERFERENCES WITH FEDERAL INSTRUMENTALITIES

The doctrine that a state cannot tax an instrumentality of the federal government is not based on any "express provision in the Constitution." It is said to rest "upon necessary implication" and to be "upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."<sup>11</sup> The soundness of the principle must be universally conceded. The only room for difference of opinion lies in its application.

An examination of the cases in which the doctrine has been applied shows that the Supreme Court has looked only to the subject matter on which the state tax fell. In *Weston v. City Council of Charleston*<sup>12</sup> the majority held that the tax in question was imposed directly on securities of the federal government — "on the contract subsisting between the government and the individual" — and was therefore invalid. Mr. Justice Thompson, dissenting, insisted that the tax was on income. After quoting from the "Federalist," he observed that "it never entered into the discriminating mind of the writer referred to that merely investing

<sup>11</sup> *The Collector v. Day*, 11 Wall. 113, 127 (1871).

<sup>12</sup> 2 Pet. 449 (1826).



property, subject to taxation, in stock of the United States, would withdraw the property from taxation.”<sup>13</sup> The property existed before its investment in stock by the national government.

“In the case now before us, the tax is not direct upon any means used by the government to carry on its operation. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, *viz.*, the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired.”<sup>14</sup>

In illustration of his point, the dissenting justice remarked that, though the states cannot tax the mint, they can tax the money coined at the mint, when held and owned by individuals. And he concluded by saying:

“The unqualified proposition that a State cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its power, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such, cannot be taxed, yet it will not be claimed that all such officers and soldiers are exempt from State taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the Constitution of the United States to include therein interest accruing from stock of the United States.”<sup>15</sup>

But against this the majority opinion by Chief Justice Marshall declared that “the tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution.”<sup>16</sup> Thus it is clear that the dispute related to the subject which the state had selected for taxation. Mr. Justice Johnson, who also wrote a dissenting opinion, conceded: “If I could bring myself to consider this question in the form in

<sup>13</sup> 2 Pet. 449, 477-78 (1829).

<sup>15</sup> 2 Pet. 449, 480 (1829).

<sup>14</sup> 2 Pet. 449, 479 (1829).

<sup>16</sup> 2 Pet. 449, 469 (1829).

which it is considered by the majority of the court, I should certainly concur in the opinion that the tax was unconstitutional.”<sup>17</sup>

It is rather difficult to regard the tax involved in the *Weston* Case as a tax on income. The ordinance under which it was levied reads as follows:

“ . . . the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted), twenty-five cents upon every hundred dollars.”<sup>18</sup>

The most natural inference from this language is that the tax is on property from which income is received, with a deduction allowed to the taxpayer of an amount equivalent to that on which he may be paying interest. The decision stands for the proposition that the subject of taxation in question is not some abstract concept of property distinct from the specific kinds of property which the taxpayer may hold, but is that specific property. If that property is an obligation of the United States to pay money, it is an agency of the United States, since it is the concrete expression of the power to borrow. Any tax on such agency is wholly outside the power of the state.

This doctrine with regard to property was later applied in *Bank of Commerce v. New York City*<sup>19</sup> to the capital of a corporation. The statute there provided that the capital stock of every corporation liable to taxation shall be assessed at its actual value. Mr. Justice Nelson, in refuting the contention that *Weston v. City Council of Charleston*<sup>20</sup> was not in point because in that case there was discrimination against the stock of the United States, laid down the doctrine that a “court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised.”<sup>21</sup> Therefore, he says, the *Weston* Case necessarily

<sup>17</sup> 2 Pet. 449, 472 (1829).

<sup>19</sup> 2 Black 620 (1862).

<sup>20</sup> Note 4, *supra*.

<sup>18</sup> 2 Pet. 449, 450 (1829).

<sup>21</sup> 2 Black 620, 631 (1862).



decided that the state could not tax federal securities at all, even though it taxed all other securities as well.

After the Bank of Commerce decision, New York changed its statute, so as to read: "All banks, banking associations, etc., shall be liable to taxation on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, and their surplus earnings, etc."<sup>22</sup> In *Bank Tax Case*<sup>23</sup> the Supreme Court held that this tax also was on the capital and therefore on the property in which the capital was invested, and that, in so far as this property consists of stocks of the United States, the case is indistinguishable from the Bank of Commerce Case. Mr. Justice Nelson in the opinion for a unanimous court thus identified the capital of the corporation with the property in which it was invested:

"Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the *corpus* or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The Legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law."<sup>24</sup>

The succeeding sentence of the opinion foreshadows the distinction which the court is soon to draw. The learned justice states that he has looked through all the statutes of New York relating to the

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<sup>22</sup> Quoted in *Bank Tax Case*, 2 Wall. 200, 206 (1865).

<sup>23</sup> 2 Wall. 200 (1865).

<sup>24</sup> 2 Wall. 200, 208-09 (1865). For another statement to the same effect see note 169, *infra*.

taxation of moneyed corporations from 1823 to the statute under review, and notes that "it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax on their privileges or franchises." <sup>25</sup>

### 1. *Taxes on Privileges*

Four years later the court decided three cases <sup>26</sup> in which the majority held that the tax was not on property but on the franchise to be a corporation, and that it was therefore valid in spite of the fact that it was measured in part by property invested in federal securities. Chief Justice Chase and Justices Miller and Grier dissented, being of the opinion that the tax was a tax on the property and not on the franchises and privileges of the corporation.

Two of the cases were from Massachusetts. The Massachusetts court had declared that, if the taxes were on property, they were invalid under the state constitution. That court, however, sustained the taxes as on "commodities" under the somewhat peculiar interpretation put on that term contained in the Massachusetts constitution. The definition of "commodities" uniformly given by the Massachusetts court was that it signifies "convenience, privilege, profit and gains." <sup>27</sup> Mr. Justice Clifford for the majority of the Supreme Court ruled that the decisions of the state court "must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation and not a tax on the property." <sup>28</sup> The minority evidently saw no ground on which to hold the taxes unconstitutional except the denial that the subject of taxation was a privilege.

The two cases differed slightly from each other. *Provident Savings Institution v. Massachusetts* <sup>29</sup> involved a requirement that all institutions for savings incorporated under the laws of the state shall pay "a tax on account of their depositors of three-fourths of one per cent per annum on the amount of their deposits." <sup>30</sup>

<sup>25</sup> 2 Wall. 200, 209 (1865).

<sup>26</sup> *Society for Savings v. Coite*, 6 Wall. 594 (1868); *Provident Savings Institution v. Massachusetts*, 6 Wall. 611 (1868); *Hamilton Manufacturing Co. v. Massachusetts*, 6 Wall. 632 (1868).

<sup>27</sup> 6 Wall. 632, 640 (1868).

<sup>28</sup> 6 Wall. 611, 628 (1868).

<sup>29</sup> 6 Wall. 611 (1868).

<sup>30</sup> 6 Wall. 611, 620 (1868).



*Hamilton Manufacturing Co. v. Massachusetts*<sup>31</sup> had to do with a statute requiring certain classes of corporations to pay, in lieu of all other taxation, a tax of one and one-sixth per cent on the excess of the market value of their capital stock over the value of their real estate and machinery. The complaining corporation was denied exemption for the part of that excess value which was contributed by \$300,000 of United States bonds owned by it. The Provident Savings Institution was denied any deduction from its \$8,047,652.19 of deposits on account of \$1,327,000 invested in the public funds of the United States. On the same day, in *Society for Savings v. Coite*,<sup>32</sup> the court declined to permit a Connecticut savings bank to deduct from a tax of one half of one per cent on its deposits of \$4,758,273.37 the sum of \$500,161 which "was then invested and held in securities of the United States, declared by act of Congress to be exempt from taxation."<sup>33</sup>

The Connecticut corporation had no capital stock, which seemed to be regarded by Mr. Justice Clifford as significant in establishing that the tax could not be one levied on property. In the Provident Savings Case the learned justice makes the questionable assertion that "there is no necessary relation between the average amount of the deposits and the amount of property owned by the institution."<sup>34</sup> In that case also he said: "The amount of the tax does not depend on the amount of the property held by the institution, but it depends upon the capacity of the institution to exercise the privileges conferred by the charter."<sup>35</sup> He seems to be assuming that uninvested deposits of the bank are for some reason not property of the bank. Manifestly a corporation without capital stock may still have legal title to property, and a tax demanded from the corporation may be levied either on its property or on its franchise as the state chooses. The Massachusetts taxes were plainly intended to be levied on the franchises as "commodities." But the Connecticut statute is substantially similar in wording to that held in *Bank Tax Case*<sup>36</sup> to be one imposing a tax on property. The New York statute involved in that case said that the banks "shall be liable to taxation on a valuation equal to" capital stock and surplus; the Connecticut statute said

<sup>31</sup> 6 Wall. 632 (1868).

<sup>32</sup> 6 Wall. 594, 604 (1868).

<sup>33</sup> 6 Wall. 594, 630 (1868).

<sup>32</sup> 6 Wall. 594 (1868).

<sup>34</sup> 6 Wall. 594, 631 (1868).

<sup>35</sup> Note 23, *supra*.

that the banks shall pay to the state "a sum equal to" a certain percentage of their deposits. Neither statute specifically named the franchise as the subject of taxation. Nor does it seem that the decision of the Massachusetts court holding that the taxes imposed by its statute were not property taxes, as that term is used in the state constitution, is necessarily conclusive of the "subject" on which the tax is levied from the standpoint of its effect on instrumentalities of the federal government. If the test of whether or not the tax is an interference with a federal instrumentality is the "subject" on which the tax is levied, the federal Supreme Court ought to determine independently any dispute as to what that subject is. Otherwise a state by mere use of words can decide for itself whether or not it is interfering with the federal government. Yet this very power on the part of the state is inherent in the doctrine that, in determining whether a tax encroaches on federal authority, the court will look only to the subject taxed and will not regard the economic effect of the measure by which the amount of the tax is determined.

Such, nevertheless, is the doctrine clearly implied by Chief Justice Marshall and specifically sanctioned by the actual decisions in the three cases under review. Corporate franchises, says Mr. Justice Clifford, are legal estates, and not mere naked powers granted to a corporation. They are "as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State."<sup>37</sup>

"All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State government. Power to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that corporation or individual has or has not made investments in Federal securities. Unless such be the rule, the two systems of government, State and Federal, cannot both continue to exist, as the States will be left without any means of support or of discharging their public obligations."<sup>38</sup>

And with respect to the Connecticut statute he says:

"Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should con-

<sup>37</sup> 6 Wall. 594, 638 (1868).

<sup>38</sup> 6 Wall. 594, 638-39 (1868).



tribute to the public burdens. . . . Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained.”<sup>39</sup>

These three decisions were the basis of *Home Insurance Co. v. New York*<sup>40</sup> which held that a tax on a corporate franchise, whose amount is determined by applying to the corporate stock the statutory rates for each one per cent of dividend declared, may include in this measure that part of the capital stock which is invested in United States bonds and the dividends thereon. Mr. Justice Field states the legal principle as follows:

“The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal.”<sup>41</sup>

Here seems to be a definite statement that, if the state finds that the capital of the bank as property is exempt from taxation because invested in federal securities, it may make good its loss from this source by taxing the franchise and basing the amount of the tax on the same capital held immune from the former tax.<sup>42</sup> And yet earlier in this very opinion it is declared:

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<sup>39</sup> 6 Wall. 594, 608 (1868).

<sup>40</sup> 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889).

<sup>41</sup> 134 U. S. 594, 600, 10 Sup. Ct. Rep. 593 (1889).

<sup>42</sup> This distinction between taxes directly on property and taxes on franchises measured by the value of property has been applied in determining whether federal taxes were interferences with the powers of the states. In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1895), it was held that a general federal tax on incomes could not apply to incomes from state and municipal securities, because this would be an interference with the powers of the states. But in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 165, 166 (1911), the federal tax on corporations measured by their income was held valid as an excise tax, and in assessing the amount of the tax the court allowed the inclusion of income from state securities. The argument to the contrary was said to confuse “the measure of the tax upon the privilege

"Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation provided the same result is effected — that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained."<sup>43</sup>

It is hardly surprising that such inconsistencies met with dissent. Very simply and without argument Mr. Justice Miller expresses his disagreement:

"Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the Statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company."<sup>44</sup>

The doctrine of the absolute power of the state over taxation of corporate privileges was later applied to taxation of inheritances. In *United States v. Perkins*,<sup>45</sup> it was held, Mr. Justice Harlan alone dissenting, that a state may tax a bequest to the federal government, since the tax is not upon the property itself, but upon its transmission by will or descent. It is "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use."<sup>46</sup> The statute

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with direct taxation of the state or of the thing taxed." After referring to the Home Insurance Case, Mr. Justice Day, speaking for a unanimous court, declared:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which, as such, could not be directly taxed. . . .

" . . . There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business."

<sup>43</sup> 134 U. S. 594, 598, 10 Sup. Ct. Rep. 593 (1889).

<sup>44</sup> 134 U. S. 594, 607, 10 Sup. Ct. Rep. 593 (1889).

<sup>45</sup> 163 U. S. 625, 16 Sup. Ct. Rep. 1073 (1896).

<sup>46</sup> 163 U. S. 625, 628, 16 Sup. Ct. Rep. 1073 (1896).



was said not to be an attempt to tax the property of the United States, "since the tax is imposed upon the legacy before it reaches the hands of the government."<sup>47</sup> This is a somewhat novel use of the doctrine that time may be of the essence. Here again the court looks at what was taxed, entirely disregarding where the burden fell.<sup>48</sup>

Ten years later it was held in *Plummer v. Coler*,<sup>49</sup> Mr. Justice White alone dissenting, that a state inheritance tax may lawfully be imposed on the bequest to an individual of a life interest in United States bonds. The principle underlying this decision was thus stated by Mr. Justice Shiras:

"We think the conclusion, fairly to be drawn from the State and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."<sup>50</sup>

Counsel for the legatee in this case had urged upon the court the economic argument:

"The States have no power to impose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State."<sup>51</sup>

To this Mr. Justice Shiras answered that the recognition of the doctrine would require the overruling of earlier decisions.

"For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might in-

<sup>47</sup> 163 U. S. 625, 630, 16 Sup. Ct. Rep. 1073 (1896).

<sup>48</sup> See *United States v. Fox*, 94 U. S. 315 (1877), holding that a state may forbid a devise of land to the United States. It is held also that a federal inheritance tax may be applied to a legacy to a municipal corporation, *Snyder v. Bettman*, 190 U. S. 249, 23 Sup. Ct. Rep. 803 (1903). But a federal income tax cannot be applied to income received by a city, *United States v. Baltimore & Ohio Railroad Co.*, 17 Wall. 322 (1873).

<sup>49</sup> 178 U. S. 115, 20 Sup. Ct. Rep. 829 (1900).

<sup>50</sup> 178 U. S. 115, 134, 20 Sup. Ct. Rep. 829 (1900).

<sup>51</sup> 178 U. S. 115, 119, 20 Sup. Ct. Rep. 829 (1900).

juriously affect the demand for such securities, it would equally be our duty to condemn all State laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds." <sup>52</sup>

He went on further to argue that the effect of the inheritance tax in question on the federal borrowing power is less serious than that of the franchise taxes which have been sustained, since, on account of the low interest yield, only a few individuals invest in United States bonds. Mention is made also of the fact that "no inconsiderable portion of the United States loans is taken and held, as everyone knows, in foreign countries, where doubtless it is subjected to municipal taxation." <sup>53</sup>

"While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations, and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by State taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the State of New York." <sup>54</sup>

Thus the economic argument is relied on to show that the legal doctrine of determining taxability or non-taxability according to the subjects on which the tax is levied does not cause the serious economic injury to federal authority that is contended. The facts adduced in support of the position are facts which change with time. The argument does not directly meet the contention of counsel

"... that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States bonds on terms as favorable as if we were to hold otherwise." <sup>55</sup>

Nor can the contention be dismissed by economic argument. Mr. Justice Shiras is entirely correct in saying that the same contention would require the overruling of earlier decisions sustaining taxes on corporate franchises. He must therefore be understood

<sup>52</sup> 178 U. S. 115, 136, 20 Sup. Ct. Rep. 829 (1900).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*



as declaring that the mere fact that federal securities would be more advantageously disposed of, if they must always be excluded from every computation to determine the amount of a tax, does not make the tax in a legal sense a burden on a federal instrumentality.

The contention of counsel confuses two questions. One is whether the market for federal securities is less favorable after the state tax than before. The other is whether the market for federal securities is more favorable if the tax takes toll from all other investments but not from federal securities. There can be no doubt as to the economic answer to the second question. Plainly, if the tax is declared inapplicable in any form to federal securities, the relative position of those securities in the market is improved. The result of imposing burdens on competing securities and leaving federal securities free is to confer a benefit upon the latter. This is what happens when non-discriminatory state taxes are held inapplicable to federal securities. But whether the state tax on franchises or on inheritances, if measured indiscriminately by all investments, really hurts the federal borrowing power more than if no such taxes were levied at all is a more difficult question. It is a question which the abandonment in 1910 of the doctrine that a tax on a proper subject can never be an encroachment on federal authority<sup>56</sup> may force upon the consideration of the court. Mr. Justice Holmes, who opposed the abandonment of this doctrine, made the point that any effect on interstate commerce of a complete prohibition against economically related domestic commerce is really not a burden, but simply the denial of a collateral benefit. "If foreign commerce," he said, "does not pay its way by itself, I see no right to demand [for the foreign corporation] an entrance for domestic business to help it out."<sup>57</sup> So also it may be urged that, if federal instrumentalities are not actually impeded by a state tax, there should be no right to claim for them a collateral benefit from the operation of state laws. If the court abandons the test of "subjects" in cases where the tax falls on what has been held a proper subject, it may abandon it also where the tax falls on what has been held to be an improper subject. If it turns from somewhat artificial legal distinctions to practical economic considerations, it may

<sup>56</sup> See cases cited in note 9, *supra*.

<sup>57</sup> 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1909).

examine afresh the whole topic. This possibility will be discussed after the cases on interstate commerce have been dealt with. It is of course obvious that the frank substitution of the test of economic effect for that of the legal subject on which the tax is levied will not necessarily establish rules that will validate the kind of taxation previously held unconstitutional.

## 2. *Taxes on Property*

In the foregoing cases the essential basis of the decision is that the state was imposing the tax on a privilege which it might have withheld entirely and which therefore it may tax as it pleases. The subject taxed came into existence only by grace or favor of the state, and the state by taxing its own creature cannot be interfering with an instrumentality of the United States. The same reason would support state taxation of the full value of shares of corporate stock in domestic corporations with no deduction for such part of that value as may be represented by corporate investment in federal securities. The decisions in favor of such taxation, however, have been based on the somewhat broader ground that a tax on the share is not a tax on the property of the corporation and therefore not on the federal securities in which some or all of that property may be invested.

The point was first involved in *Van Allen v. Assessors*,<sup>58</sup> which held that the state could tax shares of stock in national banks though the capital of the banks was all invested in stocks and bonds of the United States. This decision, however, was based on an interpretation of a congressional statute permitting the taxation of the shares. The majority were of opinion that the statute meant that the state might tax the shares at their full value. The minority, on the other hand, thought that the only purpose of the statute was to preclude the inference that the shares must be entirely exempt from state taxation on account of the functions performed by the banks as instruments of the national government, and that it had no bearing on the question whether the value assigned to the shares might include such as they derived from the federal securities in which the capital of the bank was invested. Chief Justice Chase, who, with Justices Wayne and Swayne dis-

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<sup>58</sup> 3 Wall. 573 (1866).



sented, referred to the decisions holding that a tax on the capital of a bank must not include such part of that capital as is invested in federal securities,<sup>59</sup> and declared that the same principle should be applied to a tax on the shares. If the contrary were admitted, he said:

"It would follow that the legislature of New York by merely shifting its taxation from the capital to the shares, might have avoided the whole effect of the exemptions sanctioned by the decisions just cited. The same tax on the same identical property, without any exemption of national securities, might have been assessed and collected by adopting the simple expedient of assessment on the shares of capital, instead of on the aggregate of capital — on the parts instead of on the whole. . . .

We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition. To do so would, in our judgment, deprive the decisions just cited of all practical value and effect, and make the exemption from State taxation of national securities held by banks as investment of capital, wholly unreal and illusory."<sup>60</sup>

And to this he added: "It may well be questioned, in our judgment, whether Congress has power under the Constitution to authorize state taxation of national securities, either directly or indirectly."<sup>61</sup> Thus the dissenting judges clearly indicated their conviction that, though the shares might be a proper subject of taxation, the state could not, in assessing their value for this purpose, adopt a measure which would result in imposing on federal securities the same burden as a direct levy on those securities. This position, however, has not met with sanction in later decisions.

In *Cleveland Trust Co. v. Lander*<sup>62</sup> the contention was made that a tax on the shares of stock in a bank chartered by the state "being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the

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<sup>59</sup> *Bank of Commerce v. New York City*, note 19, *supra*; *Bank Tax Case*, note 23, *supra*.

<sup>60</sup> 3 Wall. 573, 593 (1866).

<sup>61</sup> *Ibid*.

<sup>62</sup> 184 U. S. 111 (1902). The reporter states that "Mr. Justice Harlan did not hear the argument, and took no part in the decision." There was no dissent in the case. Chief Justice Chase and Justices Wayne and Swayne who dissented in the *Van Allen Case*, note 58, *supra*, were no longer on the bench.

capital of the company invested in United States bonds.”<sup>63</sup> The court answered that “the contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders.”<sup>64</sup> There was a *non-sequitur* in basing this decision, as the court did, on the Van Allen Case, for the federal statute interpreted as sanctioning the taxation of shares in national banks at their full value has no necessary bearing on the taxation of shares in state banks. It was still open for the court to say that the question before it involved general principles inherent in the federal system of government. Without questioning the Van Allen Case it might have held that, though shares in state banks were proper subjects of state taxation, the state must exclude from their value such part as was contributed by the federal securities owned by the bank, since otherwise the state would by indirection impose on the federal borrowing power, burdens which had been held unconstitutional when imposed directly. But the court was regarding the subject on which the tax fell and not the elements of value in the measure by which its amount was determined. As pointed out earlier, the opinion made no mention of any power which the state had over these shares by reason of the fact that they were shares in a domestic corporation which the state might have declined to create. It seems clear that the court would have applied the same doctrine to an Ohio tax of shares in a corporation created by a sister state.<sup>65</sup>

The distinction set forth in the Van Allen Case and followed in *Cleveland Trust Co. v. Lander* was grudgingly recognized in *Home Savings Bank v. Des Moines*.<sup>66</sup> This case involved an Iowa statute which provided that shares of stock in state banks should be assessed to the banks and not to the individual stockholders. The majority held that the tax was imposed on the property of the bank and not on that of the stockholders, and that therefore the value of United States bonds owned by the bank must be deducted from the assessment.<sup>67</sup> It was conceded in the opinion that a contrary

<sup>63</sup> 184 U. S. 111, 114-15, 22 Sup. Ct. Rep. 394 (1902).

<sup>64</sup> 184 U. S. 111, 115 (1902). In *Mead v. Commissioners*, dealt with in the opinion in *People ex rel. Duer v. Commissioners of Taxes*, 4 Wall. 244 (1867) the same point had been decided. See p. 353, *infra*.

<sup>65</sup> See *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. Rep. 1014 (1885).

<sup>66</sup> 205 U. S. 503, 27 Sup. Ct. Rep. 571 (1907).

<sup>67</sup> In reaching this interpretation reliance was placed on the difference between



conclusion as to the subject on which the tax was levied would have required a contrary decision under the doctrine of the Van Allen Case. But Mr. Justice Moody gives the impression that he thinks the Van Allen Case was wrongly decided. Referring to that case he says:

the method of taxing shares in state banks and that of taxing shares in national banks. With respect to the latter, the Iowa statute provided that they should be "assessed to the individual stockholders at the place where the bank is located." Though the national banks, like the state banks, were liable for the payment of the taxes, the national banks were given a right of reimbursement from the stockholders, and were given a lien on the stock and unpaid dividends, with authority to sell the stock to satisfy the lien in case the dividends were not sufficient to furnish reimbursement for the tax. No such right of reimbursement was given to the state banks, and the court believed that they could not have "by any possibility a common-law right to recover the tax paid from the shareholders." Continuing, the opinion declared: "The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and, unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks."

In the brief for the state it was insisted that the Supreme Court must accept as binding the interpretation put upon the state statute by the state court. This was the contention which Mr. Justice Clifford accepted in *Hamilton Manufacturing Co. v. Massachusetts* (see p. 331, *supra*). In the *Des Moines Case* Mr. Justice Moody does not directly meet the contention. After stating his conclusion that the tax is on the property of the banks, he says: "This we think is consistent with the interpretation of the law by the supreme court of Iowa, which sustained the tax on grounds which will presently be considered." Those grounds are that the tax is on the shares and not on the property of the bank. In the final paragraph of the opinion, the learned justice says: "We regret that we are constrained to differ with the supreme court of the state on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear." Thus plainly the Supreme Court rejects the interpretation of the state court as to the subject on which the tax was levied.

Mr. Justice Moody makes it clear that the question of the subject on which the tax is imposed is not answered by ascertaining the person from whom payment is required. He expressly declares his approval of *First National Bank v. Kentucky*, 9 Wall. 353 (1870), and the cases following it, which hold that a tax on the shares is not to be "deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders." These cases hold also that requirement of such payment from a national bank is not an interference with the bank as an instrumentality of the national government. But all the cases with respect to state taxation affecting national banks are controlled by the congressional permission (15 STAT. AT L. 34, chap. 7) that the real estate of the banks and the shares of their stockholders may be taxed by the states. See *Talbott v. Silver Bow County Commissioners*, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891), and *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. Rep. 597 (1899).

"In an opinion in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect to their shares was an actual though an indirect tax on the property of the corporation itself. But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion which would be little short of chaos." <sup>68</sup>

The Van Allen Case is accepted as having "settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporation owns." <sup>69</sup> The result of the various decisions is said to be that "although taxes by states have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities." <sup>70</sup> The fact that a tax on the corporation "measured by the value of the shares in it" is "equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares" <sup>71</sup> is dismissed as immaterial.

"But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose would have the same ultimate incidence." <sup>72</sup>

The statement that the question is "one of power, and not of economics" invites analysis. Mr. Justice Moody makes it to dismiss the contention that the tax before him imposes no more serious burden on the borrowing power of the federal government than do other taxes held lawful. But at the same time he seems to imply that because of the economic effects it would have been wise not to permit those taxes on shares which have taken account of the value due to federal securities owned by the corporation.

<sup>68</sup> 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907).

<sup>69</sup> *Ibid.*

<sup>70</sup> 205 U. S. 503, 519, 27 Sup. Ct. Rep. 571 (1907).

<sup>71</sup> *Ibid.*

<sup>72</sup> Note 71, *supra*.



The final paragraph of his opinion might have been applied equally well to the cases involving taxation of shares.

“If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed whenever they are owned by a corporation, and the national credit has no defense against a serious wound.”<sup>73</sup>

Yet Iowa by changing its statute and assessing these shares of stock to the stockholders might inflict this very wound. Mr. Justice Moody employs an economic argument to show that the tax on shares assessed to the corporation is as serious an interference with the federal borrowing power as is a tax on the capital of the bank. Though he declines to use the economic argument to put the tax before the court in the class of those that have been held invalid, he relies on economic considerations to reinforce his conclusion that it properly belongs with those that have been held invalid.

### 3. *Taxes Discriminating against Federal Instrumentalities*

One further possibility of indirect encroachment on the federal borrowing power remains to be considered. It is settled that the franchises of domestic corporations and the shares in state and national banks are subject to taxation with no diminution in the assessment of their value by reason of corporate investment in United States bonds. Suppose a state devises some plan whereby the franchises and the stock of corporations owning United States bonds are taxed more heavily than those of corporations having no such investments. Suppose it discriminates against such stock in favor of chattels or real estate. Would it not thereby put impediments in the way of the federal borrowing power? There can be no doubt that a state ought not to be permitted to adopt methods of assessment which intentionally and systematically bear more heavily on franchises and stock of corporations owning federal securities than on other property. This would seem a necessary corollary from the cases holding that a state cannot discriminate against interstate commerce by selecting for taxation property or

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<sup>73</sup> 205 U. S. 503, 521, 27 Sup. Ct. Rep. 571 (1907).

sales of property of extra-state origin.<sup>74</sup> But it is of course not feasible to require a state to adopt a uniform method of assessing all the various kinds of property subject to taxation. May not the state, therefore, in exercising the discretion which must necessarily be allowed it, take heavier toll from values contributed by federal securities than from those derived from other sources?

Some methods of accomplishing such results are clearly foreclosed by congressional legislation and the decisions thereunder. When Congress on February 25, 1863, passed the first act providing for the organization of national banks,<sup>75</sup> it made no provision for allowing state taxation of the shares. But the National Banking Act of 1864<sup>76</sup> permitted such taxation, subject to two restrictions: (1) that the rate should not be greater than that "assessed upon other moneyed capital in the hands of individual citizens of such state"; and (2) that "the tax so imposed under the laws of any state upon the shares of the associations shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state where such association is located." This second qualification was omitted from the reenactment of the statute in 1868.<sup>77</sup>

Under these statutes it was held in *Van Allen v. Assessors*<sup>78</sup> that the state discriminated against shares in national banks by taxing them at their full value when no tax was imposed on shares in state banks. The fact that the capital of state banks was taxed was held insufficient to overcome this inequality, since, in assessing the value of the capital, the state was required to deduct such part as was invested in United States bonds. In *People v. Weaver*<sup>79</sup> a New York statute, which permitted a debtor to deduct the

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<sup>74</sup> *Welton v. Missouri*, 91 U. S. 275 (1875); *Darnell & Son v. Memphis*, 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908).

<sup>75</sup> 12 STAT. AT L. 665.

<sup>76</sup> 13 STAT. AT L. 111.

<sup>77</sup> 15 STAT. AT L. 34; Rev. St. § 5219 (U. S. Comp. St., 1901, 3502).

<sup>78</sup> 3 Wall. 573 (1866). This is the same case cited in note 58, *supra*. Of the point for which the case is here cited, the opinion said: "This is an unimportant question, as the defect may be readily remedied by the state legislature." For a different attitude towards the exemption of shares of stock where the capital of the corporation is taxed, see note 158, *infra*. Almost the entire opinion in the *Van Allen* Case is devoted to the question whether, in assessing the shares of national banks, there must be deduction for the federal securities owned by the bank.

<sup>79</sup> 100 U. S. 539 (1880).



amount of his debts from the assessment of other moneyed capital but not from shares of bank stock, was held void as to the shares of national banks. The decision cannot proceed on the ground that there was discrimination against national banks in favor of state banks, since no deduction for debts was allowed from any bank stock, state or national. The term "moneyed capital" is plainly taken in a broader sense than "capital invested in banks."

"Nor can it be denied that, inasmuch as nearly all the banks in that State and in all others are national banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress in passing the Act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result." <sup>80</sup>

In interpreting the statute, it was held that the Act of Congress has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. This doctrine was applied in *Pelton v. Commercial Bank of Cleveland* <sup>81</sup> to prevent the assessment of shares in national banks at their full value when there was intentional and systematic undervaluation of all other moneyed capital. That "moneyed capital" is assumed to include other capital than that invested in banks is clear from the reference to testimony in the case to the effect that the assessors "had assessed bank shares generally higher than other personal property, including, of course, other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so." <sup>82</sup> Since there were the two kinds of discrimination, the case might have been rested solely on the ground that the methods of assessment favored state banks at the expense of

<sup>80</sup> 100 U. S. 539, 543 (1880).

<sup>81</sup> 101 U. S. 143 (1880). To the same effect as *Pelton v. Bank* is *Cummings v. Merchants' National Bank of Toledo*, 101 U. S. 153 (1880), decided the same day.

<sup>82</sup> 101 U. S. 143, 147 (1880).

national banks. But the reason given for the decision was the discrimination in favor of "other moneyed capital," and the inference is unmistakable that some personal property other than bank shares was regarded by the court as "moneyed capital."

The statute involved in *People v. Weaver*<sup>83</sup> came before the court again in *Supervisors of Albany County v. Stanley*<sup>84</sup> and *Hills v. National Albany Exchange Bank*,<sup>85</sup> and it was held that the state must permit the deduction of debts from the assessment of shares of national banks, even though the other moneyed capital from which such deduction was allowed did not include other bank stock.<sup>86</sup> On the same day was decided *Evansville National Bank v. Britton*,<sup>87</sup> which arose under a statute of Indiana. Counsel for the county treasurer sought to distinguish the Indiana statute from that of New York on the ground that New York permitted deduction of debts from all personal property except bank stock, while Indiana allowed the deduction only from "credits." But the court replied that, if one of the statutes "is more directly in conflict with the Act of Congress than the other, it is the Indiana Statute."<sup>88</sup>

"The Act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana Statute, from which *bonâ fide* debts may be deducted, all mean moneyed capital invested in that way."<sup>89</sup>

<sup>83</sup> Note 79, *supra*.

<sup>84</sup> 105 U. S. 305 (1882).

<sup>85</sup> 105 U. S. 319 (1882).

<sup>86</sup> These cases held also that the statute under which the tax on shares in national banks was levied was not itself unconstitutional. No relief was given to complainants who had no debts to deduct. And those who had debts to deduct were not granted an abatement of the whole of the tax on their shares in national banks, but only of that part of the assessment due to the state's disallowance of deduction for their debts.

<sup>87</sup> 105 U. S. 322 (1882).

<sup>88</sup> 105 U. S. 322, 323 (1882).

<sup>89</sup> 105 U. S. 324 (1882).



Here is a definite statement that, though "other moneyed capital" may not include all personal property, it certainly includes other personal property than that invested in bank stocks.

The same interpretation was adopted three years later in *Boyer v. Boyer*,<sup>90</sup> in which an injunction was sought to restrain the levy of a county tax on shares of stock in a national bank. By demurrer to the bill it was confessed that a large amount of other kinds of property was exempt from county taxation. The state court had held that this was immaterial, since such exemptions did not include the shares of state banks and savings institutions. But Mr. Justice Harlan replied that this decision proceeded upon a misconstruction of the Act of Congress. He interpreted the statute as follows:

"Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority, as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. As the Act of Congress does not fix a definite limit as to the percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the substantial rule of equality. But unless we have failed to comprehend the scope and effect of the taxing laws of Pennsylvania, the present case is not of that class." <sup>91</sup>

The demurrer was overruled and the defendants were put to their answer. Among the other securities exempt from county taxation were shares of stock in railroad corporations and bonds and stocks of certain other corporations which were subject to state but not to local taxation. The opinion plainly implied that the reasons of local policy for exempting these securities from local taxation were immaterial, saying that, if the principle of substantial equality between taxation of shares of national banks and taxation of other moneyed capital "operates to disturb the peculiar policy of some of the States in respect of revenue derived from taxation, the remedy therefor is with another department of the government, and does not belong to this court." <sup>92</sup>

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<sup>90</sup> 113 U. S. 689, 5 Sup. Ct. Rep. 706 (1885).

<sup>91</sup> 113 U. S. 689, 702, 5 Sup. Ct. Rep. 706 (1885).

<sup>92</sup> 113 U. S. 689, 703 (1885). In reaching the decision that Congress meant to

This decision seemed to open the door, in every case where shares in national banks were taxed, to a judicial inquiry whether the state, by exempting any other kind of moneyed capital, had imposed a substantial inequality of burden on the shares. Two years later, however, this door was practically closed by the restricted interpretation put upon "moneyed capital" in *Mercantile National Bank v. New York*.<sup>93</sup> Mr. Justice Matthews for an undivided court<sup>94</sup> said that no attempt was made in *Boyer v. Boyer*<sup>95</sup> to define the term or to enumerate the various kinds of property and investments that came within its description. After referring to earlier decisions<sup>96</sup> he declared:

"It follows, as a deduction from these decisions, that 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, ac-

forbid discrimination against shares of stock in national banks in favor of other property than shares of state banks, Mr. Justice Harlan calls attention to the act of 1864, which provided that the rate of tax on shares of national banks should not exceed that imposed on shares of state banks, and adds (page 691):

"But the Act of 1864 was so far modified by that of February 10, 1868, 15 STAT. AT L. 34, chap. 7, that the validity of such state taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in state banks. The effect, if not the object of the latter Act was to preclude the possibility of any such interpretation of the Act of Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in state banks, from discriminating against national bank shares, in favor of moneyed capital not invested in State bank stock. At any rate, the Acts of Congress do not now permit any such discrimination."

The learned justice then quotes the prohibition against assessing shares in national banks at a greater rate than that assessed on other moneyed capital. The natural implication from the quotation given above is that the act of 1868 substituted a more comprehensive prohibition against discrimination than that contained in the act of 1864. But the clause as to discrimination in favor of "other moneyed capital" was in the act of 1864 as well as in that of 1868. The latter act omitted the clause as to rates on shares of state banks. The only legitimate inference to draw from the difference in the statutes is that the lawmakers thought that discrimination in favor of shares of state banks was amply provided for in the clause preventing discrimination in favor of other moneyed capital, and that therefore the specific clause in the earlier statute was superfluous. The change in the statute throws no additional light on what was meant by "other moneyed capital."

<sup>93</sup> 121 U. S. 138, 7 Sup. Ct. Rep. 826 (1887).

<sup>94</sup> Mr. Justice Blatchford not sitting.

<sup>95</sup> Note 90, *supra*.

<sup>96</sup> *People v. Commissioners*, 4 Wall. 244 (1867); *Lionberger v. Rouse*, 9 Wall. 468 (1870); *Hepburn v. School Directors*, 23 Wall. 480 (1875); *Adams v. Nashville*, 95 U. S. 19 (1877).



according to their respective corporate powers and privileges, in business, carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital." <sup>97</sup>

The true test, he says, "can only be found in the nature of the business in which the corporation is engaged." <sup>98</sup> And it is declared that by "other moneyed capital" Congress must have meant capital invested in some business that competes with the national banks.

"The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy." <sup>99</sup>

The learned justice refers to railroad, mining and manufacturing companies and makes the point that the property of such corporations consists of real and personal property which, in the hands of individuals, no one would think of calling "moneyed capital." And from this he concludes:

"So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress

<sup>97</sup> 121 U. S. 138, 153, 7 Sup. Ct. Rep. 826 (1887).

<sup>98</sup> 121 U. S. 138, 154, 7 Sup. Ct. Rep. 826 (1887).

<sup>99</sup> 121 U. S. 138, 155 (1887). A little later, the opinion says: "But 'moneyed capital' does not mean all capital the value of which is expressed in terms of money. . . . Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money" (page 155). After describing the business of banking, Mr. Justice Matthews observes: "These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of the statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress" (page 156).

intended, in respect to these matters, to interfere with the power and policy of the States."<sup>100</sup>

It was held therefore that, however large may be "the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks. . . ." <sup>101</sup>

This restricted interpretation of "other moneyed capital" is directly at variance with that adopted in *Boyer v. Boyer*<sup>102</sup> and in the cases on the New York and Indiana statutes.<sup>103</sup> Though these latter cases are cited in the Mercantile Bank opinion for the proposition that the Act of Congress could not be evaded by unequal assessments on shares in national banks and other moneyed capital, no notice is taken of the significant fact that the "other moneyed capital" with which comparison was made was exclusive

<sup>100</sup> 121 U. S. 138, 156, 7 Sup. Ct. Rep. 826 (1887).

<sup>101</sup> 121 U. S. 138, 161 (1887). Earlier in the opinion, pages 160-61, Mr. Justice Matthews said: "It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally certain that they are not within the meaning of the Act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States." Then after quoting from *Hepburn v. School Directors*, note 110, *infra*, to the effect that "it could not have been the intent of Congress to exempt bank shares from taxation because some moneyed capital was exempt," the learned justice added: "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares." This tempts one to ask: "When is other moneyed capital not other moneyed capital?" The answer seems to be: "When the discrimination in its favor is not unfriendly." The opinion seems to proceed along diverse and somewhat inconsistent lines of reasoning. It seems to declare that all exemptions of capital that do not compete with national banks are immaterial, since such capital is not "other moneyed capital" within the meaning of Congress. Yet it is implied that exemptions of capital which is not "moneyed capital" as thus defined may violate the congressional statute if they are unfriendly to national banks and not founded upon just reason. Deposits in savings banks are said to be "moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase," and yet their exemption is immaterial because savings banks do not compete with national banks. For suggestions of a different ground on which to sustain the case and those following it, see pp. 366, 367, *infra*.

<sup>102</sup> Note 90, *supra*.

<sup>103</sup> Notes 83-87, *supra*.



of capital invested in institutions which compete with national banks. And though the Boyer Case did not, it is true, enumerate the various kinds of property that come within the description of "other moneyed capital," it held explicitly that the term embraced other property than shares of state banks and savings institutions. Nor is the decision in the Mercantile Bank Case in any way justified by the precedents cited for the proposition that "other moneyed capital" does not necessarily embrace stock in all corporations whose capital is employed in business for pecuniary profit.

The first of these cases is *People ex rel. Duer v. Commissioners of Taxes*,<sup>104</sup> decided the next term after *Van Allen v. Assessors*.<sup>105</sup> In the Duer Case an owner of national bank stock complained of discrimination because he was allowed no deduction for the value of United States bonds owned by the bank, while individuals and corporations who were taxed on their property could deduct such federal securities as they owned. The complaint was rejected on the grounds (1) that the congressional statute applies only to the rate of assessment, and (2) that it has no reference to moneyed capital in the hands of corporations but only to that in the hands of individual citizens. This first ground was overruled in *People v. Weaver*,<sup>106</sup> decided fourteen years later. The second ground was not applicable to the Mercantile Bank Case, because the exemptions there objected to included shares of stock and other capital in the hands of individuals. The Van Allen Case of course established that an owner of stock in a national bank must pay taxes on the value contributed by the federal securities owned by the bank, although an owner of the securities does not. No exemptions are allowed to owners of stock in corporations holding such bonds. The opinion in the Duer Case points out that Congress, when it permitted the taxation of shares in national banks but forbade discrimination against them, was well aware that federal securities were exempt from direct taxation. The argument of the complainant, says Mr. Justice Nelson, proves either that Congress meant that federal securities should be subject to taxation in the hands of their owners, or else that the deduction of such securities from taxes on property "should operate as a violation of the rate of the tax prescribed" in the statute permitting taxation of national

<sup>104</sup> 4 Wall. 244 (1867).

<sup>105</sup> Note 58, *supra*.

<sup>106</sup> Note 79, *supra*.

bank shares. "We dissent," he says, "from both conclusions."<sup>107</sup> The point of the Duer Case is that exemption of federal securities from direct taxation does not make a tax on the full value of national bank shares violate the requirement that such taxation shall not be "at a greater rate than is assessed on other moneyed capital." This is but to say that, if the banks as federal instrumentalities are not embarrassed by taxation of the full value of their shares, the situation is not changed because another federal instrumentality — *i. e.*, United States bonds — escapes direct taxation. It is not to say that Congress, because it meant to exclude United States bonds from the "other moneyed capital" which the State must tax at the same rate as shares in national banks, meant also to exclude shares in all corporations which did not compete with national banks. Moreover, though United States bonds escape direct taxation, they may be included in the measure adopted for assessing franchises and shares of corporations. This was declared in the opinion in the Duer Case in dealing with *Mead v. Commissioners*,<sup>108</sup> in which an owner of state bank stock was denied deduction for the value of federal securities owned by the bank. Had such deduction been granted to owners of stock in state banks and other corporations, and denied to owners of national bank stock, there would be a discrimination analogous to that held invalid in *People v. Weaver*.<sup>109</sup>

Another case cited in the Mercantile Bank opinion is *Hepburn v. School Directors*.<sup>110</sup> This held that it was not a discrimination against shares in national banks to assess them at their market value, although money at interest was assessed at its par value, since what is taxed in the case of the share is not money at interest, but the stockholder's interest in the money of the bank, which may

<sup>107</sup> 4 Wall. 244, 257 (1867).

<sup>108</sup> 4 Wall. 244, 258 (1867). No separate opinion was rendered in this case, or in ten other cases decided at the same time as the Duer Case and disposed of in the opinion in that case. The majority said that the general question involved in *Mead v. Commissioners* "was distinctly presented in the bank cases of the last term of which *Van Allen v. Assessors* was one of the class, and disposed of." This neglects the fact that the opinion in the *Van Allen* Case went on the ground that Congress granted to the states express permission, not only to tax the shares of national banks, but to assess them at their full value, including that contributed by federal securities owned by the bank. See p. 339, *supra*.

<sup>109</sup> Note 79, *supra*.

<sup>110</sup> 23 Wall. 480 (1875).



be greater or less than the sums put in by the stockholders. The Hepburn case held also that exemption of mortgages, moneys owing on agreements for the sale of real estate, etc., from local taxation did not operate to discriminate against shares in national banks, since such exemption was partial only and was "evidently intended to prevent a double burden by the taxation both of property and the debts secured upon it."<sup>111</sup> The economic value behind these debts was taxed, and to tax both the debts and the property on which they were secured would impose double the burden that is placed on the shares of national banks or the elements of value behind them. The Hepburn opinion, it is true, observed that "it could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt."<sup>112</sup> But this is only to say that some exemptions do not prevent the "substantial equality" required by the statute. The statement quoted above must be taken in connection with the remark in an earlier part of the opinion to the effect that "money at interest" is not the only moneyed capital included in the term as used by Congress. "The words are 'other moneyed capital.' That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stock and securities might be included in that descriptive term."<sup>113</sup>

*Lionberger v. Rouse*,<sup>114</sup> which is also cited in the Mercantile Bank opinion, arose under the provision in the Act of 1864 that the rate on shares of national banks should not exceed that imposed on shares of state banks. There were two state banks in Missouri which, by contract contained in their charter, could be taxed only one per cent on their capital stock. This was less than the rate imposed on shares of national banks. The Supreme Court recognized that the discrimination came within the letter of the congressional prohibition, but insisted that it was not within its spirit, because Congress could not have intended "such an absurd thing as that the power of the State to tax should depend on its doing an act which it had bound itself not to do."<sup>115</sup> Reference was also made to the fact that these two banks "hold a very inconsiderable portion of the banking capital of the State, and that the shares of

<sup>111</sup> 23 Wall. 480, 485 (1875).

<sup>113</sup> 23 Wall. 480, 484 (1875).

<sup>115</sup> 9 Wall. 468, 475 (1870).

<sup>112</sup> *Ibid.*

<sup>114</sup> 9 Wall. 468 (1870).

all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in national banks.”<sup>116</sup> The case evidently depends on its own special facts. The court declares also that the provision in the Act of 1864 under which the case arose refers only to banks of issue and not to banks of deposit. Since this portion of the statute was soon repealed, and since the continuing provision as to “other moneyed capital” is held to include shares of stock in other state banks than banks of issue, this point in the decision, whether sound or questionable, is unimportant. The opinion in the Mercantile Bank Case is therefore unwarranted in relying on the quotation from the Lionberger Case to the effect that “there was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation.”<sup>117</sup>

The other case cited in the Mercantile Bank opinion is *Adams v. Nashville*,<sup>118</sup> from which the following quotation is made:

“The Act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives and forks; six teacups and saucers of the old statutes), the property of clergymen to some extent, school houses, academies and libraries are generally exempt from taxation. The discretionary power of the Legislatures of the States over all these subjects remains as it was before the Act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power.”<sup>119</sup>

But this statement was not at all necessary to the decision in the Adams Case. The two objections there made were to the exemption of capital in state banks and of bonds of municipal corporations. As to the former the court said that the exemption of the capital stock was immaterial since the shares of stock were taxed to their owners. And as to the latter, it was said that it did not

<sup>116</sup> 9 Wall. 468, 474 (1870).

<sup>117</sup> *Ibid.* Quoted in 121 U. S. 138, 150 (1887).

<sup>118</sup> 95 U. S. 19 (1877).

<sup>119</sup> 95 U. S. 19, 22 (1877). Quoted in 121 U. S. 138, 151 (1887).



appear that the municipal bonds were in fact exempt. There was therefore no occasion for Mr. Justice Hunt to say in the opinion in the Adams Case that the Act of Congress was not intended to curtail the state power on the subject of taxation. Of course the Act did not mean to prevent a state from doing as it pleased with regard to subjects over which it has complete control. But plainly it meant to qualify the permission to tax shares of national banks, by the requirement that they should not be assessed at a greater rate than other moneyed capital. Therefore the action of the state with respect to matters within its control was made the test of the propriety of action with respect to matters without its control, except to the extent permitted by Congress. The general statement quoted from the Adams opinion is opposed to the statements in the Boyer opinion eight years later. The Mercantile Bank Case, in declaring that "other moneyed capital" meant only capital which competes with national banks, made new law.

The decisions of the Supreme Court following the Mercantile Bank Case have not uniformly rested on the ground of this restricted interpretation of moneyed capital. In *Whitbeck v. Mercantile National Bank*,<sup>120</sup> where all bank stocks were assessed at sixty-five per cent of their full value and other property at sixty per cent, the Supreme Court said that "the discrimination against national banks, as compared with other moneyed capital is established," and sustained an injunction against collecting the full amount of the tax on the shares of national banks.<sup>121</sup> The court also held that the bank was entitled to relief in respect to the tax on certain stock whose owners had not been allowed to deduct their indebtedness from the assessment. The objection that the demand for the deduction was not seasonably made is dismissed on the ground that "the laws of Ohio make no provision for the deduction of the *bonâ fide* indebtedness of any shareholder from the shares of

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<sup>120</sup> 127 U. S. 193, 8 Sup. Ct. Rep. 1121 (1888).

<sup>121</sup> Another ground for the decision is that it appeared that the State Board of Equalization had no power under the Ohio statute to equalize assessments of bank stocks with those of other property, but only to "diminish or increase the assessed value of the shares of stock by such a per centum as will make them equal among themselves." While this unwarranted action by the state board would be a sufficient ground for declaring invalid the tax on the shares in national banks, it would not necessarily involve a federal question. The opinion indicates that the decision would not have been different had the state statute authorized the action of the state board.

his stock, and provide no means by which said deduction can be secured.”<sup>122</sup> This language clearly implies that no deduction of debts was allowed from the assessment of any bank stocks, state or national. But in *First National Bank of Wellington v. Chapman*<sup>123</sup> the Whitbeck Case was distinguished on the ground that the court had “assumed that under the statute of Ohio, owners of all moneyed capital other than shares of national banks were permitted to deduct” their indebtedness.<sup>124</sup> And the opinion in the Chapman Case declares explicitly that so long as shares in state and national banks are taxed alike, deduction of debts from assessment of “credits” that do not enter into competition with national banks is immaterial.

Three years earlier, however, the opinion in *First National Bank of Garnett v. Ayers*<sup>125</sup> had failed to take the broad ground that stock in institutions that compete with national banks is all that is embraced within the term “moneyed capital.” This case, too, involved a statute permitting deduction of debts from assessment of “credits” but not from assessment of any bank stock. The reason given for the decision was that it did not appear how extensive were the deductions allowed for debts in assessing other property. The court said that to come to a decision in favor of the plaintiff in error it would be necessary to take judicial notice of the fact claimed by counsel “that the amount of moneyed capital in the state of

<sup>122</sup> 127 U. S. 193, 199, 8 Sup. Ct. Rep. 1121 (1888).

<sup>123</sup> 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

<sup>124</sup> 173 U. S. 205, 220 (1899). It is almost certain that no such assumption was made in the Whitbeck Case. The opinion in that case speaks of “shareholder” and “shares of stock” without any qualifying terms. Moreover, the other discriminations in the case were plainly between all bank stocks on the one hand and other property on the other. From section 2762 of the Revised Statutes of Ohio in force on January 1, 1886, it appears that shares of stock “in any incorporated bank or banking association . . . whether now or hereafter incorporated or organized under the laws of this state or of the United States” are treated alike. No deduction for debts seems to be allowed from any property subject to taxation except in the case of what is termed “credits.” Provision for such deduction is made in section 2730 in which it is said that “the term ‘credits’ shall be held to mean the excess of the sum of all legal claims and demands . . . over and above the sum of legal *bonâ fide* debts owing by such person.” It is worthy of note too that the complainant in the Whitbeck Case was excused for not having requested the deduction of his debts on the authority of *Hills v. National Albany Exchange Bank*, note 85, *supra*, in which there was no discrimination between national and state banks as to deduction of indebtedness from assessments of their shares.

<sup>125</sup> 160 U. S. 660, 16 Sup. Ct. Rep. 412 (1896).



Kansas from which debts may be deducted, as compared with the moneyed capital invested in national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders.”<sup>126</sup> This the court declined to do. It said that “the single fact that the statute of Kansas permits some debts to be deducted from some moneyed capital, but not from what is invested in the shares of national banks, is not sufficient. . . .”<sup>127</sup> The “moneyed capital” which the court had in mind must have been other property than shares in state and national banks.

So also, in the most recent case on the subject, the court does not base its decision on the ground that no property that does not compete with national banks is “moneyed capital.” This is *Amoskeag Savings Bank*,<sup>128</sup> in which a New Hampshire bank, owning stock in a New York national bank objected to the New York assessment of its shares because it was not allowed to deduct from the assessment an amount equal to its debts, which were in fact greater than the value of its stock. From all property except stock in state and national banks such deduction was allowed. The complainant relied on *People v. Weaver*.<sup>129</sup> Mr. Justice Pitney distinguished the case on the ground that the New York statute there involved taxed bank stock in the same manner as all other property, while the later New York statute involved in the Amoskeag Case had a different method of assessing bank stock from all other property. By that statute shares of stock in state and national banks were taxed at one per cent except in towns where the local rate was less. All other property was subject to varying local rates of assessment, which were usually higher than one per cent. The learned justice quotes at length from the opinion in the Mercantile Bank Case, but makes no further comment thereon than that “the rule of construction thus laid down has since been consistently adhered to by this court.”<sup>130</sup> He fails to state that the Mercantile Bank Case overrules the Weaver Case to the extent of holding that no comparison may be made between the assessment of bank shares and of other property that does not

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<sup>126</sup> 160 U. S. 660, 667, 16 Sup. Ct. Rep. 412 (1896).

<sup>127</sup> 160 U. S. 660, 667-68, 16 Sup. Ct. Rep. 412 (1896).

<sup>128</sup> 231 U. S. 373, 34 Sup. Ct. Rep. 114 (1913).

<sup>129</sup> Note 79, *supra*.

<sup>130</sup> 231 U. S. 373, 391, 34 Sup. Ct. Rep. 114 (1913).

compete with bank shares. The important part of the opinion is as follows:

"Nor can we say that the taxing scheme contravenes the limits prescribed by Sec. 5219, Rev. Stat. merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise."<sup>131</sup>

The vice in the contention to the contrary was said to be that it insists that "Sec. 5219 deals with the burden of the tax on the individual shareholder, rather than upon shareholders as a class."<sup>132</sup> The opinion points out that, since bank stocks are assessed at a lower rate than other property, the deduction of debts from such other property is not likely to make the assessment of that other property discriminate against bank stocks, and says that, if the contrary is true in general, the complainant must allege and prove it.<sup>133</sup> Thus it seems that the court thought that intentional and general discrimination against stocks of national banks and other banks in favor of property not competing with national banks would come within the limitations of the federal statute. Nevertheless in this and the other cases on the subject the *Mercantile Bank Case* is quoted with approval. But at the same time a number of the opinions seem to treat the rule of the *Mercantile Bank Case* with respect to the definition of "other moneyed capital" as a rule *nisi* and not a rule absolute.

But in dealing with exemptions of other property from taxation

<sup>131</sup> 231 U. S. 373, 393, 34 Sup. Ct. Rep. 114 (1913).

<sup>132</sup> *Ibid.*

<sup>133</sup> "There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares — by adopting 'book values' — which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous." 231 U. S. 373, 392-93 (1913). And in considering the contention of the complainant that the statement of the New York court that "when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital" is a mere surmise, Mr. Justice Pitney says: "We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxing system discriminates in fact against holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made" (page 393).



reliance has usually been placed on the restricted definition of "other moneyed capital."<sup>134</sup> In *Bank of Redemption v. Boston*,<sup>135</sup> an alleged discrimination against shares in national banks in favor of shares in trust companies, insurance companies and in a telephone company was held immaterial, since "the interest of individuals in these institutions is not moneyed capital" and "the investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State."<sup>136</sup> In *First National Bank of Aberdeen v. County of Chehalis*,<sup>137</sup> it was alleged in the bill that there was exempt in the county loans and securities due from residents to residents, to an amount in excess of \$237,400, and in the state outside of the county over \$14,000,000 of loans and securities due from residents to residents, and at least \$26,000,000 of stocks and bonds of insurance, wharf and gas companies, while the total capitalization of all national banks in the state was only \$7,000,000. A demurrer to the bill was sustained for the reason that, under the prior decisions of the court, since the capital exempted did not come into competition with national banks, it is not within the meaning of "other moneyed capital" as that term was used by Congress.<sup>138</sup> But Justices Harlan, Brown and White dissented, being of opinion that "the bill makes a *prima facie* case of illegal discrimination against capital invested in national bank stock."<sup>139</sup> The majority seemed to

<sup>134</sup> In addition to the cases here considered, see *Newark Banking Co. v. Newark*, 121 U. S. 163, 7 Sup. Ct. Rep. 839 (1887); *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. Rep. 324 (1890); and *Talbott v. Silver Bow County Commissioners*, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891).

<sup>135</sup> 125 U. S. 60, 8 Sup. Ct. Rep. 772 (1888). This case held also that a state could tax the shares of a national bank even when owned by other national banks.

<sup>136</sup> 125 U. S. 60, 68, 8 Sup. Ct. Rep. 772 (1888).

<sup>137</sup> 166 U. S. 440, 17 Sup. Ct. Rep. 629 (1897).

<sup>138</sup> "The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by U. S. Rev. Stat. § 5219." 166 U. S. 440, 460-61 (1897).

<sup>139</sup> 166 U. S. 440, 462, 17 Sup. Ct. Rep. 629 (1897).

think that possibly some of the loans and securities held by citizens of the country might be "moneyed capital," but nevertheless sustained the demurrer on the ground that "as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks."<sup>140</sup>

Though somewhat varying reasons have been given for the decisions subsequent to the *Mercantile Bank Case*, the *Whitbeck Case* is the only one in which the Supreme Court has invalidated a tax on shares of national banks where the discrimination in favor of other moneyed capital was not in favor of shares in state banks. In only two other cases has the charge of discrimination been sustained. In *San Francisco National Bank v. Dodge*<sup>141</sup> the majority of the court found that, while the assessment of shares of stock in national banks included the elements of value contributed by "good-will, dividend earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanence of tenure of the officers, and all those other indirect and intangible elements of value which enter into the estimate of the worth of the stock, and help to fix the market value or selling price of the shares,"<sup>142</sup> the taxation of state banks on their property only, with exemption of their shares, did not take account of these intangible elements of value. A bill to restrain the enforcement of taxes on the shares of the national banks was therefore sustained.

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<sup>140</sup> 166 U. S. 440, 461, 17 Sup. Ct. Rep. 629 (1897). This assumption as to the loans and securities and possibly also the decision as to stocks of insurance companies seem to be inconsistent with the statement in the *Mercantile Bank Case* as to what was included in the term "moneyed capital." In the opinion in that case in 121 U. S. 138, 157, Mr. Justice Matthews says: "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property." In deciding what property comes into competition with national banks, some of the later cases have given in effect an even more restricted interpretation of "other moneyed capital" than was put forward in the *Mercantile Bank Case*. See p. 363, *infra*.

<sup>141</sup> 197 U. S. 70, 25 Sup. Ct. Rep. 384 (1905).

<sup>142</sup> 197 U. S. 70, 80, 25 Sup. Ct. Rep. 384 (1905).



The minority, consisting of Mr. Justice Brewer, who wrote the dissenting opinion, Chief Justice Fuller and Justices Brown and Peckham, differed from their brethren with respect to the values reached by the method of assessing state banks, and with respect to the propriety of equitable relief. In *Covington v. First National Bank*,<sup>143</sup> a retroactive provision in a Kentucky statute, relating solely to shares of stock in national banks, by which such banks were charged with liability for taxes for past years, was also held an invalid discrimination against shares of national banks. These two discriminations related to liability to taxation and to methods of valuation.

With respect to variations in the methods of assessing shares in national banks and other property that admittedly comes into competition with national banks, the court has required complainants to show that the variation in methods actually operates to discriminate. In *Davenport National Bank v. Board of Equalization*<sup>144</sup> the proposition of counsel that savings banks and national banks must be taxed in the same way was explicitly negated. "The Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals."<sup>145</sup> In *First National Bank of Wellington v. Chapman*<sup>146</sup> complaint was made of discrimination in favor of unincorporated bankers, because they were allowed to deduct their debts, while owners of national bank shares were not. But the court found that the only debts so deducted were those incurred in the banking business, and that the deduction of such debts was necessary to determine the real value of the capital employed by the unincorporated banker. The provision that the shares of national banks should be listed at their true value in money was held to require the deduction of the liabilities of a national bank from its resources in the assessment of its shares, so that there was no discrimination in favor of the unincorporated banker.

"That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless

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<sup>143</sup> 198 U. S. 100, 25 Sup. Ct. Rep. 562 (1905).

<sup>144</sup> 123 U. S. 83, 8 Sup. Ct. Rep. 73 (1887).

<sup>145</sup> 123 U. S. 83, 85, 8 Sup. Ct. Rep. 73 (1887).

<sup>146</sup> 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system.”<sup>147</sup>

The fact that unincorporated bankers were not assessed for franchise value while shares of national banks included such value was held to be immaterial, since such value existed in the case of national banks and did not exist in the case of unincorporated bankers. And in *Amoskeag Savings Bank*,<sup>148</sup> in dealing with deductions for debts, Mr. Justice Pitney said of the federal statute:

“The language clearly prohibits discrimination against shareholders in national banks, and in favor of shareholders in competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual.”<sup>149</sup>

The opinion in the *Amoskeag Case* says also that “the holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder.”<sup>150</sup> Thus trust companies are assumed to be institutions which compete with national banks. In *Jenkins v. Neff*,<sup>151</sup> however, decided eleven years earlier, the Supreme Court dismissed an alleged discrimination in favor of trust companies on the ground that, since the New York statute did not give to New York trust companies “power to loan, discount or purchase paper,” they were not in competition with national banks.<sup>152</sup> It was suggested by complainant that in fact they exercised those powers. But the court answered that it would assume that the state would take proper steps to keep the trust companies within their proper limits, and that a neglect for a limited time cannot be deemed an assent by the state to an improper assumption of power. The opinion in the Supreme Court did not state the discriminations

<sup>147</sup> 173 U. S. 205, 216, 19 Sup. Ct. Rep. 407 (1899).

<sup>148</sup> Note 128, *supra*.

<sup>149</sup> 231 U. S. 373, 393-94, 34 Sup. Ct. Rep. 114 (1913).

<sup>150</sup> 231 U. S. 373, 391-93, 34 Sup. Ct. Rep. 114 (1913).

<sup>151</sup> 186 U. S. 230, 22 Sup. Ct. Rep. 905 (1902).

<sup>152</sup> This view of trust companies was also taken in *Bank of Redemption v. Boston*, note 135, *supra*. The statement in that case had reference to exemption of the shares of stock in trust companies as well as of their capital.



alleged, but from the opinions in the same case in the Appellate Division and Court of Appeals of New York<sup>153</sup> it appears that objection was made to the fact that trust companies were allowed to deduct from the assessment of their capital an amount equivalent to their investment in non-taxable securities, while owners of stock in national banks had no corresponding privilege. Such a contention of course denies the validity of the distinction between taxes on shares and taxes on capital, which was asserted in the Van Allen Case<sup>154</sup> and has been consistently followed.<sup>155</sup> The contention also denies the position that taxes on the capital of corporations are not taxes on moneyed capital in the hands of individual citizens.<sup>156</sup> So there were two established grounds upon which to reach the decision in *Jenkins v. Neff* without declaring in effect that no discrimination whatever in favor of trust companies would be within the limitation in the congressional permission to tax shares of national banks. But this seems to be the doctrine of the case in both the Supreme Court and the state courts. The opinion in the New York Court of Appeals relied on a quotation from the opinion in the Mercantile Bank Case to the effect that "it is evident, from this enumeration of powers [conferred by the New York statute] that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce."<sup>157</sup> But that declaration in the Mercantile Bank opinion is followed by the statement that the trust companies deal in money and securities "in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress."<sup>158</sup>

<sup>153</sup> *Jenkins v. Neff*, 62 N. Y. Supp. (96 N. Y. St. Rep.) 321 (1900); *id.*, 163 N. Y. 320 (1900).

<sup>154</sup> Note 58, *supra*.

<sup>155</sup> See cases cited in notes 62 and 108, *supra*.

<sup>156</sup> See cases cited in notes 104 and 135, *supra*.

<sup>157</sup> 121 U. S. 138, 159, 7 Sup. Ct. Rep. 826 (1887). Quoted in 163 N. Y. 320, 329.

<sup>158</sup> 121 U. S. 138, 159 (1887). In applying this to the facts in the Mercantile Bank Case the court said: "But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon the shares of stock in national banks." The reason given was that the capital of trust companies is required to be assessed at its actual value which "is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole number of shares." It is recognized, however,

It is apparent from the foregoing review that the Supreme Court has not been uniformly satisfied to rest its decisions upon a legal definition of the term "other moneyed capital" as used by Congress. The unusual definition evolved in the *Mercantile Bank Case* was evidently the product of economic considerations. It was due to a desire to exclude formal legal discriminations which did not in fact operate to the disadvantage of national banks as instrumentalities of the national government. The normal meaning of "other moneyed capital" was disregarded in favor of an artificial meaning that took into account economic considerations which the court thought must have been in the mind of Congress. Yet in applying this restricted definition of "other moneyed capital," the opinion in the *Mercantile Bank Case* was not wholly consistent with itself. For it calls municipal bonds and deposits in savings banks "moneyed capital,"<sup>159</sup> and still dismisses their exemption as immaterial. The court then, as later, labored under difficulties in relying exclusively and consistently on its legal definition of "other moneyed capital."

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that "from this are to be deducted, of course, the real estate of the corporation, otherwise taxed, and the value of such part of the capital stock as is invested in non-taxable property, such as securities of the United States." Such deductions from taxation of capital stock of state banks was held in *Van Allen v. Assessors*, note 78, *supra*, to render the tax on the capital of the state banks not equivalent to the tax on the shares of national banks. The opinion in the *Mercantile Bank Case* on the point under consideration does not refer to the *Van Allen Case*, or answer the objection there sustained, except by indirection. It states as a fact that, in addition to the tax on the capital of a trust company, the corporation pays to the state "as a state tax, a tax upon its franchise based upon its income; the tax on the capital being for local purposes." Whether this resulted in imposing on trust companies taxes equivalent to those on shares of stock in national banks would of course depend upon whether the actual amount of the tax on the franchise was equivalent to the deduction from the tax on the capital by reason of the holdings of United States bonds.

<sup>159</sup> "Bonds issued by the State of New York, or under its authority by its public municipal bodies . . . are not taxable even by the United States. . . . Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares." 121 U. S. 138, 162, 7 Sup. Ct. Rep. 826 (1887).

"However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individuals otherwise subject to taxation." 231 U. S. 157, 161, 34 Sup. Ct. Rep. 46 (1913). See also note 101, *supra*.



Perhaps a more acceptable ground for decisions involving exemptions, deductions of debts, and variations in methods of assessment other than in rates of levy would be that such alleged discriminations are not within the letter of the prohibition against taxing national bank shares "at a greater rate" than other moneyed capital, and that whether such alleged discriminations come within the spirit of the statute must depend on whether their effect is to impose a substantial discrimination against money invested in national banks. Common-sense would then require the court to hold that the exemption of any particular legal *res* was unimportant so long as there was taxation of the economic value behind that *res*. Exemption of shares of stock is therefore unimportant when there is taxation of the franchise and capital of the corporation.<sup>160</sup> Exemption of the franchise and capital is unimportant where there is taxation of the shares.<sup>161</sup> Exemption of mortgages or money due for the sale of real estate is unimportant, so long as the real estate or other property mortgaged is taxed.<sup>162</sup> Exemption of federal securities could be disregarded because the federal government would suffer less from the taxation of only one of its instrumentalities than from the taxation of two.<sup>163</sup> Exemption of state and municipal securities could be disregarded, because the exemption affects the rate at which the state may borrow.<sup>164</sup> If the securities were taxable they would bear a correspondingly higher rate of interest and the net result to the individuals and to the state would be substantially similar to the effect of their exemption. Exemption of deposits could be disregarded because the banks are taxed on the investments made with those deposits.<sup>165</sup> And such other exemptions or variations in methods of assessment as might appear in the taxing laws of any state could doubtless be excused on the ground that they were so slight as not to interfere with the substantial equality between assessment of shares in national banks and that of other moneyed capital.<sup>166</sup> The only burden that can be imposed on national banks is through taxation

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<sup>160</sup> *Amoskeag Savings Bank*, note 150, *supra*.

<sup>161</sup> *Adams v. Nashville*, note 118, *supra*.

<sup>162</sup> *Hepburn v. School Directors*, note 111, *supra*.

<sup>163</sup> *People ex rel. Duer v. Commissioners of Taxes*, note 104, *supra*.

<sup>164</sup> *Mercantile National Bank v. New York*, note 159, *supra*.

<sup>165</sup> *Ibid.*, note 93, *supra*.

<sup>166</sup> See cases cited in notes 111, 114, 125 and 128, *supra*.

of their real estate and their shares of stock. So long as substantially equivalent burdens are imposed on all other economic values by taxation of tangible property and of the capital and franchises of corporations, it would be absurd to insist that the exemption of one or more of the legal forms of property in which those values may be represented, results in taxing shares in national banks at a greater rate than that imposed on other moneyed capital. The rule of the *Mercantile Bank Case* practically comes down to a disregard of formal legal discrimination where there is in fact no substantial economic discrimination.

The cases on the subject under discussion prevent a state from imposing heavier burdens on shares in national banks than on shares in state banks. But the attempts of the state are frustrated, not because they would hamper the power of the national government to borrow money, but because, by encouraging capital to invest in state banks rather than in national banks, they would interfere with the latter as instrumentalities of the national government. And the only question which has been considered was whether the discriminations alleged came within the prohibition of Congress. The point that, owing to the large holdings of United States bonds in the vaults of the national banks, the state may by indirection impose heavier burdens on investments in federal securities than on other forms of property is not discussed.<sup>167</sup> This point raises a problem which arises independently of the question whether any method of taxation interferes with the banks as instrumentalities of government. And the solution must be sought, not in the language of a congressional enactment,

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<sup>167</sup> The nearest approach to a discussion of this question is in *Jenkins v. Neff*, note 151, 236-37, *supra*, where Mr. Justice Brewer quotes from the opinion of the same case in the appellate division of New York some remarks, which he says "in general we approve." In the appellate division Judge Woodward said: "The fact that in a given instance, by reason of an exercise of discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the shares of national banks is not a sufficient foundation for declaring the assessment invalid." (Quoted from 62 N. Y. Supp. 321, 327.) And then he adds: "If the state refused to allow its trust companies to invest in United States securities there might be a far greater cause for grievance." (Quoted from 62 N. Y. Supp. 321, 328.) Any such cause for grievance would of course be a discrimination, not against national banks as federal instrumentalities, but against the federal borrowing power. And heavier state taxation of shares and franchises of corporations owning federal securities than of those of corporations not owning such securities would differ only in degree from prohibition of investment in such securities.



but in principles inhering in the federal system of government. Only by inference and analogy do the cases on the interpretation of the statute of Congress touch the question whether the imposition of heavier burdens on the franchises and shares of corporations owning federal securities than on other intangibles or on chattels and real estate can be regarded as an interference with the power of the United States to borrow money.

Yet the inference and the analogy are unescapable. If shares of stock in national banks whose capital is invested largely in federal securities may be taxed more heavily than other legal forms of property, manifestly the state may discriminate in like manner against the franchises and shares of other corporations owning federal securities. For, in the former instance, the discrimination may be adduced as an interference with two functions of the national government, whereas in the latter the question can be raised only with respect to one. It may therefore be taken as established that exemption of many kinds of property from state taxation does not deprive the state of power to tax franchises and shares of corporations having investments in federal securities.

Had the Supreme Court followed the implications of its declarations in *Boyer v. Boyer*,<sup>168</sup> it would have been compelled to pass judgment on the almost innumerable details of the taxing system of every state. The states would doubtless have been driven to abandon any attempt to tax shares of stock in national banks. The silence of Congress after the restricted interpretation put upon the phrase "other moneyed capital" is sufficient ratification of the existing rule as to taxation of shares in national banks. And this applies *a fortiori* to the absence of any rule that taxation of shares in corporations owning federal securities must be accompanied by similar taxation of all other forms of property. Any possible discrimination against the federal borrowing power is one that Congress might in all probability by direct legislation prevent. Congress evidently is satisfied with the exemption of United States bonds from direct taxation. This exemption, coupled with the fact that corporations engaged in mining, manufacturing, trade and transportation are almost invariably taxed, both on their franchises and on all their property with the exception of that invested in public securities, makes the absence of any tax on

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<sup>168</sup> Note 90, *supra*.

their shares of stock of little practical importance. The value invested in federal securities may be molested only by taxation of the franchises and shares of stock of corporations which may own such securities. Such securities in the hands of individuals contribute nothing to the state fisc. Those in the hands of corporations cannot be taxed directly. In view of the extent to which individuals and corporations are taxed on all other kinds of property, it is most unlikely that exemptions here and there allowed, operate in any way to obstruct or discriminate against the federal borrowing power. Such occasional and isolated inequalities as may exist to the disadvantage of property which derives its value from United States bonds must be greatly outweighed by the aggregate of the many burdens borne by property in no way related to any interest of the federal government. The theoretical possibility of discrimination left open by the decisions is not destined to be realized in the actual results of the fiscal policy of any state.

#### 4. *Summary and Conclusion*

In dealing with the problem whether taxes on shares of stock in national banks violate the permission granted to the states by Congress, the Supreme Court has avoided a dryly literal interpretation of the federal statute. It has expanded the words "at a greater rate" to make them include all forms of discrimination, and has restricted the natural meaning of "other moneyed capital" to confine it to capital which comes into fairly direct competition with national banks. In determining the significance of alleged discriminations in favor of other property, it has not been content to observe merely whether the state has failed to impose an equal burden on some other legal *res* which the law calls property and which in general it would call moneyed capital. In expanding one phrase of the statute and contracting the other, the judges have looked through legal form to economic substance. Any interpretation of "other moneyed capital" which excludes money loaned at interest or invested in insurance companies and trust companies must be due to other than verbal considerations. Nor is such an interpretation the product of an analysis of the legal characteristics of the property so excluded. It is reached by considering the economic relations of such property to that invested in national banks. The court has been concerned with



economic effects rather than with legal names, though it has felt compelled to label those economic effects according to legal nomenclature. As has been pointed out, this was not a necessary mode of procedure. Most of the alleged discriminations with which the court has had to deal have not fallen within the express terms of the limitations imposed by Congress. In deciding the cases which did not involve variations of rates where there were similar methods of assessment, the court could have sustained the tax on the shares of national banks without denying that the property with which the shares were compared was moneyed capital. The same decisions could have been reached by informing the complainant that he had not brought himself within the letter of the statute, and that by reason of economic considerations he had not brought himself within its spirit. The fact that the court has chosen to call its inquiry an interpretation of the meaning of language should not blind us to the considerations which have controlled its decisions. It has really been concerned, not with the legal characteristics of the property adduced for comparison, but with what gave value to that property.

When, however, we turn to the cases where no complaint is made of discrimination against a federal instrumentality, we find the legal characteristics of the subject taxed, of more controlling importance. As the law now stands, the test of whether a state tax is an interference with the federal borrowing power, is what subject is taxed, and not what gives value to the subject taxed or what determines the amount of the tax. The capital of a corporation is treated as but a name for the property of the corporation.<sup>169</sup> So a tax on the capital is a tax on the property in which it is invested. To the extent that such property consists of federal securities, it is totally outside the taxing power of the state. The shares of stock are a kind of property totally distinct in law from the property of the corporation. A tax on such shares is not removed from the power of the state even though its economic effect on the borrowing power of the United States is indistinguishable from that of a tax on the capital of the corporation or specifically on United States securities.

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<sup>169</sup> "The capital stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock." Mr. Justice Paxson, in *Appeal of Fox & Wife*, 112 Pa. St. 337, 554, 4 Atl. 149 (1886).

This legalistic formalism appears subversive of the very basis on which rests the doctrine of the exemption of federal instrumentalities from state taxation. As Mr. Justice Strong said in *Railroad Company v. Peniston*:<sup>170</sup>

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax*; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."<sup>171</sup>

All this applies *mutatis mutandis* to the exemption of federal securities from state taxation. Such exemption should depend, not on the nature of the property named by the state as the subject on

<sup>170</sup> 18 Wall. 5 (1873).

<sup>171</sup> 18 Wall. 5, 36 (1873). Italics are author's. The economic argument was here used, however, to determine whether the subject on which the tax was levied could be regarded as a federal instrumentality. It was held that a tax on the property of a railroad corporation chartered by the federal government and subject to a large degree of control by the federal government was not an interference with the exercise of any power belonging to the federal government, and therefore not a tax on a federal instrumentality. The majority distinguished *McCulloch v. Maryland* (4 Wheat. 316) and *Osborn v. Bank* (9 Wheat. 738) on the ground that the taxes there held invalid were on the operations of a federal agency, and not on the property of a federal agent. Mr. Justice Bradley for the minority insisted that the relation between the Union Pacific and the federal government was such that the property of the road was an agency of the government. He argued that, if the roadbed might be taxed, it might be sold for non-payment of the tax and that this would prevent the road from fulfilling its obligations to the federal government. To tax the roadbed, he said, is to tax the very instrumentality which Congress desired to establish, since the track is as essential to the operations of the road "as the use of a currency, or the issue or purchase of bills of exchange is to the operations of a bank." The dispute between the majority and the minority was not whether a tax on a proper subject was invalid because of the inclusion of improper elements in assessing its value, but whether the subject taxed was itself an agency of the federal government.

In accord with *Railroad Company v. Peniston*, in sustaining taxes on property privately owned but used in performing services for the United States, are *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904) and *Gromer v. Standard Dredging Co.*, 224 U. S. 382, 32 Sup. Ct. Rep. 499 (1912). See also *Ackerlind v. United States*, 240 U. S. 531, 36 Sup. Ct. Rep. 438 (1916). State taxes have been held void where the subject taxed was a franchise obtained from the United States, *California v. Central Pacific Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888), or included the business of sending telegraph messages for the United States, *Williams v. Talledega*, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912). For a case declaring invalid a method of collecting a valid tax because the method interfered with an instrumentality of the national government, see *Western Union Telegraph Co. v. Massachusetts*, 125 Mass. 530 (1888).



which the tax falls, but on the effect of the tax. Otherwise the state by legislative legerdemain may make a tax on a federal instrumentality seem to be something different from what it really is, and thus do indirectly what it is forbidden to do directly.

It may, however, be doubted whether the Supreme Court has been as unmindful of economic considerations as some of its declarations would imply. It may be that the effect of the tax varies with the kinds of property on which it is levied. It may be also that the effect of the taxes which have been declared invalid was not so serious as was supposed and that the court has adopted technical legal distinctions in order to limit as narrowly as possible the economic effect of the earlier decisions. It is possible, too, that any decision on the subject under consideration must be in the nature of a somewhat arbitrary compromise between maintaining the interests of the nation and yet not unduly restricting the resources of the state. These suggestions will again be adverted to after consideration has been given to the cases on state taxation as an indirect regulation of interstate commerce.

*(To be continued.)*

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## THE SCHOOLS OF JURISPRUDENCE

## THEIR PLACES IN HISTORY AND THEIR PRESENT ALIGNMENT

## THE QUARRELS OF THE "SCHOOLS"

THE several schools of jurisprudence — philosophical, analytical, historical, comparative, sociological — do not represent different avenues of approach to a common goal, but rather different goals. It is not merely a case of three blind men disagreeing in their descriptions of an elephant to which they have been led, there is rather a genuine difference of opinion as to which of the animals is the elephant. The first and most enduring difference among the schools pertains to what law is. Then, naturally, they differ as to what jurisprudence is. Is it a science, a philosophy, a general attitude, a system, a theory, or a method?<sup>1</sup> The current names of the schools do not always make the issues among them clear. There is nothing in the study of history or philosophy that excludes analysis or a consideration of the social ends or other ends that the law serves or should serve. One writer, indeed, feels that he has "reconciled" all the differences of the historical and analytical schools by combining between the covers of one book a sketch of legal history with an analysis of law.<sup>2</sup> And others either confound historical jurisprudence with legal history<sup>3</sup> or deliberately use the "imposing quadrisyllable" instead of "law"

<sup>1</sup> Perhaps a great deal of confusion could be avoided by avoiding the word "jurisprudence" and coining such expressions as Prof. John Henry Wigmore's Nomoscopy, Nomosophy, Nomodidactics, and Nomopractics to cover the branches of Nomology. (See JOURNAL OF PHILOSOPHY, PSYCHOLOGY, AND SCIENTIFIC METHODS, vol. XI, 348, 1914.) The Germans are substituting *Rechtswissenschaft* and *Rechtsphilosophie* where *Jurisprudenz* was used a generation ago. But the important question is not as to the "right meaning" of a word, nor as to the "proper" method of the studying of law. It concerns the general nature of law, disagreements as to which will be reflected in our definitions, in our methodology, in our selection of sources, in our emphasis of conscious and unconscious processes in its genesis, in our general attitude toward the law. I am accordingly using the word "jurisprudence" as it is generally understood in the phrase "schools of jurisprudence" as synonymous with "general theory of law."

<sup>2</sup> HANNIS TAYLOR, THE SCIENCE OF JURISPRUDENCE, 1908.

<sup>3</sup> E. g., GUY CARLETON LEE, HISTORICAL JURISPRUDENCE, 1900.



in spite of Professor Holland's warning.<sup>4</sup> Sir Frederick Pollock, the Dean of Anglo-American writers on Jurisprudence, to whom we shall have many occasions to refer, long ago discussed "The Methods of Jurisprudence" — the practical, historical, comparative, and analytical study of existing law and the practical and speculative treatment of law as it ought to be — lamenting the fact that these methods were generally considered positively hostile to each other instead of mutually helpful.<sup>5</sup> An American teacher<sup>6</sup> has proposed a college of jurisprudence that will teach *inter alia*:

1. Historical, or *genetic*, jurisprudence.
2. Comparative, or *eclectic*, jurisprudence.
3. Formal, or *analytical*, jurisprudence.
4. Critical, or *teleological*, jurisprudence.
5. Legislative, or *constructive*, jurisprudence.
6. Dynamic, or *functional*, jurisprudence.

A man in a restaurant once ordered cherry pie, mince pie, peach pie, and lemon pie. The waiter quietly asked, "What's the matter with the apple pie?" What is the matter with philosophical jurisprudence, sociological jurisprudence, ethnological jurisprudence, and so forth? But, seriously, if all that is intended by these formidable expressions is the history of laws, a comparison of legal provisions or systems, an analysis of law, and so on, it is possible, though by no means probable, that one jurist, one school, or one age will find it satisfactory or profitable to approach law over and over again from each of these angles — provided always that one can satisfy himself as to what law is without completely surrendering to one of the "schools" at the outset. If anyone is inclined to try this experiment, lest he take all these varieties of jurisprudence to connote the teachings of the schools that bear their names,<sup>7</sup> I commend to his attention a passage that Jhering pre-

<sup>4</sup> THOMAS ERSKINE HOLLAND, *ELEMENTS OF JURISPRUDENCE*, 1880, 12 ed., 1917.

<sup>5</sup> SIR FREDERICK POLLOCK, *THE METHODS OF JURISPRUDENCE* (delivered 1882) in *OXFORD LECTURES AND OTHER DISCOURSES*, [1890] 24.

<sup>6</sup> WESLEY NEWCOMB HOHFELD, *A VITAL SCHOOL OF JURISPRUDENCE AND LAW*, in *ASS'N AM. LAW SCHOOLS. PROC.*, [1914] 76, at page 83.

<sup>7</sup> Needless to say the severe logician who wrote "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *YALE L. JOUR.* 16, 26 *ib.* 710, avoids the pitfall of confounding "these departments of general jurisprudence" with the teachings of the schools that bear the names he has adopted.

tends to quote, half in jest and half in earnest.<sup>8</sup> He speaks of three kinds of minds: those that can see only one side of a matter; those that can see all sides, but only one at a time and are therefore untroubled by inconsistencies; and finally, those that can see the several sides at once, detect the inconsistencies, and be troubled by a doubt. I should pity any of these minds in a College of All Jurisprudences, but the last class in particular would suffer martyrdom. For the "schools" are inconsistent with each other, sometimes consciously, sometimes unconsciously. They are the products of different times and places, and differ not only in their points of view, methods, and tendencies, but in their fundamental concepts, their problems and purposes — in a word, in the subject matter of their studies.

#### CHANGES IN JURISPRUDENCE CONDITIONED BY CHANGES IN LAW

Indeed, how can theories of law escape change, so long as the law itself is changing? The idea of a jurisprudence fit for the law of a given time and place is, of course, not new. Austin's severest critics admit that his conception of law is unimpeachable so far as the English Law of his time is concerned. Their attacks are based on the fact that it will not comfortably fit the law of all times and places.<sup>9</sup> Professor Pound goes further and suggests in several connections that certain of the schools of jurisprudence are apt to make their appearance in legal periods of one type or another.<sup>10</sup> Sir Frederick Pollock in an essay already cited<sup>11</sup> asks

<sup>8</sup> RUDOLPH VON JHERING, *SCHERZ UND ERNST IN DER JURISPRUDENZ*, 1885 (9 ed., 1904), 29.

<sup>9</sup> SIR HENRY SUMNER MAINE, *EARLY HISTORY OF INSTITUTIONS*, 1875 (7 ed., 1897), 380; *VILLAGE COMMUNITIES IN THE EAST AND WEST*, 1871 (7 ed., 1895), 67; cf. EDWIN CHARLES CLARK, *PRACTICAL JURISPRUDENCE*, 1883, 5, 135; EDWARD JENKS, *LAW AND POLITICS IN THE MIDDLE AGES*, 1897, 2. See also remark *ib.* 3, on the changing conception of law.

<sup>10</sup> Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 *HARV. L. REV.* 594; 25 *ib.* 147: "It is noteworthy that the breakdown of philosophical jurisprudence in both countries coincides with the rise of a body of enacted law in which many traditional rules and doctrines were rejected summarily or made over from end to end. A tendency to dry-rot in juristic theory in periods of enactment and codification is to be observed throughout legal history." Cf. also 18 *YALE L. JOUR.* 462; 8 *COLUMBIA L. REV.* 612.

<sup>11</sup> See note 5.



why one or another of the methods of jurisprudence has in different times and nations had the supremacy. His answer, paradoxically enough, is rendered less useful for our present purpose than might have been expected by his tendency here as elsewhere<sup>12</sup> to look beneath the surface for the great underlying similarities. After discussing the historical conditions, mere accidents, that seem to sever the schools, he concludes: "There is no reason why in England, Germany, or America we should make ourselves the slaves of such conditions, or why one method should be cultivated to the exclusion of others. The false pride and exclusiveness of a favorite method will always bring their own punishment." It is painful to take issue with a teacher to whom one owes so much, but I cannot resist the conclusion which I expressed elsewhere in another connection<sup>13</sup> that each age is *entitled* to its own theories and classifications of law, and that it cannot resist the necessity of making them even when it renders a lip homage to the past by keeping the old terms to express new meanings.

At any rate, whether meriting blame or defense, the general tendency has been to do exactly what Sir Frederick Pollock condemns, to cultivate one method at a time to the exclusion of others. Even those writers who introduce their treatises with discussions of the work of the earlier schools, almost always proceed on the theory that each of the schools has been in possession of part of the truth the whole of which is to be presented in the treatise in hand. In the last few years, however, great progress has been made in laying the world's legal philosophies before us, side by side.<sup>14</sup> This work furnishes a strong temptation to marshal

<sup>12</sup> Cf. HISTORY OF THE SCIENCE OF POLITICS, 1890 (ed. 1908), 112-17.

<sup>13</sup> 23 JOURN. POL. SCI. 530.

<sup>14</sup> Especially in THE MODERN LEGAL PHILOSOPHY SERIES, edited by a Committee of the Association of American Law Schools; THE CONTINENTAL LEGAL HISTORY SERIES, published under the auspices of the same association; THE MODERN CRIMINAL SCIENCE SERIES, published under the auspices of the American Institute of Criminal Law and Criminology; and the EVOLUTION OF THE LAW SERIES, compiled by Albert Kocourek and John Henry Wigmore. (What a monument are all of these series together with SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY to the diligence and initiative of Dean Wigmore!) Of the first series I have made freest use of FRITZ BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES, translated in 1912, from vol. II of his SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE (1904-07). Of the second series, No. 2, on THE GREAT JURISTS OF THE WORLD, has been quite useful, though an older, less systematic work, covers much of the same ground, and viewed as a storehouse of information, is far more extensive: DENIS CAULFIELD HERON,

the schools, or at least to discern in their appearance, growth, and disappearance from time to time, and in their reappearances, a reflection of the normal stages of legal development. In predicating a normal course of the development of communities, and in suggesting further that the stages in this course tend to reappear from time to time, I am not arguing for a fatalistic philosophy of history such as Vico unfolded: his cycles deal with a sequence of accomplishments which are in reality subject to accidents; I am speaking only of thought tendencies. Still there is no necessity of adopting the theory of spontaneous generation of ideas in a predestined order such as McLennan, Morgan, Post, and Friedrichs imposed on the helpless savages of all climes. The thought tendencies that I believe are discernible in the legal histories of all the peoples with which we are acquainted form a sequence that Tarde himself would admit of, as tendencies due to the workings of what he calls logic.<sup>15</sup> In fact, in the present attempt to marshal the schools of jurisprudence, we shall avoid so far as possible a consideration of the changing content of the law, and confine our attention to the successive changes in its outward form and in the consequent manner of approaching and handling it.

### HOW LAW CHANGES — THE CYCLE THEORY

The notion of a normal course of legal development has exercised an easily explained fascination on many types of minds. Different as are the generalizations of Vico, Hegel, Maine, Fustel de Coulanges, and Pound, to mention only one name in each country, they all agree that the law itself is subject to a law of development. I have attempted elsewhere<sup>16</sup> to trace the successive steps in the progress of the law of a people in outlines suggested by all of these, but particularly by Sir Henry Maine. Beginning in an attempt to

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INTRODUCTION TO THE HISTORY OF JURISPRUDENCE, 1860. Works on the history of political theories are also helpful, especially WILLIAM ARCHIBALD DUNNING, *POLITICAL THEORIES (ANCIENT AND MEDIAEVAL)*, 1902; *FROM LUTHER TO MONTESQUIEU*, 1905). The indebtedness of anyone working in this field to the essays of Professor Pound in the *HARV. L. REV.* (XXIV, 591; XXV, 140, 489; XXVII, 195, 605; XXX, 201) is too obvious to require further mention. He gives a bibliography of the schools of jurisprudence in note 1, 24 *HARV. L. REV.* 591.

<sup>15</sup> GABRIEL TARDE, *LES TRANSFORMATIONS DU DROIT*, 1893 (7 ed., 1912), 185;  
2 *EVOLUTION OF LAW SER.* 49.

<sup>16</sup> "The Law and the Law of Change," 65 *U. OF PA. L. REV.* 665.



explain the reason behind his remarkable observation that Legal Fictions, Equity, and Legislation follow each other universally in the order named, I was led to the consideration that each of these instrumentalities, by which the law is kept in harmony with society, is connected with a peculiar point of view resulting from the state of the law at a given time.

To illustrate the successive states of the law it is necessary only to look into the history of any people that has once achieved codification. The first task of its lawyers is word-study or glossation. New cases, hard cases, can be met only by intensive word-study, perhaps by word-stretching or Legal Fictions. The letter remains though the spirit has outgrown it. In the history of Roman-Continental Law not only the Twelve Tables, but the Code of Justinian and its modern successors in the various continental countries, "Las Siete Partidas," "Code Napoléon," and "Bürgerliches Gesetzbuch," each produced its code-bound glossators. Other illustrations abound in the histories of other legal systems.<sup>17</sup> In Anglo-American Law the closing of the Register of Writs, at the end of the thirteenth century just before the days of the Year Books, is for all practical purposes analogous to codification.<sup>18</sup>

When a reaction finally sets in against this artificial over-emphasis of the tittles and jots of the law, it matters little how it is brought about, the net result is the emphasis of principle-study as compared with word-study. Commentators supersede the glossators in the schools, and in the courts salvation is sought in the magisterial administration of general principles — that is, Equity. The general principles administered may be very vague appeals to a "word of God" or "conscience" or a "Law of Nature," or they may be more definite principles derived from the extension of the known rules of the law to similar cases. For illustrations we may turn to the several periods following the glossation periods already mentioned: for example, the periods of Natural Law in the Rome of the Praetors and in the seventeenth and eighteenth centuries in Continental Europe, and the Equity period of Anglo-American Law, especially the seventeenth and early eighteenth centuries.

<sup>17</sup> "The Law and the Law of Change," 65 U. of PA. L. REV. 674-79, 748-63.

<sup>18</sup> *Ib.* 671, more fully developed in my paper on "The Standardizing of Contracts," YALE LAW JOUR., November, 1917.

Finally, the principles of a given time become exhausted. In spite of the court's efforts to bend and twist them into new shapes, their inflexibility gradually becomes apparent. The needs of the time finally force men into the conscious modification of their received law, and Maine's third instrumentality, Legislation, appears. *Parva metu primo*, it takes on strength and courage with every stride, until it stalks about as it did in Imperial Rome, in France at the end of the eighteenth century, in Germany in the nineteenth century, and in England and America, still.

Here Maine would end the tale, but history goes right on. Legislation finally is swallowed up in a new codification, and the cycle is ready for another turn. We have then in a developed system of law, that is, one in which codification has once made its appearance:

#### Codification

Glossation (word-study and Legal Fictions)

Commentation (principle-study and Equity)

Legislation (conscious modification)

#### Codification

### THE CYCLES OF JURISPRUDENCE

With each of these stages, within every cycle, we can associate not only a certain degree of crystallization and a different instrumentality for the improvement of the law, but also a different appearance of the subject matter of jurisprudence, and a different method of study appropriate to the needs of the time. Now if we divide jurists into two general classes on the basis of their predilection for the law as it is, or the law as it ought to be, calling them, as Bentham<sup>19</sup> does, "Expository" and "Censorial,"<sup>20</sup> we can construct a diagram which seems to marshal the schools in the order in which they have actually made their appearance and reappearance from time to time. Of course, one must not expect to find the periods sharply divided. Not only will there be overlappings and occasional conscious imitations of the jurisprudence of another period, or another country, but, in general, the jurisprudence that belongs logically with a given state of the

<sup>19</sup> WORKS OF JEREMY BENTHAM, ed. BOWRING, I, 148. See HOLLAND, *op. cit.* 5.

<sup>20</sup> Perhaps the Germans would call their works *BEGRIFFSJURISPRUDENZ* and *ZWECK-JURISPRUDENZ*, respectively.



law will be seen rather to follow its crest and lag behind after its decline than to appear along with it. This is but natural when we consider that jurisprudence is generally learned from observation of the law, and based on the accomplished fact, rather than *vice versa*. Allowing to each typical stage of legal development its two classes of jurists, we have six groups into which the several schools may roughly, but I hope without too great violence, be cast.

#### TABLE OF THE STAGES OF LAW AND OF JURISPRUDENCE

Type of period	Expository Jurisprudences	Censorial Jurisprudences
Glossation	Exegetical (studying the text)	Comparative - Apologetic (criticizing by reference to foreign systems)
Commentation	Analytical (studying principles)	Philosophical (recognizing Law of Nature as <i>the</i> Law)
Legislation and Codification	Historical (conscious of change)	Constructive (using the power to change)

There is no magic in the formula. On the contrary, it may possibly be reduced to mere truisms, for it is difficult to see how any different results could be expected from turning scientists and reformers loose upon the law at any given stage.

#### (a) *Constructive Schools*

Believing in the desirability of reading history backwards, let me first take a law reformer and set him down in a time such as we are passing through in Anglo-American Law — when law reform is by means of easily achieved legislation, when it is a general postulate of all men that we can make and unmake laws to suit ourselves. He is bound to become a constructive jurist. He may, and probably will, be more concerned about the particular ideas that he wishes to embody in his legislation than in the instrumentality on which he relies. He may call himself a sociological jurist or may embroider the "Rights of Man" on his banner, he may make "the greatest good of the greatest number" his

battle-cry, or "Kultur" his *Schlagwort*, but his conception of law will be shot through with the theory of legislation.<sup>21</sup> Thus he will hardly be frightened by the notion that laws are born and not made, on the one hand, nor will he lapse into theories to the effect that certain rules are law whether men declare them or not. He will be neither an historical nor a philosophical jurist — historian and philosopher though he may be. He will not look up to the words of the law as authorities, nor consider its principles final. His exegesis is strict or free — whichever happens to offer the greatest assistance for the moment in his constructive work.<sup>22</sup> He may, indeed, have his principles of interpretation, yet the height of legal wisdom for him will certainly not reside in hermeneutics; in fact, he is likely to take pride in his freedom from Mechanical Jurisprudence.<sup>23</sup> And as far as analysis is concerned, what is there to analyze while law is in a state of flux? He knows that the legislature can render the nicest scheme obsolete at a single session. Still, whatever details the problems of his day may bring to the front, no matter how they may color his definition of law, he can hardly escape the necessity of defining it as positive law.

This kind of jurisprudence we can trace in each of the European systems of law on the eve of codification. The *Corpus Juris* of Justinian, though quoting disagreeing writers indiscriminately, seems to take its jurisprudence from men of the type of Ulpian. His picture of the Roman lawyer of the classical period is that of a man "skilled and competent to advise in the laws of Rome; not the laws of Plato's Republic on the one hand, nor the particular ordinances of Rhodes or Ephesus on the other."<sup>24</sup> In the language of our day he is neither a philosophical nor a comparative jurist, but an expounder of positive law. The opening sentences of the *Institutes* (those imitated in Glanvil, Bratton, the "Fleta," the

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<sup>21</sup> In this study I am not concerned with the particular rules of law advocated, a subject matter more closely allied with practical politics than with jurisprudence. My topic is limited to varying attitudes towards law — the means, and not the end.

<sup>22</sup> The advocate of conscious development of the law is just as apt to criticize the court's construction of a statute by reference to a "rule of reason" as he is to oppose a strict construction that refuses to go one jot beyond the actual words used by the legislature.

<sup>23</sup> Cf. Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605 (1908).

<sup>24</sup> SIR FREDERICK POLLOCK, OXFORD LECTURES (1890), 20.



"Regiam Majestatem" and Fortescue) make laws, like arms, instruments of the sovereign in the work of government. Laws are imposed by the sovereign. In modern times we find the constructive or legislative theory first among French, then among German, and finally among Anglo-American jurists. In France the way was blazed by the French Revolution, whose hot-heads and philosophers felt their creative power so keenly that they set about the making of a new reckoning of time, a new system of government, a new set of laws — positive laws. The spirit of Rousseau's *volonté générale* rode on top of the wave.<sup>25</sup> It was not the arms of Napoleon, but his Code, that set this attitude toward law at rest. In Germany, codification was delayed, but when the "Bürgerliches Gezezbuch" was going through the crucible (1874-96) the spirit of the times was likewise a recognition of the power of man to make his law. Law, according to Jhering (1818-92), was not merely the outcome of unconscious forces, but the result of the efforts of individuals.<sup>26</sup> "*Die höhere Jurisprudenz*," says he, "*ist nicht bloss Bildnerin des Stoffs sondern auch Schöpferin*."<sup>27</sup> To him the process of law-making seemed an increasingly conscious process. That the tide of legislation would ever ebb and the subconscious processes become important again, did not occur to him, any more than it does to those in our midst who rejoice that the law is at last like clay in the potter's hands. In the Anglo-American system the constructive period not only has its theorists near the end, but a prophet at the beginning. Jeremy Bentham (1748-1832) is now claimed by many schools — but his capital discovery has paradoxically, yet fairly, been summarized as the duty of legislation.<sup>28</sup> Though he has points of contact with other schools, he is the jurist of the legislative era that ensues after his death. Coming down to the end of the period and crossing the Atlantic, we have the names of John Henry Wigmore (b. 1863)

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<sup>25</sup> JEAN JACQUES ROUSSEAU (1712-78), DISCOURS SUR L'ORIGINE DE L'INÉGALITÉ PARMI LES HOMMES, 1752 (destructive) and DU CONTRAT SOCIAL, OU PRINCIPE DU DROIT POLITIQUE, 1762 (constructive, distilling the *volonté générale* out of the Social-Contract theory).

<sup>26</sup> Preface to JAHRBÜCHER, cited in GREAT JURISTS, 598. Man's conscious effort in another form is the theme of his KAMPF UMS RECHT, 1872.

<sup>27</sup> Quoted in GREAT JURISTS, 596.

<sup>28</sup> SIR FREDERICK POLLOCK, HISTORY OF THE SCIENCE OF POLITICS, 1890 (ed. 1908),

and Roscoe Pound (b. 1870) to represent us in this school. These words written recently of Jhering<sup>29</sup> could be applied as readily to any of our own constructive jurists: "He is constantly protesting against the excessive importance given to mere logical expressions of law and the absurdity of treating jurisprudence as if it were a sort of legal mathematics. He had a craving for actuality; he could not abide phantasies severed from facts."

### (b) *Historical Schools*

Not all — not even most — jurists have their faces turned towards the future. Law as it is, is also a proper and fertile field for their cultivation. Set the reflective mind to work upon the law in a period of conscious change: whatever its attitude towards particular changes, it cannot regard the law as a fixed thing. On one side are those on whom the plasticity of law dawns as a new discovery — the nascent constructive school. They would codify what they approve and remake whatever they disapprove. They would break with the past. Some of them would not hesitate to draw up constitutions for commonwealths which they have never seen. Their excesses call forth reactions. Thibaut is checked by Savigny in Germany; Bentham in England and David Dudley Field in America find their contemporaries of the historical schools tough-minded. The most conspicuous representatives of the historical schools have thus become identified with reactionary doctrines, and they have accordingly been criticized for their lack of prospective vision.<sup>30</sup> The typical constructive jurist who comes after legislation has proved its power, has a large and hopeful program; the historical jurist, on the other hand, coming a little earlier is apt not only to lack such a program, but to extend his enlightened scepticism to the future as well as to the past, and to question the ultimate power of legislation to do more than what history is ready for. This is the fatalism that many have found

<sup>29</sup> By SIR JOHN MACDONNELL, in *GREAT JURISTS*, 599.

<sup>30</sup> "The Anglo-American historical school (founded by Maine) has not a single reform or constructive piece of legislation of any magnitude to its credit. Indeed, the historical school has been a positive hindrance to any improvement or enlargement of the law, — precisely because those who think of new problems exclusively in terms of historical analogies get tangled up in their own traces and think that what has been must remain forever." Morris R. Cohen, "History *versus* Value," *JOURN. PHIL., PSY. AND SCI. METHODS*, vol. XI, 701, 706.



in this school. Yet not all of the historical jurists have been reactionary. Maine in England, and Savigny in Germany, recognized the value of legislation in its place. Maitland, the master of legal history (not strictly an historical jurist), began and ended his career as a law-writer by advocating the sweeping away of the cobwebs in real property law,<sup>31</sup> and like our own Mr. Justice Holmes used his vast learning quite as frequently to point out the folly of conservatism as its wisdom.<sup>32</sup> No one could more gracefully represent the transition from the historical phase to the constructive phase of a generation that views law as a changing phenomenon, than does Judge Holmes. "For the rational study of the law," said he twenty years ago, "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Again, "I look forward to the time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."<sup>33</sup> But whether looking only to the past, or willing to see the future continue to develop the law as the past has done, the historical jurist recognizes many limitations on the powers of conscious change. His favorite analogy is the analogy of language. Since Savigny's day attempts have, indeed, been made to create new languages — but most of the world is not yet speaking Ro or Esperanto, nor are we likely to substitute an artificial universal law for the national laws that have grown up among us.

Historical jurists, just because their subject matter is hemmed in by local and national facts, will not be of one accord in their definitions — but it is natural to expect them to pick flaws in the definition which emphasizes the "command," the unhistoric command. Neither will they uncritically accept the Law of Nature or the Law of Reason. "The law," says the historical jurist,<sup>34</sup> "embodies the story of a nation's development through many

<sup>31</sup> THE LAW OF REAL PROPERTY, 1879, in COLLECTED PAPERS, 1911, vol. I, 162. In 1906, the year of his death, he lamented the timid and half-hearted acts relative to land transfer with which Parliament was muddling along. *Ib.* vol. III, 488.

<sup>32</sup> Cf. "A Plea for the Codification of English Law," IX, in NEW CENTURY REVIEW, vol. XI, 52, 1897.

<sup>33</sup> "The Path of the Law," 10 HARV. L. REV. 469, 474.

<sup>34</sup> OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), 1.

centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

The Historical School was one of the prevailing schools in Anglo-American jurisprudence during the nineteenth century. With its weapons James Coolidge Carter (1827-1905) successfully fought off codification, and became the Savigny of America.<sup>35</sup> For England we have already mentioned Sir Henry Maine. Though his outlook was too broad to permit him to remain within the confines of one school — he outdid the comparative jurists of France in their own specialty — his phrases have become the common property of the Anglo-American historical jurists: "from status to contract," "Legal Fictions, Equity and Legislation," the precipitation of substantive law in the interstices between the meshes of adjective law, and so forth.<sup>36</sup> As a result of Maine's teaching, the advocates as well as the critics of modern legislation have been conscious of living in an era of legislation, which simply tops off other eras of legal history — and the lawyers, at least, have minimized the importance of statutory law as a result, frequently to the astonishment and disgust of the layman.

In Germany the Historical School came and went about fifty years earlier than it did in England. Its greatest name is that of Friedrich Carl von Savigny (1779-1861).<sup>37</sup> He was not the founder of the school; Gustav Hugo (1764-1844)<sup>38</sup> had preceded him. Nor were his works so finished as were those of his own disciples,<sup>39</sup>

<sup>35</sup> His writings include: PROPOSED CODIFICATION OF OUR COMMON LAW, AM. BAR ASS'N, REPORT, 1884 (answered in DAVID DUDLEY FIELD, SHORT RESPONSE TO A LONG DISCOURSE); PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW, an address to the Virginia Bar Association, 1889; THE IDEAL AND THE ACTUAL IN LAW, 24 AM. LAW REV. 752, and AM. BAR ASS'N, REPORT, 1890; LAW, ITS ORIGIN, GROWTH, AND FUNCTION, 1907.

<sup>36</sup> SIR FREDERICK POLLOCK, Introduction to SIR HENRY MAINE'S ANCIENT LAW, 1906; ROSCOE POUND, 30 HARV. L. REV. 209 ff., 1917.

<sup>37</sup> VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT, 1814 (ed. 1892); GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, 1815-51; SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, 1840-49.

<sup>38</sup> LEHRBUCH EINES ZIVILISTISCHEN KURSUS, 1792-1821; ZIVILISTISCHES MAGAZIN, 1790-1837. Foreshadowings of the school may be traced back to Christian Gottlieb Haubold (1766-1824), Jean Etienne Putter (1725-1807), and even to Leibnitz (1646-1716).

<sup>39</sup> Especially G. F. PUCHTA (1788-1846), DAS GEWOHNHEITSRECHT, 1828; FRIEDRICH HARMS (1819-80), BEGRIFF, FORMEN, UND GRUNDLEGUNG DER RECHTSPHILOSOPHIE; EDUARD GANS (1797-1839), DAS ERBRECHT IN WELTGESCHICHTLICHER ENTWICKELUNG (1824-35); VERMISCHTE SCHRIFTEN, 1834.



but his influence was tremendous. He saved jurisprudence from the clutches of the so-called Natural Law with its "infinite arrogance" and its "shallow philosophy." The philosophy of the day was preparing the way for Savigny's jurisprudence. In particular, Hegel (1770-1831) developed a philosophy exactly suited to the needs of the Historical Schools.<sup>40</sup> Clearly Savigny reflected the "Beruf" of his time correctly. To spring from the dogmatic Law of Nature of Christian Wolff into Codification merely because France had made a code, though a great temptation, would have been futile. Savigny was a young man in 1794 when the obscurantist mystic, Frederick William II, gave Prussia its *Landrecht*. He was soon able to compare the final product with the original project of Frederick the Great and Samuel von Cocceji (1679-1755).<sup>41</sup>

France, indeed, had been prepared for Codification not only by an eventful political history during the preceding generation, and a long-standing national unity and self-consciousness (its eighteenth-century jurists wrote in French, Germany's were still using Latin), but by a much earlier disappearance of the school of the Law of Nature. Montesquieu (1689-1755) has frequently been described as the founder or forerunner of the Historical School. The suggestion is usually accompanied by the observation, on the one hand, that his historical method was faulty, and on the other that the study of history as an aid to law was much older than Montesquieu. Were not Alciati and Cujas historical students of law, and did not their spirit transcend even the Natural Law period in France? We must distinguish here, however, between the study of legal history and the peculiar attitude towards law that typifies the so-called Historical School of Jurisprudence. In this school there is first of all a realization of the importance of what we should call today the subconscious processes that contribute to the growth of law, and the consequent relativity of law. There is a revolt from those older schools that postulate a perfect law independent of mankind. We can almost identify

<sup>40</sup> GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE, 1821.

<sup>41</sup> SAMUEL VON COCCEJI, SYSTEMA NOVUM JUSTITIAE NATURALIS, SIVE JURA DEI IN HOMINES, ET HOMINUM INTER SE, 1748; ELEMENTA JURISPRUDENTIAE NATURALIS ET ROMANAE, 1740. Cocceji is said to have drafted the LANDRECHT for Frederick the Great.

the spot where Montesquieu steps out of one and into the other. In the eighty-first of the "Persian Letters" (1721) he says, "I have often set myself to think which of all the different forms of government is the most conformable to reason, and it seems to me that the most perfect government is that which guides men in the manner most in accordance with their own natural tendencies and inclinations." The question is a question of the philosophical period. The answer opens the door for the historical jurist. "L'Esprit des Lois" (1748) is the development of this answer. It holds that "there is no one best form of state or constitution: no law is good or bad in the abstract. Every law, civil and political, must be considered in its relation to the environment, and by the adaptation to that environment its excellence must be judged."<sup>42</sup> Savigny, too, taught this doctrine, though it is true he emphasized the elements of race and nationality as conditioning factors, whereas climate, geographical conditions, differences of forms and degrees of civilization, were all-important in the mind of Montesquieu. Montesquieu's great influence is to be explained neither by the elegance of his diction nor by the vulgar appeal of some of the Persian Letters, but rather by the fact that men's minds were ready to question the philosophical theories that had held undisputed sway for so many generations. The Encyclopedists represent the philosophical background of Montesquieu's jurisprudence. For a generation French jurisprudence consisted of attacks on and defenses of the "Esprit des Lois."<sup>43</sup> It had barely accomplished its work of opening men's minds to the mutability of laws when the forces of the Revolution were set free.

### (c) *Philosophical Schools*

Turning backwards in the pages of history we can set our law reformer in an epoch when reform is not by Legislation but by Equity, when resort must be had to a court to have conduct declared proper and therefore in accordance with law. He will hardly be so independent of the law in the books as is the con-

<sup>42</sup> GREAT JURISTS, 427. Though Montesquieu thus gets away from the older Law of Nature, he does not abandon the concept, but he defines Natural Laws as those "derived wholly from the constitution of our nature." Bk. I, ch. 2, 3.

<sup>43</sup> About twenty-five titles are collected in ARMAND GASTON CAMUS, *PROFESSION D'AVOCAT*, vol. II, *BIBLIOTHÈQUE CHOISIE DES LIVRES DE DROIT*, 1772 (5 ed., DUPIN, AÎNÉ, 1832), 25-27.



structive jurist, nor so dependent on it, accidents and all, as the historical jurist. He will seek general principles by which to test the law that is placed before him, and he will argue that what does not correspond with these principles is not law, though it may have been so declared; and what is dictated by these principles is law though it has never been declared in so many words. Positive law is a mere approximation to *the* law, and constantly subject to correction by the mere process of showing a court wherein it falls short. It makes little difference whether he finds his principles in a "word of God," or conscience, a Law of Nature newly observed, or a Law of Nature discovered by the Ancients, whether "Nature" means human nature or something superhuman — he is a philosophical jurist. He is not constructive, for it is not his business to *make* the law, the law is there to be *found*; yet he is not historical, at least not primarily, though he may make history itself one of the means for the revelation of his principles.<sup>44</sup>

Sir Frederick Pollock has spoken of the continuity of the Law of Nature theory in legal history, but a fairer alternative is suggested by Sir John MacDonnell: that the history of jurisprudence is marked by an often-renewed attempt to revive in a new form the conception of a Natural Law, of a "*richtiges Recht*."<sup>45</sup> The Equity periods generally develop this type of jurisprudence. The eclectic Cicero's acceptance of the Stoics' Natural Law is the philosophic reflection of the growing Edict of the Praetors. Through this Edict the law common to the nations (the little Italian gentes) became the Law of Nature. In another Natural-Law period, the seventeenth century, this Law of Nature was destined to become the Law of Nations in a bigger sense (the law binding on states). The glide from the Law of Nations to the Law of Nature in the old Roman sense is not without a parallel today. After an exhaustive study of comparative law a people is likely to realize that the likenesses are more essential than the differences,

<sup>44</sup> "People who quite honestly believe themselves to possess infallible means of knowing what ought to be, will hardly spend their time on the humbler task of learning from the experience of what has been." Sir Frederick Pollock, JOURN. SOC. COMP. LEGIS., N. S., 1903, No. 1, 81. The same remark applies to the Constructive Schools.

<sup>45</sup> Sir Frederick Pollock, "The History of the Law of Nature, a Preliminary Study," JOURN. SOC. COMP. LEGIS., vol. II, N. S., 1900, No. 3, 418; 1 COL. L. REV. 11. Cf. SIR JOHN MACDONNELL, Introduction to BEROLZHEIMER'S THE WORLD'S LEGAL PHILOSOPHIES, xxxii.

and a distinction between the essential and the incidental in law is apt to lead into one phase or another of a *jus naturae*.<sup>46</sup> France, as we shall see, the first country of Europe to achieve a modern code, has led in Comparative Jurisprudence for several generations. Now that it is passing into the second stage of its relations with the code, it is witnessing a *renaissance du droit naturel*, the distinguishing feature of a Philosophical Jurisprudence.<sup>47</sup> Contemporary Italy is a close second.<sup>48</sup> But whatever the genesis of Philosophical Schools, Equity, as a means of legal development, cannot flourish without the theory that there is an enforceable norm for conduct independent of the positive law. A jurist of the legislative period may be inspired by an ideal of Natural Law; a glossator may believe that his code embodies Nature's decrees; but Equity *must* make its appeal to the natural. The vagueness of the idea seems rather a help than a hindrance. Long before Equity emerged triumphant in England as coördinate with the law, or rather superior to it,<sup>49</sup> Englishmen had read that in Utopia the law was the Law of Nature.<sup>50</sup> Hooker (1553-1600) had laid

<sup>46</sup> The learned editor of the JOURNAL OF COMPARATIVE LEGISLATION has not escaped this spell. In his essay on Leibnitz (GREAT JURISTS, 301) he says: "But is there an end of the idea of Natural Law? May it not, revised in the light of psychology, history, and comparative jurisprudence, have a future before it?" Cf. also preceding note. The comparative jurists of Germany are also just beginning to look forward to the next stage. Stammer's accord with the French "natural law with a variable content" — a sort of comparative natural law theory — is the first fruit. The American lawyers, dealing daily with the laws of many jurisdictions as fundamentally the same, are for the same reason a little more apt to see in the common law a kind of natural law than is the Englishman.

<sup>47</sup> Cf. JOSEF CHARMONT (b. 1859), LA RENAISSANCE DU DROIT NATUREL (1910). The Glossatorial Jurists of France during the 1800s had, of course, ignored "philosophy." But the last twenty-five years have witnessed the inspiration of an idealist philosopher, ALFRED FOUILLÉE (1838-1912), L'IDÉE MODERNE DU DROIT (1878), and a great philosophical jurist, Raymond Saleilles. "A host of younger men" we are told in SCIENCE AND LEARNING IN FRANCE, 1917, 154, "now cultivate this field with such originality and success that for the philosophy of law of the coming generation, the French systems are vital for every American student." See MODERN FRENCH LEGAL PHILOSOPHY (MODERN LEGAL PHILOSOPHY SERIES, No. 7).

<sup>48</sup> As represented in GEORGIO DEL VECCHIO, THE FORMAL BASES OF LAW, 1905-08 (MODERN LEGAL PHILOSOPHY SERIES, No. 10).

<sup>49</sup> 1616 is a convenient date for the localizing of this gradual process; in that year Lord Coke was unsuccessful in his effort to prosecute defendants in common-law actions who had applied to the Chancellor for injunctions to stop the plaintiff's proceeding, and the King having been appealed to, decided in favor of the Chancellor.

<sup>50</sup> SIR THOMAS MORE (1476-1535), DE OPTIMO REPUBLICAE STATU, DEQUE NOVA INSULA UTOPIA, 1516, Bk. II; "They define virtue thus, that it is a living according to



Nature's Law down as one of the tests of human law.<sup>51</sup> A learned Italian, Albericus Gentilis (1551-1611), taught a Natural-Law jurisprudence at Oxford.<sup>52</sup> Bacon (1561-1626) assumed the existence of a Law of Nature, though he would probably seek it in a new way.<sup>53</sup> Soon the idea became one of the commonplaces of literature. Nathanael Culverwell (1612-51) wrote about the "Light of Nature."<sup>54</sup> The greatest scholar of the day, John Selden (1584-1654), drew from the laws of the Hebrews a type of Natural Law.<sup>55</sup> Zouch (1590-1661), Hobbes (1588-1679), Cumberland (1632-1719), Locke (1632-1704), and their successors in England and the Colonies,<sup>56</sup> differing as they did in many respects, agreed

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Nature, and think that we are made by God for that end; they believe that a man then follows the dictates of Nature when he pursues or avoids things according to the direction of reason. . . . They have but few laws. . . . They have no lawyers among them." SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE*, had mentioned Natural Law only to dismiss it rather brusquely (ch. XVI). Cf. POLLOCK, 1 COL. L. REV. 27. But cf. his *OPUSCULUM DE NATURA LEGIS NATURAE*, in *WORKS* (ed. Clermont, 1869), 63-184, 187-333.

<sup>51</sup> RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY*, circa 1592-1647.

<sup>52</sup> *DE LEGATIONIBUS*, 1585; *DE JURE BELLI*, 1589; *DE ADVOCATIONE HISPANICA*, 1613. COLEMAN PHILLIPSON, *GREAT JURISTS*, 109 ff., minimizes the Natural Law element in Gentilis. Still Professor Holland, the rediscoverer of Gentilis, in *ELEMENTS OF JURISPRUDENCE*, ch. III, recognizes the Law of Nature as the scaffolding upon which Gentilis built, and in his article in *ENCYCLOPAEDIA BRITANNICA* he says: "He uses the reasonings of the civil and even the canon law, but he proclaims as his real guide the *JUS NATURAE*, the highest common sense of mankind, by which historical precedents are to be criticized and, if necessary, set aside." Thus in *DE JURE BELLI*, III, 9: *Naturalis ratio, quae est auctor juris gentium*. See *GREAT JURISTS*, 119.

<sup>53</sup> Argument in favor of the *Post-Nati*, quoted in *GREAT JURISTS*, 165. For other instances of the Law of Nature in court see Andrew Amos's learned note to FORTESCUE's *DE LAUDIBUS*, ch. XVI (antagonistic). In popular jurisprudence its currency is represented in GERARD MALYNES, *LEX MERCATORIA*, 1622.

<sup>54</sup> *AN ELEGANT AND LEARNED DISCOURSE OF THE LIGHT OF NATURE*, 1652 (ed. Brown, 1857). *Jus Naturae* is presented as a code of law self-existent and antecedent to all human law.

<sup>55</sup> *DE JURE NATURALI ET GENTIUM JUXTA DISCIPLINAM EBRAEORUM*, 1640.

<sup>56</sup> RICHARD ZOUCHE, *JURIS ET JUDICII FEICIALIS, SIVE JURIS INTER GENTES ET QUAESTIONUM DE EODEM EXPLICATIO*, 1650: "When many men at different times affirm the same thing this fact must be referred to an universal cause, which can be nothing else than a right conclusion flowing from the principles of Nature, or else some common consent; the former indicates the Law of Nature, the latter the Law of Nations." (Quoted and translated, HERON, 442.)

THOMAS HOBBS, *DE CIVE*, 1642; *HUMAN NATURE, OR THE FUNDAMENTAL ELEMENTS OF POLICY*, 1650; *DE CORPORE POLITICO*, 1650; *LEVIATHAN, OR THE MATTER, FORM AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL*, 1651; *OF LIBERTY AND NECESSITY*, 1654.

in beginning with a Law of Nature as the underlying basis of all things.

Learned Europe was united in the seventeenth century by the use of the Latin language, and the exaltation of Natural Law was not limited to England. In fact, it did not originate there. It may be well before passing to its representatives in Continental Europe to consider what Nature meant in another field of thought to the savants of those days. The literary criticism of this period was very fond of the word "Nature." Much of its wit and wisdom eventually found its way into Pope's "Essay on Criticism" (1711). After setting up Unerring Nature as "at once the source, the end, the test of art," Pope hastens to explain that "Nature" means the classical standards of the Ancients:

Those rules of old discovered, not devised,  
Are Nature still, but Nature methodized.

This idea ran through the literature of the seventh century both in England and on the Continent. Thus Rapin (1672) says of Aristotle's

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SIR ROBERT WISEMAN, *LAW OF LAWS, OR THE EXCELLENCY OF THE CIVIL LAW ABOVE ALL OTHER HUMANE LAWS WHATSOEVER*, 1657.

RICHARD CUMBERLAND, *DE LEGIBUS NATURAE DISQUISITIO PHILOSOPHICA*, 1672.

JOHN LOCKE, *TWO TREATISES ON GOVERNMENT*, 1690.

JAMES TYRRELL, *BRIEF DISQUISITION ON THE LAW OF NATURE* (based on CUMBERLAND), 1692.

Among the later English writers on Natural Law are: THOMAS WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW WITH [comparative] NOTES*, 1705; *INSTITUTE OF THE LAWS OF ENGLAND OR LAWS OF ENGLAND IN THEIR NATURAL ORDER ACCORDING TO COMMON USE*, 1720; T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW*, 1754-56; RICHARD WOODDESSON, *ELEMENTS OF JURISPRUDENCE*, treated in the preliminary part of a course of lectures on the Laws of England, 1783; *SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND*, as treated of in a course of Vinerian Lectures at Oxford, commencing in 1777, 1792-93; and SIR WILLIAM BLACKSTONE (1723-80), *COMMENTARIES ON THE LAWS OF ENGLAND*, 1765-69, Introduction, § II.

A belated work of this kind by a recalcitrant pupil of Austin is CHARLES JAMES FOSTER'S *ELEMENTS OF JURISPRUDENCE*, 1853.

For references on Natural Law in the American Colonies see "Select Essays" in *ANGLO-AMERICAN LEGAL HISTORY*, I, 418, 437, 451.

In America, besides the Declaration of Independence, 1776, and the Bills of Rights in the various Constitutions, which were drawn up under the influence of the Law-of-Nature theory, we have the lectures of one of our first law professors, James Wilson (1742-98), *WORKS*, . . . including *LECTURES AS PROFESSOR OF LAW*, 1790-92 (eds. 1804, 1896, ch. II and III). (Of *THE GENERAL PRINCIPLES OF LAW; OF THE LAW OF NATURE*.) The Natural-Law theory has furnished one of the most important cross-currents in the later American writings on Jurisprudence, the main tendencies in which have been Analytical and Historical. The American jurists will be the subject of a separate study by the present writer.



rules; "If you consider them well, you will find that they are merely made to methodize Nature, to follow her step by step."<sup>57</sup> And so, going back to the time when the Reception of Roman Law followed in the wake of the Renaissance and the Reformation, we can understand the enthusiasm of the Humanist jurists of France and Italy for Roman Law: to them it was Natural Law methodized.<sup>58</sup> It was more than this, it was the will of the Author of Nature.<sup>59</sup>

When we read of the astounding work of Cujas in making historical studies that reach back of Justinian we must not endow him with thoughts of our own time. He was not anticipating Savigny's theory that true law is a development, a growth; he was simply seeking the sources of Roman Law, the undefiled fountain-head of the Law of Nature. Far from believing in an evolution from the lower forms to the higher, he was trying to get back to a Golden Age. It is therefore misleading to confound his school with Historical Schools in the modern sense. He simply represents a second phase of the commentation stage in Continental Law. The

<sup>57</sup> RÉFLEXIONS SUR LA POÉTIQUE, § xii.

<sup>58</sup> This notion has persisted in one form or another down to our own times. Thus EDWIN CHARLES CLARK, PRACTICAL JURISPRUDENCE, 1883, 3: "By far the wider utility of the subject [Roman Law] lies in its connexion with Jurisprudence, from which the study of Roman Law can never be separated without the greatest detriment to both, coupled with which, that study is most profitable towards the acquisition of sound principles and clear ideas as to law in general." In the same spirit John George Phillimore inspired by a passage in D'Aguesseau on the Natural Law hidden in the maxims of Roman Law, wrote his PRINCIPLES AND MAXIMS OF JURISPRUDENCE, 1856. About the same time Nathaniel Lindley published AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE, BEING A TRANSLATION OF THE GENERAL PART OF THIBAUT'S SYSTEM DES PANDEKTENRECHTS, 1855. In 1853 CHARLES JAMES FOSTER (ELEMENTS OF JURISPRUDENCE, 2) complained that Jurisprudence was lumped with Civil Law in the Inns of Court.

<sup>59</sup> Thus GROTIUS: *Jus Naturae est dictatum rectae rationis . . . ac consequenter ab Auctore Naturae Deo*. There was an earlier Natural Law, among the theologians before the Renaissance, while the Canon Law was going through a Commentation or generalizing stage. See my note on the history of Canon Law in 65 U. OF PA. LAW REV. 749. This theological Natural Law is represented in ST. THOMAS AQUINAS (1228-74), SUMMA THEOLOGIAE; DE REGIMINE PRINCIPUM. St. Thomas was followed by some of the earlier modern writers, notably by Hooker. On Natural Law in Gratian see POLLOCK, JOUR. SOC. COMP. LEGIS., N. S., 1900, No. 3, 423; 1 COL. L. REV. 11. The Natural Law of the Church like other Natural Laws had its inception as early as the days of Saint Augustine in a clash between conflicting systems. The *Mosaicarum et Romanarum Legum Collatio* attributed to this period was an attempt to reconcile the laws of the Empire with the dictates of the conscience of a Christian.

first, that of the Bartolists,<sup>60</sup> had brought emancipation from the words of the code by concerning itself with a minute study of the substance of the rules. In course of time, it is true, it had buried the code beneath its dissertations. The Humanists rebelled against all this Mediævalism, believing that they could understand the true spirit of Roman Law better than could the scholastic scribes of barbarous Latin. Glosses and commentaries were to be consigned to the rubbish-heap, and centuries of juristic work forgotten. This is hardly an historical program, but there is a philosophy back of it—at first only dimly felt, but soon the common knowledge of every jurist and publicist in Europe: Roman Law is Reason, the Law of Nature.

It will suffice here to mention only a few of the greater names. Spain had been the foremost nation of Europe before the Revival of Learning. Its Romanesque Law had assumed the form of a code under Alphonso the Wise (r. 1252-82) and after several centuries of interpretation of the kind that generally follows codes, Vasquez (fl. 1509-66), Victoria (sixteenth century), Soto (1494-1560), and Suarez (1548-1617) developed the Law of Nature that had been neglected during the ascendancy of the Code. Balthazar Ayala (1548-84) carried this learning to the Netherlands.<sup>61</sup> In the Dutch School, Grotius (1583-1645)<sup>62</sup> built International Law on the foundation of the Law of Nature. Vinnius (1588-1637), Spinoza (1632-77), and a distinguished line of publicists ending in Bynkershoek (1673-1743) continue their building on the same foundation.<sup>63</sup> In France Bodin (1550-1627)

<sup>60</sup> Bartolus (1314-57) himself had a means of bridging the gap between the actual positive law of his day and the Roman Law, which represented the law as it ought to be. To him Roman Law was the law *de jure*. Other customs and regulations were in force *de facto*. His theory of the relation between the state and the law has been made the subject of a recent study: CECIL W. SIDNEY WOOLF, *BARTOLUS OF SASSOFERRATO, HIS POSITION IN THE HISTORY OF MEDIAEVAL POLITICAL THOUGHT*, 1913.

<sup>61</sup> VASQUEZ, *CONTRORSIAE ILLUSTRES*; FRANCIS DE VICTORIA, *RELECTIONES THEOLOGICAE*, V. DE INDIS, VI; DE JURE BELLI; DOMINIC SOTO, *DE JUSTITIA ET JURE*, 1580; FRANCISCUS SUAREZ, *DE LEGIBUS AC DEO LEGISLATORE*, 1579; BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI*, 1597.

<sup>62</sup> HUGO GROTIUS, *DE JURE BELLI ET PACIS*, 1625. He attempted to separate Instituted Law from Natural Law. "For Natural Law, as being always the same, can be easily collected into an Art; but that which depends upon institution, since it is often changed, and is different in different places, is out of the domain of Art" (quoted in *GREAT JURISTS*, 179; cf. *ib.* 180).

<sup>63</sup> VINNIUS, *INSTITUTIONUM IMPERIALIUM COMMENTARIUS*, pub. 1665. BARUCH



bases his Republic on the concept.<sup>64</sup> Godefroy (1587-1652), Favre (1557-1624), Domat (1625-95), D'Aguesseau (1668-1751), and Pothier (1699-1772), and in Switzerland Burlamaqui (1694-1748) and Vattel (1714-67), develop the idea.<sup>65</sup> In Italy the many-sided Vico (1668-1743), like the English Bacon, has a more modern idea of what it is and how to find it — he even anticipates Montesquieu in his recognition of historical relativity — but he still holds to a Law of Nature.<sup>66</sup> Beccaria (1735-83), Filangieri (1752-88), and a series of writers who vacillate between the schools of France and those of Germany, carry on the tradition to its quiescence in Italy.<sup>67</sup> Germany was the last of the nationalities of Western Europe to develop the Law of Nature. It is borrowed from the Dutch School through the Swedish Baron Pufendorf (1632-94),<sup>68</sup> the first professor of the Law of Nature and of Nations in Germany,

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SPINOZA, TRACTATUS THEOLOGICO-POLITICUS, 1670; TRACTATUS POLITICUS, 1678 (a fragment). In the latter work, ch. 2, § 4: *Per jus. . . Naturae intelligo ipsae naturae leges seu regulas, secundum quas omnia fiunt.* CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM, 1702; OBSERVATIONES JURIS ROMANI, 1710-33; DE DOMINO MARIS, 1721; QUAESTIONES JURIS PUBLICI, 1737. Though Bynkershoek would base International Law on Custom, he leaves the door open for Natural Law in holding that “*nullus ullorum hominum auctoritas ibi valet, si ratio repugnet.*”

<sup>64</sup> JEAN BODIN, DE LA RÉPUBLIQUE, 1577; JURIS UNIVERSI DISTRIBUTIO, 1591. In the latter work law is said to be twofold, human and natural; natural law is inculcated by our reason, human law is the work of man.

<sup>65</sup> Some of these are perhaps more closely allied with the Analytical School, where their works will be mentioned (*cf.* note 85, below). Henri François D'Aguesseau, in a series of essays entitled MÉDITATIONS MÉTAPHYSIQUES SUR LES VRAIES OU LES FAUSSES IDÉES DE LA JUSTICE, discusses the question whether man finds in himself the natural ideas of the just and the unjust. He was deeply interested however in the idea of legislation and codification, a taste of which France had had in the work of Louis XIV at the end of the seventeenth century. The Swiss publicist Jean Jacques Burlamaqui has been the widest-read teacher of Natural Law outside of Germany. He wrote PRINCIPES DU DROIT NATUREL, 1747, and PRINCIPES DU DROIT POLITIQUE, published posthumously, 1751. EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉE À LA CONDUITE ET AUX AFFAIRES, DES NATIONS ET DES SOUVERAINS, 1758 (based on Wolff).

<sup>66</sup> GIOVANNI BATTISTA VICO, PRINCIPII D'UNA SCIENZA NUOVA, 1725. DE UNIVERSI JURIS UNO PRINCIPIO ET FINE UNO, 1720. Excerpts in English are in HERON, *op. cit.* 535-586. On Natural Justice see page 540.

<sup>67</sup> CESARE BONESANO, MARCHESE DI BECCARIA, DEI DELITTI E DELLE PENE, 1764. GAETANO FILANGIERI, LA SCIENZA DELLA LEGISLAZIONE (1780-88). JOHANNIS FR. FINETTI, DE PRINCIPIIS JURIS NATURAE ET GENTIUM, 1777; this was directed *adversus Hobbesium, Puffendorfum, Thomasium, Wolfium et alios.*

<sup>68</sup> SAMUEL VON PUFENDORF, SYSTEMA JURIS NATURAE ET GENTIUM, 1672; ELEMENTA JURISPRUDENTIAE UNIVERSALIS, 1669.

acquiesced in by the cosmopolitan Leibnitz (1646-1716),<sup>69</sup> and by the lesser lights, Rachel (1628-91), the open-minded Thomasius (1655-1728), Gerhard (1682-1718), Grundling (1671-1729), Achenwall (1719-72).<sup>70</sup> But the climax of its pretensions is reached in the work of the man who calls himself Professor *Generis Humani*: Christian Wolff (1679-1754), in his "Institutiones juris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur" (1754), unintentionally reduces the Law of Nature *ad absurdum* and plays into the hands of its enemies. At length, as we have seen, it disappears as a vital force in the jurisprudence of each country: first in France and Italy, later in Germany, then in England, and finally in America, in spite of the petrification of some of its catchwords in documents of national importance.<sup>71</sup> Far from the halls of justice, philosophers still conjure with it,<sup>72</sup> reformers appeal to it — but with this limitation: no one argues that it is the law of our courts *proprio vigore*. Only in Scotland was it still respected. Beginning with Continental traditions, its lawyers were prevented from sharing in the movements of related systems in the nineteenth century, with the result that it still cherished the Law of Nature a century after

<sup>69</sup> GOTTFRIED WILHELM VON LEIBNITZ, *METHODI NOVAE DISCENDAE DOCENDAEQUE JURISPRUDENTIAE*, 1667; *CODEX JURIS GENTIUM DIPLOMATICUS*, 1693.

<sup>70</sup> SAMUEL RACHEL, *DE JURE NATURAE ET GENTIUM DISSERTATIONES DUAE*, 1678; CHRISTIAN THOMASII, *FUNDAMENTA JURIS NATURAE ET GENTIUM, EX SENSU COMMUNI DEDUCTA*, 1705-18; EPHRAIM GERHARD, *DELINEATIO JURIS NATURALIS*, 1712; NICHOLAS JEROME GRUNDLING, *VIA AD VERITATEM JURIS NATURAE*, 1714-28; *JUS NATURAE ET GENTIUM*, 1728; GOTTFRIED ACHENWALL, *JUS NATURAE*, 1750; *OBSERVATIONES JURIS NATURAE ET GENTIUM*, 1750; *PROLEGOMENA JURIS NATURAE*, 1748; CHRISTIAN WOLFF, *PHILOSOPHIA CIVILIS SIVE POLITICA*, 1746; *JUS GENTIUM*, 1749; *JUS NATURAE METHODO SCIENTIFICA PERTRACTATUM IN DECEM TOMOS DISTRIBUTUM*, 1740-47.

<sup>71</sup> The appeal of the Declaration of Independence is to "the laws of nature and of nature's God," and the reasons that make against revolutions are reduced to "prudence."

<sup>72</sup> The leading German philosophers who adhered to a modified Law-of-Nature concept in the 1800s were Adolf Trendelenburg (1802-72); Karl Chr. Fr. Krause (1781-1832), Heinrich Ahrens (1808-74), and Karl D. Röder (1806-79). On the other hand the prevailing tendency has been away from *Naturrecht* as in Felix Dahn (b. 1834) and Adolph Lasson (b. 1832). The most ambitious attempt to revive Natural Law in America has perhaps been that of GEORGE HUGH SMITH, *THE ELEMENTS OF RIGHT AND OF THE LAW*, 1886 (2 ed., 1887). Here as in Germany, philosophers, as distinguished from jurists, and perhaps in criticism of the jurists, busy themselves from time to time with the Law-of-Nature concept. Cf. *JOURN. PHIL., PSY. AND SCI. METHOD*, vol. XI, 345-48; *ib.* vol. XII, 141.



it was neglected elsewhere. The typical work of this epoch is James Lorimer's "Institutes of Law, a treatise of the principles of Jurisprudence as determined by Nature."<sup>73</sup>

It is hardly possible to lay down a definition of law that will suit all of the philosophic schools, but if we were to attempt it, we should certainly avoid drawing the line between what is and what is not law by reference to anything so accidental as a formal enactment or pronouncement of a sovereign or even the accidents of history except as those accidents affected Nature. We should look for something with universal applicability; we should seek the essential and avoid the incidental and the arbitrary; and above all we should define law (at least now-a-days) as something connected with and growing out of human nature.

#### (d) *Analytical Schools*

The notion that law is a body of interrelated principles and not merely a haphazard selection of rules, is not inextricably interwoven with that of a transcendental Law of Nature. It is logically applicable to positive law, and has been so applied by the Analytical School. There is, of course, in the name itself nothing to prevent its use with reference to those who would analyze a code or statutes. There are jurists of this type and they are sometimes described as analytical.<sup>74</sup> But *the* Analytical School is quite different. It is not interested in accidental details. It speaks in universal

<sup>73</sup> 1872 (2 ed., 1880). Other works showing Scotch influence include: SIR JAMES MACKINTOSH (1765-1832), DISCOURSE ON THE STUDY OF THE LAW OF NATURE AND NATIONS (delivered 1799); JAMES HUTCHISON STIRLING, LECTURES ON THE PHILOSOPHY OF LAW, 1873; WILLIAM GALBRAITH MILLER, LECTURES ON THE PHILOSOPHY OF LAW, 1884; DATA OF JURISPRUDENCE, 1903; W. HASTIE, preface and notes to OUTLINES OF THE SCIENCE OF JURISPRUDENCE, translated from the German of Puchta, Friedländer, Falck, and Ahrens, 1887; DAVID GEORGE RITCHIE, NATURAL RIGHTS, A CRITICISM OF SOME POLITICAL AND ETHICAL CONCEPTIONS, 1895; WILLIAM ROBERT HERKLESS, LECTURES ON JURISPRUDENCE, OR THE PRINCIPLES OF POLITICAL RIGHTS, 1901.

<sup>74</sup> The work of an Analytical School is likely to be useful to later schools if only, as Sir Henry Maine says, "for the purpose of clearing the head." (EARLY HISTORY OF INSTITUTIONS, Lecture XII.) Its tendency to limit law to positive law is calculated to make the transition from it to a legislative school quite easy. Binding's theory of Norms, and Bierling's modifications, though resembling the Austinian imperative theory, are related to the constructive work of their time in Germany rather than to the attitude of the Analytical schools. Cf. *infra*, note 79, as to Professor Holland and other current Anglo-American Constructive-Analytical jurists.

affirmatives and negatives. It would define all law, classify all laws, discover the essential features of every law, and get a yardstick by which all laws can be measured. Its critics have accused it of being more interested in the logical working out of a system than in the effect of its rulings. *Fiat justitia, ruat coelum*. This would be a serious charge, indeed, if the School professed to be engaged in the process of law-making — but it is not. Analytical jurisprudence makes its appearance when there is a body of law on which to work, and, what is more, a law that is supposed to be worth analyzing because consistent with itself and all-inclusive. Neither the Analytical nor the Philosophical School can thrive on the piecemeal work of a modern legislature, nor under the illiberal hand of a rigid code of positive law. Not that you can forbid men to philosophize; but you can render their legal philosophies more or less nugatory by the form in which you cast their law. Philosophical and Analytical Jurisprudence have one other phase in common. The latter, it is true, says nothing of the Law of Nature — though it may easily lapse into it,<sup>75</sup> or bridge the chasm between positive and transcendental laws by one theory or another.<sup>76</sup> Still, the very notion that there is a universal element in laws that can be made the basis of an analysis, the very notion that there are parts in a legal system that fit together as neatly, as inevitably, as wonderfully as the coincidences of mathematics, is a kind of admission that the handiwork of Nature is visible in law. As several eighteenth-century writers who were both philosophical and analytical expressed it, they sought to arrange the laws in their “natural order.”<sup>77</sup> It is not surprising to find the learned Doctor Heinrich Brunner classifying the theories of Austin and Bentham as *naturrechtlich*.<sup>78</sup>

The greatest exponent of this school, the intellectually honest Austin, comes at the end of its active career in England, not at the beginning as is often erroneously assumed. Further, not everything in Austin's theory of the universe is essential to the

<sup>75</sup> As in AUSTIN, LECTURES II-IV.

<sup>76</sup> As in the case of Hobbes and Locke, see below, *ap.* note 82.

<sup>77</sup> Cf. notes as to Wood (55) and Domat (85).

<sup>78</sup> In the Introduction to HOLTZENDORFF'S ENCYCLOPÉDIE (3-5 eds.), translated in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, II, 51, somewhat freely, see POLLOCK, HISTORY OF THE SCIENCE OF POLITICS (ed. 1908), 104, 111. Cf. Pollock, “History of Comparative Law,” JOURN. SOC. COMP. LEGIS., N. S., 1903 (vol. V), No. 1, 85.



Analytical School. Thus if we were to seek a definition of law for the school that attempts to make a scientific study of what the law is (when all agree that it is a body of correlated principles), we should not be forced to the Austinian command, though that would suit very well, as indeed it would in any theory of positive law. We should certainly limit ourselves to ascertainable, perhaps to "municipal," law, and should avoid alike the suggestion that man is impotent to change the kind of law with which we deal, and the other extreme, that law is a series of unrelated whims or *ex post facto* decrees of the law-maker. Austin did his work quietly before the power of legislation had been revealed in England.<sup>79</sup> That his formulas were readily adaptable to the conditions that became obvious after his death is a wonderful testimony to the thoroughness of his work. But his work is not of the legislative period. Professor Holland, who attempts to continue it, must change his book every time a new law is passed.<sup>80</sup> At best the

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<sup>79</sup> JOHN AUSTIN (1790-1859), *PROVINCE OF JURISPRUDENCE DETERMINED*, 1832; *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW*, delivered 1828-32, published posthumously, 1861-63. The greatest power of legislation is not realized in England until after the Reform Bill of 1832. That Austin comes at the end and not at the beginning of his school has been observed by Sir Frederick Pollock. After denying his own allegiance to the Analytical School, he remarks: "It may be that I love Hobbes a little too well to be perfectly just to his successors, who to my thinking have often got more praise than they deserved for repeating Hobbes' ideas in clumsier and really less exact words." Preface to *FIRST BOOK OF JURISPRUDENCE*, vii.

<sup>80</sup> THOMAS ERSKINE HOLLAND, *ELEMENTS OF JURISPRUDENCE*, 1880 (eds. 1882, 1886, 1888, 1890, 1895, 1896, 1900, 1906, 1910, 1917). Though each edition differs from its predecessor chiefly in taking note of changes in the law, the learned author states that the twelfth edition may be regarded as final. Cf. however his statement in ch. I: "It follows that Jurisprudence is a progressive science. Its generalizations must keep pace with the movement of systems of actual law." Austin has found many imitators and disciples in spite of the changed condition. While his definition of law is admirably suited to legislation, in the actual analysis, all of these writers labor under the same handicap as Professor Holland: SIR WILLIAM MARKBY, *ELEMENTS OF LAW CONSIDERED WITH REFERENCE TO PRINCIPLES OF GENERAL JURISPRUDENCE*, 1871 (6 ed., 1905); SHELDON AMOS, *A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE*, 1872; *THE SCIENCE OF LAW*, 1874; WILLIAM EDWARD HEARN, *THE THEORY OF LEGAL DUTIES AND RIGHTS, AN INTRODUCTION TO ANALYTICAL JURISPRUDENCE*, 1883; HENRY TAYLOR TERRY, *SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, EXPOUNDED WITH A VIEW TO ITS ARRANGEMENT AND CODIFICATION*, 1884; JOHN WILLIAM SALMOND, *ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY*, 1891; *FIRST PRINCIPLES OF JURISPRUDENCE*, 1893; *JURISPRUDENCE, OR THEORY OF LAW*, 1902 (5 ed., 1916); WILLIAM JETHRO BROWN, *THE AUSTINIAN THEORY OF LAW*, 1906; *THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION*, 1912.

analytical method can yield in such a period a stocktaking of the condition of the law from time to time.<sup>81</sup> The truth is that general principles are no longer supreme in our law, and we cannot write an analytical jurisprudence today that will not be a Procrustean bed for the living, growing content of the law. Austin's connection, I have suggested, is with the past. He worked on Blackstone's principles. Blackstone (1723-80) in turn had used Hale's *Analysis of the Law*.<sup>82</sup> In Hale's century (1609-76) two famous attempts were made to bridge the gap between a jurisprudence of positive law and a philosophical jurisprudence of Natural Law. Hobbes taught that man in society surrendered all of his Natural Rights to escape the bellicose state of Nature. Locke taught that men organized governments to execute the behests of Nature through their positive law. The gap was at least recognized by Lord Coke when he contrasted the "artificial reason and judgment of the law" with "natural reason."<sup>83</sup> His great contemporary and antagonist, Bacon, was the first of a series of thinkers who proposed the reducing of this artificial reason to natural reason.

In other countries some kind of Analytical School accompanies the Philosophical School; that is, some kind of principle-seekers supplement the work of those who would apply principles to life in the making of laws. In contemporary France (now reëntering the philosophical stage) we are told of Planiol of Paris, "whose books entitled 'Elementary Jurisprudence' represent most nearly what we are accustomed to term 'Analytical Jurisprudence.'"<sup>84</sup> Among the eighteenth-century jurists of the Continent it would be a little harder to separate the analysts from the philosophers, because of the peculiar assumption then current that Roman Law

<sup>81</sup> Cf. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW*, 1909, § 10.

<sup>82</sup> MATTHEW HALE, *ANALYSIS OF THE LAW*, BEING A SCHEME OR ABSTRACTS OF THE SEVERAL TITLES AND PARTITIONS OF THE LAW OF ENGLAND, DIGESTED INTO METHOD, n. d. (ed. 1713 with his HISTORY). Cf. SIR WILLIAM BLACKSTONE, "Analysis of the Laws of England" (in *TRACTS*, 3 ed., 1-129).

<sup>83</sup> 12 COKE, 63: "Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature: but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it" (1608).

<sup>84</sup> *SCIENCE AND LEARNING IN FRANCE*, 1917, 155.



and the Law of Nature were identical. Of Heineccius (1681-1741), one of the Germans, the author of "*Elementa Juris Civilis secundum ordinem Pandectarum*," (1740), Sir James Mackintosh said that he was the best writer of elementary books with whom he was acquainted on any subject.<sup>85</sup> Others who produced analytical books, mere "digests of Roman Law stripped of its details," were Ickstedt (1702-76), Nettelblatt (1719-91), Baumgarten (1714-82), and Bach (1721-58).<sup>86</sup> I fancy, however, that Leibnitz is as worthy of the name of "Analytical Jurist" as any of the Germans. He it was who vigorously criticized the illogical division of law in the Institutes: Of Persons, Of Things, Of Actions. All actions are among persons concerning things. Accordingly he planned a new division and urged its adoption in one work embracing the Code, Novels, Institutes, and Digest of Justinian.<sup>87</sup> He believed that nothing approached so near the method and precision of geometry as did the Roman Law.<sup>88</sup> And throughout the philosophical period there were others who attempted to analyze the positive law of Rome, even as far back as the great systematizer, the bitter opponent of Cujas, Doneau (1527-91).<sup>89</sup>

### (e) *Comparative-Apologetic Schools*

Let us finally turn back one more page of history to the point where legal study is by Glossation, and growth is surreptitious.

<sup>85</sup> DISCOURSE (ed. 1835), 4.

<sup>86</sup> J. A. F. VON ICKSTEDT, *ELEMENTA JURIS GENTIUM*, 1740; DAN NETTELBLADT, *SYSTEMA ELEMENTARE UNIVERSAE JURISPRUDENTIAE NATURALIS USUI JURISPRUDENTIAE POSITIVAE ACCOMMODATUM*, 1749; ALEXANDER GOTTLIEB BAUMGARTEN, *JUS NATURAE*, 1765; J. A. BACH, *HISTORIA JURISPRUDENTIAE ROMANAE*, 1754; *OPUSCULA AD HISTORIAM ET JURISPRUDENTIAM SPECTANTIA*, 1767; JOHANN GOTTLIEB HEINECCIUS, *ELEMENTA JURIS NATURAE ET GENTIUM*, 1738; *PRAELECTIONES ACADEMICAE IN H. GROTHII DE JURE BELLI AC PACIS LIBROS*, 1744; *PRAELECTIONES ACADEM. IN SAM. PUFENDORF. DE OFFICIO HOMINIS ET CIVIS*, 1742. Here may be mentioned the analytical works of the French jurists: JACQUES GODEFROY, *MANUALE JURIS*; *CODEX THEODOSIANUS*, 1655; ANTOINE FAVRE, *CONJECTURARUM JURIS CIVILIS*, 1580; *RATIONALIA IN PANDECTAS*, 1604; *CODEX FABRIANUS*, 1606; JEAN DOMAT, *LES LOIS CIVILES DANS LEUR ORDRE NATUREL*, 1766; ROBERT-JOSEPH POTHIER, *PANDECTAE JUSTINIANEAE IN NOVUM ORDINEM DIGESTAE*, 1748.

<sup>87</sup> HERON, 526 ff.; *GREAT JURISTS*, 297.

<sup>88</sup> *OPERA*, IV, 254, quoted in MACKINTOSH, *DISCOURSE* (ed. 1835), 20.

<sup>89</sup> HERON, 256: "Doneau taught a contrary doctrine to that of Cujas. With him law was a sort of geometrical system and method of deciding all civil and political affairs."

Here too there are jurists who limit their vision to the given law and others who look about for new ideas and standards, though the range of activity of both classes is necessarily limited. What can the restless spirit do when set down amid a group of glossators with a perfect, or supposedly perfect, code — in modern Germany, for example, or in France of the last century? In both of the instances mentioned the most popular avenue of escape has been through comparative law. Among the great names in nineteenth century France in this field are Fustel de Coulanges, Dareste, Gide, Laveleye, Letourneau, Tarde, Arbois de Joubainville, the brothers Révillout, in the department of comparative legal history; and in the field of comparative contemporary law France has long been in the lead. There was a chair of Comparative Law at the Collège de France as early as 1830, and another, limited to Criminal Law, at the Sorbonne.<sup>90</sup> The French Société de Législation Comparée, founded in 1869, is the oldest of its kind. Only recently has Germany rediscovered this field and taken possession of it through the work of Josef Kohler (b. 1849) and his associates. The German societies for the study of Comparative Law are a generation younger than the French.<sup>91</sup> Nineteenth-century Italy, like France, was equipped with a code. Though it was not a native code, though Italian nationality had reached its lowest point, in the middle of the century Emerico Amari (d. 1870) published his "*Critica di una scienza della legislazione comparata*,"

<sup>90</sup> Cf. the French works showing an interest in comparative law shortly after the Code. In CAMUS, *PROFESSION D'AVOCAT*, vol. II (5 ed., 1832) there are fourteen works (Nos. 1998–2011) on *DROIT ROMAIN CONFÉRÉ AVEC LE DROIT FRANÇAIS NOUVEAU*, and six (2012–17) on *DROIT FRANÇAIS ANCIEN CONFÉRÉ AVEC LE NOUVEAU*. Cf. also No. 129. Several English works were produced directly under the influence of the French Code, e. g., BLAXLAND, *CODEX* (cited below, note 91), and BRYANT BARRETT, *CODE NAPOLEON*, verbally translated, to which is prefixed an Introductory Discourse containing a succinct account of the civil regulations, comprised in the Jewish Law, the ordinance of Manu, the Ta Tsing Leu Lee, the Zend Avesta, the Laws of Solon, the Twelve Tables of Rome, the Laws of the Barbarians, the Assizes of Jerusalem, and the Koran, 1811.

<sup>91</sup> GESELLSCHAFT FÜR VERGLEICHENDE RECHTS- UND STAATSWISSENSCHAFT, 1893; INTERNATIONALE VEREINIGUNG FÜR VERGLEICHENDE RECHTSWISSENSCHAFT UND VOLKSWIRTSCHAFT, 1894. The (English) Society of Comparative Legislation was founded in 1894. Though Sir Henry Maine had been appointed Professor of Historical and Comparative Jurisprudence at Oxford in 1869, the name assumed by the English Society shows the influence of a French model, rather than a direct continuation of Sir Henry Maine's influence. The Comparative Law Bureau of the American Bar Association was founded by a small group in 1908.



a work in comparative legal history, or Comparative Jurisprudence in the modern sense. Though a little attention is being paid to Comparative Law in England and America today, for an exact parallel we should have to go back to the days when English justice was still untempered with Equity. Here we find little worthy of the name of jurisprudence, but we do find several comparativists who bear a remarkable likeness to the latest Germans in their general attitude. Sir John Fortescue (d. *circa* 1476), for example, has a good word even for the criminals of his own country, as compared with those of France.<sup>92</sup> We have already seen how in the ancient world the observation of the differences between the strict law of Rome and the laws of the Italian gentes served as a stepping stone to Equity. The next great Comparative period in the history of Roman Law came when Imperial and Christian law became definite enough to clash.<sup>93</sup> In one form or another this lasted throughout the Middle Ages, Pope and Emperor jealously watching each other's dominion. The motive for the study of foreign systems is not always the same.<sup>94</sup> Indeed, the Roman story would have us believe that the method was once adopted as the basis of codification. Greek tradition attributes the collecting of constitutions to Aristotle for the purpose of analysis. Leibnitz once tossed off the idea that there ought to be a *theatrum legale*, a universal historical and comparative survey of legislation. Montesquieu saw in a comparative study a means of shaking the faith of his countrymen in the immutability of law.

<sup>92</sup> SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE*, CC. XIX-XXIII, XXVIII, XXIX, XXXV, XXXVI, XXXVIII-XLIII. In fact most of the intervening chapters are developments of the differences between English and foreign laws. Cf. also his *DE DOMINIO REGALI ET POLITICA* called also *THE DIFFERENCE BETWEEN AN ABSOLUTE AND LIMITED MONARCHY AS IT MORE PARTICULARLY REGARDS THE ENGLISH CONSTITUTION (ON THE GOVERNANCE OF THE KINGDOM OF ENGLAND)*. In this connection should be mentioned the comparisons of systems actually taught and used in England, that appeared from time to time: CHRISTOPHER SAINT GERMAN, *DIALOGUS DE FUNDAMENTIS LEGUM ANGLIAE ET DE CONSCIENCIA* (DOCTOR AND STUDENT), 1523; WILLIAM FULBECKE, *A PARALLEL OF THE CIVIL, CANON AND COMMON LAW*, 1602; THOMAS WOOD, *A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW WITH NOTES SHOWING . . . HOW THE CANON LAW, THE LAWS OF ENGLAND AND THE LAWS AND CUSTOMS OF OTHER NATIONS DIFFER FROM IT*, 1704 (4 ed., 1730). GEORGE BLAXLAND, *CODEx LEGUM ANGLICANARUM, OR A DIGEST OF THE PRINCIPLES OF ENGLISH LAW ARRANGED IN THE ORDER OF THE CODE NAPOLÉON*, 1839.

<sup>93</sup> Cf. note 58, *supra*.

<sup>94</sup> Cf. Sir Frederick Pollock, "The History of Comparative Jurisprudence," *JOURN. SOC. COMP. LEGIS.*, N. S., 1903, No. 1, 74-89.

Maine used it as a key to English legal history.<sup>95</sup> Nineteenth-century ethnologists and anthropologists with no particular juristic purpose (except as such may have been implied in their several racial theories) have come to it through the path of comparative philology or folklore. Occasionally our legislatures investigate the work of other legislatures to help them in their peculiar problems. In fact a comparison of laws may be found useful and interesting in any stage of the law for one purpose or another. Still there are times when great thinkers reject "a useless quintessence of all systems" in favor of "an accurate anatomy of one's own,"<sup>96</sup> when jurisprudence will be explained as some treatment of a given body of law. In general, I believe that the Austinians, the historical jurists, and the constructive jurists of England and America agree that our system of law is self-sufficient, and that it can be studied satisfactorily without reference to other systems. The comparative studies have their devotees, but their work is considered more or less ornamental. Even Sir Frederick Pollock, who has done his share to popularize it, tells us that the real trouble with Austin was not that he neglected other systems of law, but that he did not know enough about English law. Numerous are the opinions, and not surprising, in insular England that a jurisprudence limited to a single legal system is self-sufficient. Still there are occasions when it seems natural to turn to foreign systems and times when the attitude of the lawyer who in default of a local authority cites a "well-reasoned" foreign case becomes chronic and epidemic. The force that drives men to look into foreign systems is not essentially different from that which drives our own lawyers from time to time to look into foreign digests — it is the earliest realization of the limits of the local system for theoretical as well as for practical purposes. Consequently the Comparative School is an after-product of an age of settled, codified law in the country from which it reaches out. This reaching out is apt to be fragmentary, sketchy, based on no general theory of

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<sup>95</sup> Cf. the opening lecture of his *VILLAGE COMMUNITIES*.

<sup>96</sup> Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *HARV. L. REV.* 474. Not only has the study of Roman Law been criticized but to its door has been traced much of the unsound doctrine that has crept into Anglo-American jurisprudence, and this by a teacher of Roman Law. Cf. Roscoe Pound in 30 *HARV. L. REV.* 219 ff. (1917). "Thus both the schools of Anglo-American jurists [Analytical and Historical] were Romanized."



inferiority, but only on practical needs. Indeed for practical reasons it is likely to be cloaked in the hypothesis that what is expressed in the foreign system is implied in our own. The other side, the side that resists importation, is the one that generally makes itself heard more clearly in the literature of the law. Fortescue and Saint German in England, like the earliest French comparativists and the Germans of today, write apologetics. The last of these make out of their *vergleichende Rechtswissenschaft* an *Universalrechtsgeschichte*, a kind of history of civilization in which their own condition is shown as the grand climax towards which the universe has been striving all these years, and in which each nationality is given a little recognition for its own little contribution to the final results.<sup>97</sup> Failure to correspond with modern German standards shows a defect in development whether found in Islam or in the Anglo-American system.<sup>98</sup> Fortunately not all apologists go to this extreme. But all this vehemence is not wasted on denying what no one asserts, for in the current if not in the written jurisprudence of such periods, the dogma of the first days of the code is being seriously questioned.

#### (f) *Exegetical Schools*

Your true glossator in practice is concerned with the enforcement of the supposedly perfect code, and his theory seeks only the proper ways of explaining that code. It deals with hermeneutics or exegesis. Strangely enough, the word *Jurisprudenz* in Germany has come to stand for just this sort of activity, while

<sup>97</sup> Thus KOHLER, *ENCYKLOPÄDIE*, 6 ed., 1902, 17-18: Die Universalrechtsgeschichte die man auch vergleichende Rechtswissenschaft zu nennen pflegt. Quoted by POLLOCK, in *JOURN. SOC. COMP. LEGIS.*, N. S., 1903, No. 1, 76. Cf. also KOHLER, *EVOLUTION OF LAW*, translated in *Evolution of Law Series*, vol. II, 3-9. After commenting on the newness of the science of Comparative Legal History (it was quite old in France), he remarks: "Evolution makes use of men and nations against their will. . . . We are now competent to appreciate the unending benedictions of culture. . . . If one speaks constantly of the barbarism of earlier legal systems, it is not to commend as worthy of imitation, but as an object of the movement of culture." The aim of the study is to "discover what was the elastic force, and what the machinery which lifted humanity from one level of development to another, until culture and even superculture, replaced the rudest forms of existence." Cf. also his *PHILOSOPHY OF LAW (MODERN LEGAL PHILOSOPHY SERIES, No. 12)*, 11: "Neo-Hegelianism . . . in close touch with the universal study of law introduced anew into this study [Philosophy of Law] the doctrine of Evolution."

<sup>98</sup> Cf. his *PHILOSOPHY OF LAW*, 196.

*Rechtswissenschaft* and *Rechtsphilosophie* have been coined for our own denotations of the term. But even their *Rechtswissenschaft* is now primarily the scientific study of the code. Such a book as Karl Gareis on the "Science of Law" (1887, English translation, 1911) could not have been written but in a country contemplating a code. It is not of the Analytical School but of the Exegetical, for it does not analyze *the law*, it only analyzes the "Bürgerliches Gesetzbuch." "It may be admitted," says Dean Pound in his Introduction to Gareis on "Rechtswissenschaft," "that a systematic survey of the materials of jurisprudence might easily fail because of over-abstractness. But recent German texts err, if at all, in the opposite direction. At every point the text is fastened firmly to the German Civil Code."<sup>99</sup> France a hundred years ago produced exactly this kind of work on the "Code Napoléon."<sup>100</sup> The remnants of our own Analytical School may survive to join hands with the Exegetical School that will have to appear as our codifications progress; but consciously or unconsciously they will have to abandon all concepts of "law in general" in doing so. Perhaps we should deny the name "Jurisprudence" to this purely interpretative work. It seems to be the vanishing point of theories of law. But it too has its definition of law. Law is positive law. Legislation is its normal form. Philosophy, history, analysis, comparison, all have their places here, but they are subordinate places. They become the handmaids of Exegesis.

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<sup>99</sup> Kohler has also worked along these lines, frankly in his numerous monographs on particular branches of the law and in his *LEHRBUCH DES BÜRGERLICHEN RECHTS NACH DEM BÜRGERLICHEN GESETZBUCH* (1904-06), and not so frankly in his *LEHRBUCH DER RECHTSPHILOSOPHIE* (1909) where he is constantly pretending to reach the same conclusion as in his work on the German code.

<sup>100</sup> The first annotations of the CODE NAPOLÉON, now long forgotten, are listed in CAMUS, *PROFESSION D'AVOCAT*, vol. II (5 ed., 1832). One of the most notable works mentioned is TOULLIERS, *LE DROIT CIVIL FRANÇAIS, SUIVANT L'ORDRE DU CODE; OUVRAGE DANS LEQUEL ON A TACHÉ DE RÉUNIR LA THÉORIE À LA PRATIQUE*, 1811. According to Dupin, the learned editor of CAMUS, this is "*sans contredit, le plus parfait de tous ceux qui, jusqu'à présent ont paru sur le Code Civil.*" The great work of A. DURANTON, *COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL*, 1828-32 had just appeared. Though echoes of the *droit naturel* were still being heard in France during this period, the hopelessness of a jurisprudence based on it in the face of the code is reflected in L'HERBETTE, *DISCOURS SUR LES CAUSES DE LA STAGNATION DE LA SCIENCE DU DROIT EN FRANCE*, printed with his *INTRODUCTION À L'ÉTUDE PHILOSOPHIQUE DU DROIT*, 1819.



## THE IMPORTANCE OF POPULAR JURISPRUDENCE

I have drawn my illustrations from the great names among the world's jurists. To a very great extent they represent the best opinions and the most potent opinions current in their times. Here and there a genius — a Bacon, a Leibnitz, a Vico, a Bentham; or a Maine — stands head and<sup>1</sup> shoulders above his surroundings, or an eccentric person — perhaps some of the same names could be repeated as examples — deliberately withdraws from his associates. In one sense the very greatest exponents of each jurisprudence stand somewhat aside from the smaller advocates, the blinder partisans. But our present study is concerned with large movements, general trends. We must remember that the connection between the jurisprudence of an epoch and its practices is not limited to the jurisprudence of the chair, the *professoren-philosophie der philosophie-professoren*. Popular jurisprudence, that of the man who does not know that he has any jurisprudence, is elevated to a position of importance and influence. It is hardly to be expected that the general practitioner will form a lasting alliance with any one school: today he needs a strict construction, tomorrow a loose one may help him; in one case he insists that he cannot find it in the bond, in another he finds it necessary to appeal to a higher law in which justice is tempered with mercy. Only judges and professional law teachers seem able consciously to align themselves with the schools, and it is significant that in America the development of a teaching profession coincides with the awakening of interest in jurisprudence. But the practitioner too is carried along with the trend of the times and helps to control it. I know that there is a great temptation among the learned to despise the juristic theories of the American lawyer brought up on the first chapters of Blackstone, and to sneer at those who seem to be discovering principles that are all but discarded in some more "advanced" country;<sup>101</sup> but unless one's jurisprudence is to progress step by step with his law, jurisprudence will remain *im juristischen Begriffshimmel* and be despised by the practical lawyer. We cannot import a ready-made jurisprudence from

<sup>101</sup> Thus it has been pointed out as a reproach that the American historical school resembled the older German school.

Germany without importing its code, and for that matter its whole *Kultur*.<sup>102</sup> We must make our own jurisprudence out of the raw materials found in our law and in the popular mind. Of course, we can be helped by the experience of others. Thus, so long as we are going through a consciously constructive period our theories will be more like those of Jhering than like those of Kohler. We still have a "struggle for law," and cannot look down from the benign heights of a perfect legal system on the imperfect specimens around us, either to correct their defects or benevolently to assimilate their virtues. When an American jurist argues for "realism in Constitutional Law" he is following in the footsteps of the man who first condemned the jurisprudence of concepts in Germany and ennobled the jurisprudence of everyday life.<sup>103</sup> Our theory must smack of the periods of the making of great codes, rather than of the periods of their use. Thus Glossatorial Germany may honestly argue from the fact that International Law is not written, that it is not law.<sup>104</sup> To Anglo-American jurists, the influence of Austin notwithstanding, it is law because history has made it, or if it is not law it would at least seem reasonable that we should enact it — perhaps through a League of Nations. Public opinion under neither system would be greatly influenced by the Grotian basis of International Law, the Law-of-Nature theory; though French and Italian public opinion probably would. Perhaps it is going too far to search in general history for the remote effects of popular jurisprudence, but when the history of law is completely written we can confidently expect that popular jurisprudence will be given its due place as a concomitant, if not a cause and effect, of other more tangible developments. It is at least no accident that one section of the American Bar is still

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<sup>102</sup> Cf. Robert Ludlow Fowler, 27 HARV. L. REV. 718, "The New Philosophies of Law," page 720: "Now it is indubitable that the science of the law of Germany is not the science of the law of English-speaking countries." If to Judge Fowler's vertical division of jurisprudences by countries, we add a horizontal division on the basis of stages of development we can almost reconcile the views so pointedly contrasted in 27 HARV. L. REV.

<sup>103</sup> Cf. Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353 (1916).

<sup>104</sup> Kohler's discussion of International Law at the end of his *PHILOSOPHY OF LAW* (1909, Eng. tr. 1914) is a remarkable presentation of the German point of view in the World War, particularly 301, 303, and 306-307. Lasson also denied that International Law had any legal basis. Cf. BEROLZHEIMER, 258.



going to school to Maine and Savigny, while another section is endeavoring to lead the way to a *Zweck im Recht*.

### THE INDIRECT TEACHING OF JURISPRUDENCE

The American Bar "going to school" suggests the final thought that this popular jurisprudence is not generally disseminated by conscious teaching. It is caught in the courtroom more from the manner than from the matter, and taken for granted in the classroom in its methodology. There is a palpable connection between our conception of what law is, and our way of handing it down to the next generation. The Inns of Court flourishing while law was a philosophy, a spirit to be inhaled, or swallowed with one's meals, a mystery into which to be initiated, broke down when Blackstone showed that it was a series of principles to be learned. The University class was to take the place of the legal monastery. But was not this change a reversion to type? Coke, it will be remembered, that incarnation of the common law as opposed to equity, lamented the decline of the ancient system of readings, a system under which the Inns of Court had practically been universities of strict law.<sup>105</sup> The revival of readings in the early nineteenth century and the other changes in the system of education, including the establishment of examinations for admission to the bar (1827), represent a veering to the analytical branch of the principle-school, the only branch that had any life remaining in it after the crystallization of Equity under Lord Eldon and his immediate predecessors. The analytical attitude finds its expression in the lecture and text-book methods of teaching law for the next two generations. The law to the great imitators of Blackstone, regardless of how they phrased it in their needless introductions, was a body of principles, perhaps a perfect body of principles. As the consciousness that these principles were not immutable was forced upon the lawyers, however (when it became necessary to explain, for example, that only so much of English Law as was applicable to American conditions had been received in this country),<sup>106</sup> the analytical presentation seemed to be doomed. True, a new method of teaching was not substituted as early as it could have

<sup>105</sup> FIRST INSTITUTE, I, 280. Cf. BERNARD W. KELLEY, A SHORT HISTORY OF THE ENGLISH BAR, 1908, 51 ff.

<sup>106</sup> E.g., STORY, J., in *Van Ness v. Pacard*, 2 Pet. 144 (1829).

been logically,<sup>107</sup> but eventually the analytical text-books and lectures passed away<sup>108</sup> before the study of cases which implies all that the Historical School stands for. And today rumblings are being heard against the tacit assumption of our schools that the common law is a growth independent of the courts that enforce it or the governments that sanction it.<sup>109</sup> Our ignoring of the relation of the state to the law and, in fact, of all statute law cannot go on forever. Dean Wigmore's courses in Legislation are an echo of the Constructive School.<sup>110</sup> Will the next generation be pondering over excerpts from the code, and will it spend its time studying out the implications of every word, using history to fill in the gaps with "Encyklopedie" as the frame, and hermeneutics as the general content of the course — as they do in the German law schools today? One can hardly expect such sudden changes in the habits of the most conservatizing of professions. Still the need of a study of statutory interpretation is already foreseen here,<sup>111</sup> and other changes will follow. But *stare decisis* and all that it implies will probably retain a great part of its hold upon us. It seems that in every legal system one of the instrumentalities of development predominates over the others, without however excluding any of them. Is this mere accident, or can the ethnological jurists help us here? Glossation seems to have impressed itself on Jewish law so that its typical text-book is a gloss upon a gloss, with mar-

<sup>107</sup> John Henry Wigmore, "Nova Methodus Discendae Docendaeque Jurisprudentiae," 30 HARV. L. REV. 812 (1917).

<sup>108</sup> Even the "elementary" or "general" courses have had a hard and losing fight. Cf. Association of American Law Schools, REPORT, 1902, remarks by Joseph Henry Beale, 45, and the lively discussion, 11-31; REPORT, 1903, 23, Simeon Eben Baldwin, in defense. Prof. Josef Redlich recommended such a course in his report on THE CASE METHOD IN AMERICAN LAW SCHOOLS (1914), to the Carnegie Foundation, but it was generally disapproved in the discussion at the meeting of the Ass'n of Am. Law Schools in 1915, REPORT, 1915, 77 ff.

<sup>109</sup> Prof. Albert Martin Kales and Mr. Herbert Pope have been especially insistent on this point. See REPORTS OF THE AMERICAN BAR ASSOCIATION, vol. XXXI, 1012-27, and 1091-1119; REPORTS OF THE ASS'N OF AM. LAW SCHOOLS, 1907, 82; 1915, 109, 112; 4 ILL. L. REV. 11; 21 HARV. L. REV. 92; 24 *ib.* 6.

<sup>110</sup> Cf. Ass'n Am. Law Schools, REPORT, 1915, 34-47.

<sup>111</sup> Prof. Ernst Freund has taken the lead in this work: "The Interpretation of Statutes," 65 U. OF PA. L. REV. 207 (1916); A COURSE IN STATUTES, Ass'n of Am. Law Schools, REPORT, 1916, 160-165. Several law schools now offer courses in Statutes. A widespread interest in the subject of interpretation is also reflected in the recent volume of select essays on THE SCIENCE OF LEGAL METHOD (MODERN LEGAL PHILOSOPHY SERIES, No. 9), 1917.



ginal glossations. In Roman-Continental Law, codification reached such perfection that it has obscured the value of judicial precedents. Its typical text-book is the volume of "Institutes." In Anglo-American Law, Commentation seems to have made case-law the predominant element, even while our statutes, codes, and constitutions are fresh and vigorous.

In conclusion: there is a place for each school of jurisprudence in connection with the particular law out of which it grows, just as each grammar is fitted to the language that it describes.<sup>112</sup> There are perhaps permanent and universal elements in grammar and in jurisprudence — if there are any permanent and universal traits in human nature — but it is as unsatisfactory to teach English law with German jurisprudence as to teach the English language with German grammar. Neither should we condemn the jurisprudence of a past age for its failure to meet our present problems, any more than we should condemn the double negative in the grammar of Chaucer's day. At present our problems in this country have to do with a final dash of legislation before codification settles in our bones. The jurisprudence of modern American life has not yet been written, yet enough has been said and done to show that to represent the needs of our day it must deal with law in a manner that will do justice to the social changes and discoveries that lie immediately behind it. But in accepting the program of the sociological jurist of the Constructive School for today, we do not close our eyes to what Dicey would call "cross currents" from past and future systems, that save us from the tyranny of ideas. Granting the predominance of a school today in America, we neither regret its absence in the past nor prophesy its continued endurance here or imitation abroad. May we not accept the doctrine of the relativity of jurisprudences? It is unfortunately true that most of the writers on jurisprudence who pass in review the systems of the past do so only to show that they have been discredited. In Germany the greatest of living jurists while preaching the doctrine of relativity as applied to laws, even to the extent of justifying slavery, is so far from a recognition

<sup>112</sup> Cf. HOLLAND, *op. cit.* ch. I. In this connection the value of the Separate Course in Jurisprudence has been discussed. But after a student has learned law by one of these methods referred to in the text, it is not a hopeful task to make of him a jurist of a type inconsistent with the assumptions back of all of the work of his teachers by merely adding a formal course in jurisprudence to what he has already learned.

of the relativity of jurisprudences that he blushes for some of his predecessors, and asks that others be buried and forgotten because they fail to embody his doctrines. At best their appearance is to be tolerated as a "necessary disease" or, as one of his contemporaries would say, for the propagation of more or less useful "illusions." But in this country it is hoped that the protagonists of the new movements well trained in the school of history, and willing — perhaps too willing — to lend an ear to every foreign system, will not demur to the suggestion of relativity, for they must frequently have observed that jurisprudence has a continuing history as well as law. They have learned that "every man is the child of his age" — and jurists are men.

*Nathan Isaacs.*

CINCINNATI LAW SCHOOL.



## THE SHERMAN ACT

## I

## PROBLEM OF CONSTRUCTION

THE Sherman Act has given the federal government an opportunity to deal through its judicial department with contracts, combinations, and conspiracies in restraint of trade, monopolies, and attempts to monopolize.<sup>1</sup>

The first sentence of the act declares certain contracts, combinations, and conspiracies to be illegal generally. It reads:

"Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2, which speaks of monopoly or attempts to monopolize, merely declares that:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

There is no explicit provision that the acts of monopolizing or attempting to monopolize are generally illegal. Nevertheless, monopolies and attempts to monopolize are properly regarded as prohibited. Whether this is because monopolies or attempts to monopolize are really included in the prohibition of the first section, or because they are made illegal by the second section,

<sup>1</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, [1089].\* ("The debates show that doubt as to whether there was a common law of the United States which governed the subjects in the absence of the legislation was among the influences leading to the passage of the act.")

21 CONG. REC. 3151-3152: "Mr. KENNA. If the Senator will permit me, I should like to ask him whether a monopoly such as he defines is prohibited at common law. I ask the Senator from Massachusetts whether a monopoly coming within the definition which he gives is prohibited at common law. Mr. HOAR. I so understand it. Mr. KENNA. Then why should this bill proceed to denounce that very monopoly? Mr. HOAR. Because there is not any common law of the United States."

\* Figures in brackets refer to pages in *KALES, CASES ON CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE*.

is immaterial. Indeed, the United States Supreme Court in the Standard Oil Case suggests that the second section may include acts which were not covered by the first.<sup>2</sup>

The most important question regarding the construction of the Sherman Act is this: Does the prohibition of the act apply to *every* contract, combination, and conspiracy which is (however slightly) in restraint of trade, according to the literal significance of those words; or does it apply only to every *illegal* contract, combination, or conspiracy in restraint of trade — the determination of what contracts, combinations, and conspiracies are illegal because in restraint of trade being left to a standard outside of the act? In short, does the act by its terms prohibit any specified conduct, or does it simply induct the federal courts into a new federal jurisdiction there to operate and obtain results based on some standard outside the terms of the act?

There are three ways of describing this outside standard: It may be called the standard of the common law. It may be described as the fiat of the court itself, based upon its collective judgment and reason. It may be referred to as an authority to obtain results just as a common-law court reached them, *i. e.*, by the exercise of a certain technique of judicial reasoning, which includes a consideration of the conclusions which other common-law courts have reached, while at the same time exercising the power to examine the basis for the results which other courts have obtained and possibly reaching a different conclusion. Characterizing the standard as that of the common law really is not different from describing it in the other two ways, because the Supreme Court of the United States must always remain the final judge of what the common law which it adopts may be. That introduces into the standard the fiat of the court or the technique of judicial reasoning used by common-law courts. Referring to the standard as the fiat of the court is not different in fact from describing it

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<sup>2</sup> Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, [1098]. ("In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even though the act by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.")



as based upon a certain technique of judicial reasoning. It is objectionable because it suggests arbitrary action by the court instead of action based upon a recognized judicial process of reasoning. The three methods of describing the standard outside the act, therefore, really come to the same thing; but the third method is the most complete and the fairest way to describe the standard referred to. We may call it for the sake of brevity "the standard of reason which had been applied at common law."

Our principal question of construction of the Sherman Act then is: Does the act by its terms prohibit any specified conduct, or does it simply induct the federal courts into a new federal jurisdiction there to operate and obtain results in accordance with "the standard of reason which had been applied at common law"? The latter view has now been accepted, but not before the court seemed to have committed itself to the former. The decisions of the United States Supreme Court will therefore be examined with a view to showing that the results reached are consistent with the application of the standard of the common law and the standard of reason which had been applied at common law, and inconsistent, in some instances, at least, with the view that the Sherman Act on its face specified the conduct prohibited without reference to any standard outside the act. Then the *dicta* of the court will be examined to show how the court, after first taking the view that the act specified the conduct prohibited without reference to any outside standard, abandoned that position and adopted the view that the conduct prohibited was to be determined in accordance with the "standard of reason which had been applied at common law."

The principal difficulty in applying the Sherman Act is, therefore, not strictly one of construing its terms, but in determining what acts in restraint of trade and in the furtherance of monopoly are illegal according to "the standard of reason which had been applied at common law." How shall the judicial discretion which the act vests in the court to declare some contracts, combinations, and conspiracies in restraint of trade to be legal and others illegal be exercised? The uncertainty which arises from the operation of such a judicial function is no greater than that which attends any new course of decision by common-law courts.<sup>3</sup>

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<sup>3</sup> It is, of course, arguable that the results reached by the court, while arrived at slowly and piecemeal, and with considerable expense to the individuals who litigate,

## II

THE DECISIONS OF THE UNITED STATES SUPREME COURT  
UNDER THE SHERMAN ACT*(a) Contracts Accompanying the Sale of a Business*

*Cincinnati Packet Co. v. Bay*<sup>4</sup> presents the question of the validity of a restrictive covenant accompanying the sale of a business. The covenant is limited in time and not broader than the scope of the seller's business. It is just the sort that would have been valid at common law. It was held valid under the Sherman Act.<sup>5</sup> If the Sherman Act prohibited all contracts which restrained trade, however slightly, surely this would have been one of those that would be void.

In *Shawnee Compress Co. v. Anderson*<sup>6</sup> we have a plain case, so far as the record in the Supreme Court of the United States is concerned, of many leases with restrictive covenants, all secured for the purpose of creating a combination and with the intent to monopolize the business. At common law this would have been an illegal attempt at monopoly. It was held illegal under the Sherman Act.

*(b) Exclusive Contracts of Sale and Purchase*

*Continental Wall Paper Co. v. Voight*<sup>7</sup> is of little value so far as the application of the Sherman Act is concerned. The case arose on demurrer to a defense which set out a combination of ninety-eight per cent of the manufacturers of wall paper which entered into exclusive contracts with jobbers and retailers all over the United States. This made in fact a combination between the manufacturers, jobbers, and retailers, with the intent to monopolize and

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are better and will last longer than if Congress had attempted *a priori* to prohibit certain definite acts, or to break up any clearly defined status.

<sup>4</sup> 200 U. S. 179, 26 Sup. Ct. 208.

<sup>5</sup> *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, [878]. ("A contract which is a mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale; and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question.")

<sup>6</sup> 209 U. S. 423, 28 Sup. Ct. 572.

<sup>7</sup> 212 U. S. 227, 29 Sup. Ct. 280.



exclude from the business everybody else. The case is so plainly one of an attempt to monopolize which would have been illegal at common law that the court spends only a few lines in stating in substance that it assumes the illegality of the combination.

(c) *Contracts to Keep up the Price on Resale*

*Dr. Miles Medical Co. v. Park & Sons Co.*<sup>8</sup> might appear to be a case where the Supreme Court had held contracts, or a combination to be in violation of the Sherman Act, which would not have been invalid at common law.<sup>9</sup> It might be used, therefore, to indicate that the Sherman Act was broader than the common law. But this is not so. The Supreme Court of the United States is the sole judge of what is the common law which it recognizes as the standard to be used in applying the Sherman Act. It may have determined, as it had a right to do, what it considered to be the common law applicable, and that this common law required the result reached in the *Dr. Miles Case*.

In the same way, if the Supreme Court of the United States should in operating under the Sherman Act hold that a contract by the purchaser of a mule not to use any currycombs on it except those furnished by the seller was illegal; that a contract by the purchaser of a picture not to use any cleaning or preservative material upon it except that furnished by the seller was illegal; and that similarly a contract by the purchaser or licensee of a patented article that he would use with it only unpatented accessories sold by the seller or licensor was illegal, we should not have a decision that the Sherman Act is broader than the common law, but merely that the United States Supreme Court is the final judge of what the common law, which it purports to follow, may be.

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<sup>8</sup> 220 U. S. 373, 31 Sup. Ct. 376, [838].

<sup>9</sup> *Elliman, Sons, & Co. v. Carrington & Son*, [1901] 2 Ch. 275; *Grogan v. Chaffee*, 156 Cal. 611, 105 P. 745; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Clark v. Frank*, 17 Mo. App. 602; *New York Ice Co. v. Parker*, 21 How. Pr. 302.

*(d) Combinations*

## COMBINATIONS OF TRANSPORTATION UNITS

The basis for the decisions in the Trans-Missouri Freight Association Case <sup>10</sup> and the Joint Traffic Association Case <sup>11</sup> is clear. The railroads operated under special franchises. The public was excluded from the business in general. If two were let into the business, the public policy was made plain that they should compete, and as all the rest of the public was excluded, the two had a monopoly except for the competition between themselves. When, therefore, they united, they not only violated the declared public policy in favor of competition, but they achieved an actual monopoly. All combinations of public utilities, which can operate only under special franchises so that the public generally is excluded from the business, are therefore illegal *per se* at common law. Hence, such combinations are illegal *per se* under the Sherman Act where interstate or foreign commerce is involved. So far, therefore, as railroads are concerned, the proposition is literally true, that under the Sherman Act every restraint of trade by combination and every attempt to monopolize by combination is illegal. This, however, is not because of any language of the Sherman Act, but because of the standard of the common law or the standard of the rule of reason which the Sherman Act adopts.

This ground for the decision in the Trans-Missouri Freight Association Case appears rather vaguely in the opinion of the court. If the case had been put squarely and solely upon this ground much subsequent difficulty would have been avoided.

The Northern Securities Case <sup>12</sup> is to be supported on the same basis as the Trans-Missouri Freight Association and Joint Traffic Association cases. The actual decision is therefore confined to the cases where public utilities which must have special franchises under which to operate are combined. In this view it would make no difference whether the combination were by a holding corporation or an individual. The suggestion of Mr. Justice Brewer and of Mr. Justice Holmes that an individual could have bought up the stock control of both roads cannot be sustained.

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<sup>10</sup> 166 U. S. 290, 17 Sup. Ct. 540.

<sup>11</sup> 171 U. S. 505, 19 Sup. Ct. 25.

<sup>12</sup> 193 U. S. 197, 24 Sup. Ct. 436.



The opinion of the majority contains no suggestion, however, of the proper basis for the result. It serves up cases of combinations of coal companies, trading and manufacturing companies, as if the court were entitled to treat combinations of railway corporations operating under special franchises in exactly the same way as it was combinations of trading and manufacturing corporations. Furthermore, much language in the opinion will justify the inference that the court was not only making no distinction between combinations of public utilities using special franchises, and trading and manufacturing units, but was asserting that no combination which eliminated competition between the units would be legal. It was this apparent position on the part of the court that raised the storm of protest against the Northern Securities Case. Even Mr. Gray<sup>13</sup> insisted that the court had in fact held that the elimination of competition between any units engaged in interstate commerce would be illegal.<sup>14</sup>

All the difficulties with the Northern Securities Case, and all the grounds for objection to it, are immediately eliminated when it is observed that the essential feature of the case was that the railroads combined were operating under special franchises which gave the competing roads together a monopoly as against the rest of the public, and also indicated a public policy that the railroads which had the special franchises to go into the railroad business should compete. It is not to be expected that Mr. Gray would disagree with the result of the Northern Securities Case based upon this fact. Without this element the case put by Mr. Gray concerning the three Jerseymen certainly presented no violation of the Sherman Act, and such a conclusion would not be at all inconsistent with the result reached in the Northern Securities Case.<sup>15</sup>

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<sup>13</sup> John C. Gray, "The Merger Case," 17 HARV. L. REV. 474.

<sup>14</sup> Mr. Gray put the following as containing all the essential elements of the Northern Securities Case with the dramatic elements left out and picturesque ones substituted: "Three Jerseymen, whom we will call Morgan, Hill, and Lamont, own each a cart and one horse. Their occupation is the carrying of eggs and chickens from the neighboring farmers to a market town over the New York border. They agree to form a corporation under the name of the Interstate Poultry Traffic Association. The only capital they turn in consists of their horses and carts, except a few dollars contributed to pay for their charter. Are they criminals liable to be fined \$5,000 apiece and imprisoned for a year?"

<sup>15</sup> The majority regarded the formation of the Northern Securities Company and its acquisition of stock as affecting interstate commerce so that it might be brought

The Union Pacific Case<sup>16</sup> follows the Trans-Missouri Freight Association and Joint Traffic Association cases and the Northern Securities Case. It holds that the mere union of competing railroad corporations is illegal.

The court emphasizes the application of the rule to railroads, but why a difference should be made between railroads and trading and manufacturing units is not in the least hinted at. It is submitted that the fact that the railroads can be operated only under special franchises, and that the public generally is thus excluded from the business, furnishes the true basis for the difference.

The competition between the Union Pacific and the Southern was very much less conspicuous than the competition between the Union Pacific and the Northern Pacific. The Union Pacific ran from Omaha to Ogden and from Ogden to San Francisco over the Southern Pacific's own line. It also ran from Ogden to Portland. From Portland to San Francisco it operated by steamer. The Southern Pacific ran from New Orleans to San Francisco *via* Los Angeles. The court assumed that a line shipping from New Orleans in the Mississippi Valley competed with a line shipping from Omaha, that is to say, shipments to the Pacific from a large area east and west of the Mississippi might go as conveniently *via* New Orleans as *via* Omaha. Hence, though these terminals were 1,000 miles apart or more, they were competitive. Then the Supreme Court found the principal competition at the other end of the line to be between the Southern Pacific to San Francisco and the Union Pacific to San Francisco *via* the Union Pacific's own line to Portland, and then by water to San Francisco.

It has been suggested that as a matter of fact both lines were competitive to San Francisco direct by rail, because the connection between the Union Pacific and the Southern Pacific to San Francisco would be compelled by the Interstate Commerce Commission. It has been suggested also that both lines were competitive so far as foreign trade was concerned, because each reached the Pacific coast from the Mississippi Valley, and it was immaterial

within the Sherman Act. Four judges dissented on this proposition. No comment is made on this phase of the case. Whether the interstate commerce act excluded the railroads from the Sherman Act was a question fully argued and determined in the Trans-Missouri Freight Association and Joint Traffic Association cases.

<sup>16</sup> 226 U. S. 61, 470, 33 Sup. Ct. 53, 162.



for the purposes of foreign commerce whether they reached the same port or not.

The court in the Standard Oil Case<sup>17</sup> affirms the soundness of the result reached in the Joint Traffic Association cases.<sup>18</sup> It refers to "the nature and character of the contract creating . . . a conclusive presumption which brought them within the statute." This leaves much to be desired in the way of explaining why there should be a "conclusive presumption" making a combination of railroads illegal, while when manufacturing and trading corporations combined or occupied a preponderant position in the market, there was only a *prima facie* presumption which would bring them within the prohibition of the act. It is submitted that the explanation already offered indicates the difference.

In *United States v. Terminal Railroad Association of St. Louis*<sup>19</sup> it was held that a combination of all the railroad terminal facilities of St. Louis under the control of less than all the companies under compulsion to use them was illegal. At the same time the court insisted that the combination of all such facilities under the control of all the companies under compulsion to use them, and open to the use of all on equal terms, would be legal. Such a combination it was declared could only further competition and commerce. It could not restrain or suppress either. Hence the court ordered a decree of dissolution, unless the defendant underwent a reorganization, as outlined by the court, which would make it a combination of all the terminal facilities, subject to the control of all the railroads under compulsion to use them and without discrimination against any.

In *United States v. Reading Company*<sup>20</sup> the court held illegal, in accordance with the principle of the Northern Securities Case, a combination of competing railroads. The court also held the combination to be illegal under the principle established by the Standard Oil Case, because it was a combination of anthracite coal companies in a limited anthracite coal field together with the railroads serving the mines, which occupied a preponderant position in the anthracite coal business and had the actual intent and pur-

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<sup>17</sup> Standard Oil Co. v. United States, 221 U. S. 1, 21 Sup. Ct. 502.

<sup>18</sup> [1102.]

<sup>19</sup> 224 U. S. 383, 32 Sup. Ct. 507.

<sup>20</sup> 226 U. S. 324, 33 Sup. Ct. 90.

pose to exclude others from the business, or suppress their competition, and thereby secure a monopoly. The facts which proved this were intricate and voluminous. The principle applied is clear.

#### OF TRADING AND MANUFACTURING UNITS

The case of *Addyston Pipe & Steel Co. v. United States*<sup>21</sup> has already been fully dealt with.<sup>22</sup> The opinion in the United States Supreme Court makes the case one where the preponderant position in the business, as a result of combination by contract, caused the combination to be illegal. Whether this was because size and preponderant position by combination were *per se* illegal, or whether there was an un rebutted *prima facie* inference of illegality, does not appear.

In *Swift & Company v. United States*<sup>23</sup> the decree attacked was entered upon demurrer to the bill, and the bill made a very plain case of excluding purposes and preponderant position on the part of the defendants. The preponderant position is set out. The defendants had control of about six-tenths of the entire trade. The illegal practices are set out. There was a secret arrangement on the part of the units in the combination not to bid against each other. There were also rebates and an assumption of control<sup>24</sup> of the market by fixing prices.

In *United States v. Kissel*<sup>25</sup> the only question was the sufficiency of a plea of the Statute of Limitations. It was sufficient if the acts constituting the offense were continuing. It was held that the acts were continuing. The case is of some value as making clear that in cases of illegal combinations, restraints of trade, and attempts to monopolize, the combinations created not only may, but usually are, continuing wrongs. The court apparently had nothing to do with whether the particular scheme in question practiced was an unlawful or unfair method of competition or not.

In *Standard Oil Co. v. United States*<sup>26</sup> we have a case where a

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<sup>21</sup> 175 U. S. 211, 20 Sup. Ct. 96, [1047].

<sup>22</sup> A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 847.

<sup>23</sup> 196 U. S. 375, 25 Sup. Ct. 276, [1056].

<sup>24</sup> A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 852.

<sup>25</sup> 218 U. S. 601, 31 Sup. Ct. 124.

<sup>26</sup> 221 U. S. 1, 31 Sup. Ct. 502.



manufacturing and trading unit carrying on a business which was normally free to all, occupying a preponderant position in that business, had the purpose to use its power to exclude others, and did in fact do so by illegal and unfair methods of competition. This case together with the Tobacco Case<sup>27</sup> stands for the proposition that where these elements are presented the unit in question is an illegal attempt to monopolize and an illegal restraint of trade.

That the business in question was normally free to all to engage in appears from the fact that it was a manufacturing and trading business — the manufacturing of refined oil and its sale and distribution. It was not a business depending upon special franchises.<sup>28</sup>

As to the size of the unit: The evidence clearly showed that the Standard Oil Company of New Jersey held a preponderant position in the manufacturing and distribution of oil. There is a difficulty, however, in finding any passage in the opinion which describes the percentage of the total business which the Standard Oil Company did.

It may be assumed that there was ample evidence of illegal and unfair methods of competition, particularly in the early stages of the Standard Oil Company. Curiously enough, however, the opinion of the court is very weak in setting forth any such methods. The passages which purport to deal with them contain many words which give an impression of weight by their sound; but a careful attention to what is said must leave the reader in doubt as to whether any of the suggested methods were illegal or unfair methods of competition. One is impressed by the fact that in various forms the Chief Justice has simply reiterated the fact that the Standard Oil Company was large and successful. What he says boils down to size and success.

The whole case against the Standard Oil Company as made in the opinion of the court seems to rest upon the defendant's attempt to monopolize by excluding others from the business. It is noticeable, however, that while the court talks about the intent to monop-

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<sup>27</sup> *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632.

<sup>28</sup> It has been suggested that as there were included in the Standard Oil Company many pipe lines operated under special franchises, the rule applicable in the Northern Securities Case might also have been invoked. But the opinion of the court does not suggest any such basis for its decision, and hence this aspect of the case is ignored.

olize, it does not specify that that intent is to be carried out by the use of illegal and unfair methods of competition. Yet that must be the assumption. An intent to succeed in business over rivals by the achievement of greater efficiency is not a crime or illegal at common law. The intent to monopolize in the opinion of the court arises only as a *prima facie* inference from size. The Chief Justice has used a great many and some very long sentences, but every time they are read carefully it will be found that all he has said is, that the Standard Oil Company was an organization of monstrously large size, and from this size, constantly referred to in various ways, the intent to monopolize is discovered. Nevertheless, it is said constantly that the intent to monopolize arises from size only as a *prima facie* inference or presumption.

The character of the organization of the Standard Oil Company of New Jersey with respect to whether it was a combination of competing units, or even, properly speaking, a combination at all, requires attention.

The Standard Oil Company of New Jersey as reorganized in 1899 was the precise point of attack by the government. It was that organization which was dissolved by the decree. Of course, the decree did not permit the older organizations to step into the place of the Standard Oil Company of New Jersey, but required a dissolution which created new operating units.

The Standard Oil Company of New Jersey as organized in 1899 was plainly not a combination of competing units. True, they may have competed years ago, and before the Sherman Act, but when the Sherman Act was passed in 1890 they were all, or substantially all, already combined in the Standard Oil Trust and had ceased to compete, and the combination was legal so far as the federal law was concerned. It follows, therefore, that the Standard Oil Company of New Jersey was a combination of non-competing units which never had competed since the Sherman Act was passed. The elimination of competition between the units combined before the Sherman Act could not be urged as a ground of illegality under the Sherman Act. The legality or illegality of the Standard Oil Company of New Jersey must have been determined with reference to a *single combination of non-competing units*.

One may even doubt whether the Standard Oil Company of New Jersey was properly speaking a combination at all. When



the Standard Oil Trust was formed in 1882 it was perfectly legal so far as the federal law was concerned. It represented an effort at organization in larger units than formerly, in accordance with the demands of the industrial revolution which was in progress. If then it was not illegal — and it was not so far as the federal law was concerned since there was no Sherman Act — surely it must be regarded as a normal and proper method of creating a unit in the industrial world. Hence at the time of the Sherman Act the Standard Oil Trust was a normal, legal, and proper industrial unit. Only in a very popular sense was it still a combination. In dealing with it under the Sherman Act the court was simply bringing within its jurisdiction an industrial unit which was in existence and with respect to the legality of the original organization of which there could be no question.

The Standard Oil Case, therefore, seems actually to hold that a unit, which started as entirely legal and which grew as its business succeeded until it held a preponderant position in the business, but which all the time had the intent to monopolize, would be illegal when it came to occupy the preponderant position. In short, it appears actually to hold that any unit, however formed, which secures a preponderant position by means however legal and proper, and which then acquires the intent to monopolize, becomes illegal. You do not need combination. You do not need a unit which is organized in a particular way. You do not even need the elimination of competition between the units. You do not need abnormal growth, so called. What you do need is merely a preponderant position in the business coupled with an intent to monopolize.

If A., for instance, as an individual, manufactured low-priced automobiles and had, by a process of the extraordinary growth of business, secured a preponderant position in the manufacture and sale of such cars, and if he should then as an individual start to use his power to exclude others by illegal and unfair methods of competition, or if there could be brought home to him the intent to monopolize by any other means, he would be carrying on business in violation of the Sherman Act. One does not quite see how equity could dissolve him, but indictment and injunction against the committing of acts would probably be ample remedies. Would a court of equity undertake to limit the size of his business and its output so as to reduce it to a unit not occupying a preponderant position?

Could it split up his business and require parts of it to be sold? There are difficulties here, but the main proposition that the individual could violate the Sherman Act is sound.

In *United States v. Pacific and Arctic Railway and Navigation Company*<sup>29</sup> the first and second counts of the indictment were sustained. They charged a combination between a steamship company, a wharves company, and a railroad, which together occupied a preponderant position in the transportation service from ports in the United States to places in Alaska. This combination had the actual purpose to exclude others from this transportation service and to secure a monopoly, and attempted to carry out this purpose by unfair methods of competition. The carriers were connected and not competing, and there was, therefore, no application of the principle of the Northern Securities Case;<sup>30</sup> but the combination used its combined powers to exclude all other companies serving any part of the route in question. The railroad fixed local rates higher than the railroad's *pro rata* of the through rate which it made to members of the combination. The railroad then refused any through rate to steamship lines outside the combination. The wharves company charged more for freight if shipped by a line outside of the combination than it did for freight shipped on a line in the combination, and the wharves company had a monopoly of the wharfing facilities at the connecting port. The facts set up in the indictment clearly brought the case within the principle of the Standard Oil and Tobacco cases.<sup>31</sup>

### (e) *Competitive Methods*

In *Anderson v. United States*<sup>32</sup> a rule of the Trader's Live Stock Exchange of Kansas City which provided that its members should not deal with any other yard trader, unless he was a member of such exchange, was sustained. Clearly the Trader's Exchange was competing with outside traders. It was trying to gain something by concerted action in refusing to deal with them. It seems to have been assumed that the exchange was not attempting primarily to force the outside traders out of business so as to secure the entire business for the members of the exchange, but was merely trying to hamper the outside traders sufficiently to bring them into the ex-

<sup>29</sup> 228 U. S. 87, 33 Sup. Ct. 443.

<sup>31</sup> *Supra*, notes 26 and 27.

<sup>30</sup> *Supra*, note 12.

<sup>32</sup> 171 U. S. 604, 19 Sup. Ct. 50.



change, where they would be subjected to standards of conduct which were assumed to be highly desirable.

In *Montague v. Lowry*<sup>33</sup> we have an exclusive arrangement between the tile dealers of San Francisco and the manufacturers. The manufacturers were to sell only to those tile dealers in San Francisco and to no others. The plaintiffs were independent tile dealers in San Francisco who were injured because they could not buy from the manufacturers who were in the association. The plaintiffs had a verdict of \$500 and a judgment under the Sherman Act for \$1,500. This was affirmed.

This case is subject to the comment that it does not appear clearly how large the combination of manufacturers was. Did it occupy a preponderant position in the tile-manufacturing business? Probably it did. Very likely the evidence disclosed the fact, but as it is a fact of the very utmost importance, it is strange that the opinion of the court lays no emphasis upon it.<sup>34</sup> If such an arrangement as this had been made with three manufacturers out of fifty, it would have been entirely unobjectionable. The plaintiffs would then have had ample opportunity to secure all the tile they wanted. It is only when the combination occupies a preponderant position and begins to connect up with collective units of dealers having also a preponderant position in the local situation, that the *prima facie* inference of intent to use the power of the combination to exclude others by unlawful and unfair methods of competition arises, and the damage to the plaintiff caused by the exclusive contracts becomes a tort according to the common law.

In *Eastern States Retail Lumber Dealers' Association v. United States*<sup>35</sup> the government obtained an injunction restraining an association of retail lumber dealers from circulating among its members lists of wholesalers who were attempting to sell directly to consumers.<sup>36</sup> It was conceded that the circulation of these lists was for the purpose of systematically causing the retailers not to

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<sup>33</sup> 193 U. S. 38, 24 Sup. Ct. 307.

<sup>34</sup> Is this because Mr. Justice Peckham who wrote the opinion of the court was still under the influence of his *dicta* in the Trans-Missouri Freight Association and Joint Traffic Association cases and therefore was declining to make size an element of illegality?

<sup>35</sup> 234 U. S. 600, 34 Sup. Ct. 951, [1157].

<sup>36</sup> It would seem that this was the only relief obtained. See *United States v. Eastern States Retail Lumber Dealers' Ass'n*, 201 Fed. 581.

deal with such wholesalers. What objection was there to this? Two groups of lumber dealers were in competition — the wholesalers and the retailers. Both were competing for the trade of the consumer. The wholesalers were really trying to break into the retail trade. It is of course in the public interest that they should compete. Very well, how may this competition be carried on? Is competition in price the only method of competition which the courts will permit? Certainly not. It happened that the retailers bought from the wholesalers. May not the retailers then cease buying from the wholesalers for the purpose of defeating them in this competitive struggle? Would not such an act be exactly the same as the act of striking by employees to compel their employer to refuse to recognize a rival group of employees working for the same employer, and by this means enable the strikers to triumph in their competitive struggle with the rival group of workers? If the employer started to work on his own job with his workmen and they struck to prevent him, the situation would be precisely the same as the action by the Retail Lumber Dealers. Such acts of striking, whether by employees against an employer,<sup>37</sup> or a Retail Dealers' Association against the wholesalers,<sup>38</sup> are not by themselves illegal. Such acts have been regularly held to be legitimate methods of competition. They do not become illegal simply because they succeed in defeating the rival. Why? Because the public interest is, on the whole, better served by permitting this freedom of action to compete and the triumph of some competitors over others, than it is by calling the strike in and of itself an unfair method of competition and illegal and tortious, and by this means maintaining the *status quo* of existing competition.

The situation is altered as soon as one can say that the strikers or the blacklisters have a preponderant position in the field and in consequence a power which makes it impossible for any rival to retaliate by the use of the same competitive methods.<sup>39</sup> Size *ipso facto* deprives the preponderant unit of the right to use methods of competition which, in the hands of smaller units, are legal. The result in the Lumber Dealers' Association case is to be supported

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<sup>37</sup> *Allen v. Flood*, [1898] A. C. 1.

<sup>38</sup> *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119.

<sup>39</sup> *Martell v. White*, 185 Mass. 255, 69 N. E. 1085; *Macauley v. Tierney*, 19 R. I. 255, 33 Atl. 1.



on the ground that the retailers had sufficient size and preponderant position in the retail business so that they were deprived of a method of competition which was in and of itself lawful.

There are, however, two difficulties with the opinion of the court: First, the case as reported does not disclose any facts clearly indicating the size and preponderant position of the retailers in any market. One may guess from statements made that they constituted a large and powerful organization, but if this fact be left to guesswork, one may also hazard the surmise that the wholesalers would have been quite as powerful and perhaps more so if they had been organized, and that the wholesalers were therefore, potentially at least, quite able to retaliate by refusing to sell to any retailer who belonged to an association which blacklisted any member of the Wholesalers' Association. If such was the case it was not the business of the courts to say that the success of one competitor over another by the use of its power to refuse to deal with the other became a tort by the mere fact of success, or because it was used for the purpose of successful competition in securing business. Secondly, it is not at all clear that the court concedes the right of any combination of retail lumber dealers, however insignificant in size, to act in concert in refusing to deal with wholesalers who sell to consumers direct. The opinion while conceding that any one retail lumber dealer may refuse to deal with a wholesaler for any reason he pleases intimates that two or more could not do so.<sup>40</sup> This sounds like the proposition that a single workman may strike for any reason he pleases, but that if two or more do it in concert it is an unlawful conspiracy. It is difficult to believe that a court, unhampered by any statute or previous decision dealing directly with the point and reaching the problem today for the first time with full power to

<sup>40</sup> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 30 Sup. Ct. 535, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

solve it by the application of the rule of reason, could seriously put forward any such proposition.

Even, however, if the Supreme Court's decision in the Lumber Dealers' Association case be regarded as inconsistent with the results reached by common-law courts, that does not mean that the Sherman Act specifies as illegal conduct which at common law was legal. It only means that the Supreme Court, in the exercise of its function as a common-law court, reaching results as common-law courts are accustomed to do, obtained a different result from some other common-law court; or that it exercised its prerogative to determine for itself what the common law was.

In *Loewe v. Lawlor*<sup>41</sup> the secondary boycott by the hatters' union was held to be illegal because in violation of the Sherman Act, and the employer recovered triple damages. The union members boycotted dealers throughout the country who handled the plaintiffs' hats. This was done for the purpose of inducing such dealers not to handle the plaintiffs' hats. The plaintiffs were damaged, and pressure was thus brought to bear upon them to compel them to unionize their shop and thus aid the National Hatters' Union in its competitive struggle with non-union labor. The preponderant position of the hatters' union in the United States was brought out by the number of employees in the union and by the fact that seventy out of eighty-two manufacturers in the hat business had acceded to the demands of the union to exclude non-union labor. In accordance with the common law, the secondary boycott by itself was a tort<sup>42</sup> and might be expected to be held illegal under the Sherman Act; but the additional facts showing a preponderant position in the business of the boycotting hatters was sufficient to have made some acts torts which otherwise might have been lawful though rather strenuous methods of competition.

In *Thomsen v. Cayser*<sup>43</sup> a judgment for triple damages secured by a shipper against a combination of steamship lines which established a uniform freight rate and made a rebate to those shippers dealing exclusively with the combination was sustained.

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<sup>41</sup> 208 U. S. 274, 28 Sup. Ct. 301, [1166]; also *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170.

<sup>42</sup> *Quinn v. Leathem*, [1901] A. C. 495.

<sup>43</sup> 243 U. S. 66, 37 Sup. Ct. 353.



In the opinion of the court it was intimated that the combination employed

“‘fighting ships’ to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants’ monopoly.”

Here we have the same methods of competition which were found not to constitute a tort in *Mogul Steamship Co. v. McGregor, Gow & Co.*<sup>44</sup> Again we must ask whether these methods are *per se* illegal under the Sherman Act, regardless of the size and preponderant position of the combination, or does the court assume the existence of such size and preponderant position from its effectiveness or from any other evidence?

### III

#### THE DICTA OF THE UNITED STATES SUPREME COURT

So far as the actual decisions of the United States Supreme Court are concerned, they are consistent with the view that not *every* contract, combination, or conspiracy which is (however slightly) in restraint of trade according to the literal significance of those words, is illegal. The decisions of the court are equally consistent with the view that the act condemns only contracts, combinations, and conspiracies in restraint of trade which are deemed illegal according to some standard which is outside the language of the act — either the standard of the common law or the standard of the rule of reason.

But when we look at the *dicta* of the court we find that originally there was much uncertainty in the choice to be made between the possible views.

In *United States v. Trans-Missouri Freight Association*<sup>45</sup> the court, speaking by Mr. Justice Peckham, said: “the contract may be a restraint of trade, but still be valid at common law.” The court thus intimated that the Sherman Act might hit restraints of trade which were valid at common law.<sup>46</sup> There was no call for this state-

<sup>44</sup> [1892] A. C. 25, [309].

<sup>45</sup> 166 U. S. 290, 17 Sup. Ct. 540.

<sup>46</sup> “A contract may be in restraint of trade, and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so

ment, and it has given rise to a great deal of unnecessary discussion. For instance, the majority of the court having talked in the unnecessary way just noted, the dissenting justices poured forth pages of dissenting opinion combating this *dictum*. The result was that the majority were right in their decision, but wrong in this *dictum*. The dissent is right in criticizing the *dictum*. The result is apparent disagreement as to the proper decision to be reached when, as a matter of fact, there is only disagreement as to an unnecessary statement of opinion.

In the Northern Securities Case<sup>47</sup> four judges out of nine failed to state in their opinion the true ground for the decision,<sup>48</sup> and appeared to place the result reached by them on the ground that any merger of competing units, however insignificant, was illegal.<sup>49</sup> Four judges, therefore, seemed to support the view that the Sherman Act went far beyond the common law in holding acts illegal because in restraint of trade. Mr. Justice Brewer, while supporting the result reached by the court and furnishing in fact the decisive vote in favor of that result, repudiated the unnecessary language and *dictum* of the Trans-Missouri Freight Association Case, and asserted that the restraint to be illegal must be unreasonable. Mr. Justice Peckham agreed with Mr. Justice Holmes that the Northern Securities Company did not violate the Sherman Act; and it therefore became necessary for him to distinguish the actual decision in the Trans-Missouri Freight Association Case, in which he wrote the opinion of the court. This he permits Mr. Justice Holmes to do for him. Mr. Justice Holmes attempts to draw a distinction between combination by contract and combination by merger. In the Traffic Association cases the railroads stayed in the business

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described either at common law or elsewhere. By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

<sup>47</sup> 193 U. S. 197, 24 Sup. Ct. 436.

<sup>48</sup> *Supra*, note 47.

<sup>49</sup> John C. Gray evidently so regarded the opinion: "The Merger Case," 17 HARV. L. REV. 474, *supra*, note 15.



and continued to operate their respective properties. There was still competition in service. By agreement they eliminated competition as to rates. In the Northern Securities Case they combined by merger and the placing of competing properties in the hands of a single new operating unit. This eliminated competition both as to rates and service. The elimination of competition was quite as effective, if not more so, than that which occurred by contract in the Traffic Association cases. It now seems impossible to condemn a combination by contract, such as was dealt with in the Traffic Association cases, and at the same time sustain a combination by merger such as occurred in the Northern Securities Case.

It was entirely unnecessary for the decision in the Standard Oil Case<sup>50</sup> that the court should attempt to say whether the Sherman Act prohibited every contract, combination, or conspiracy which was (however slightly) in restraint of trade, according to the literal meaning of that phrase, or whether it prohibited only illegal contracts, combinations, and conspiracies in restraint of trade — the illegality being determined by some standard outside the act, such as the standard of the common law or the standard of the rule of reason. On either theory the Standard Oil Company of New Jersey was illegal. Nevertheless, eight judges out of nine undertook in a solemn *dictum* to settle the matter in favor of the latter view.

The court, in generalizing as to what was prohibited by the Sherman Act, referred to:

“All contracts or acts which were *unreasonably* restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of *reasonably* forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the *intent to do wrong* to the general public and to limit the *right* of individuals, *thus* restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.”

Such a characterization is of course absolutely silent as to what specific acts are illegal. As to that matter the phrases used are all quite circular and self-proving. A reference to acts which are “un-

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<sup>50</sup> Standard Oil Company v. United States, 221 U. S. 1, 31 Sup. Ct. 502.

reasonably restrictive of competitive conditions" still leaves undone the process of balancing interests in order to determine what features of a given situation are distinctive, and whether the balance is in favor of or against the validity of the acts in question. So where the court, in attempting further to specify what is a test of unreasonableness, says that the act would be illegal if "done with the *intent to do wrong* to the general public and to *limit the right* of individuals," it leaves us quite as much in the dark as before as to what is a "wrong" to the general public and what is "the right" of individuals. What the passage does clearly say is that the Sherman Act is not to be looked to for the purpose of determining what specific acts are prohibited; that the function of the act is merely to conduct the court into a given federal jurisdictional subject, and there leave it to secure results according to some standard outside the terms of the act itself.

Then the court undertakes to define what this standard is. It says:

"... the provision [of section 1 of the Sherman Act] necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

As to section two of the act the court says:

"... the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law. . . ."

The court does not say that it adopts the common law as a standard, but rather that it adopts "the standard of reason which had been applied at common law." This means that the United States Supreme Court is admitted by the Sherman Act into an area of federal jurisdiction over interstate and foreign commerce to decide what contracts, combinations, and conspiracies, and what attempts to monopolize, are illegal; that in the exercise of this jurisdiction it



is not guided by the language of the act nor bound by any adjudications of other courts; that it must therefore secure its results as any court does which is dealing with the common law when it reaches a problem upon which there is no binding decision. It must decide according to a certain technique of judicial reasoning practiced by judges sitting in courts administering the common law. With regard to contracts, combinations, and conspiracies in restraint of trade and attempts at monopoly, it must analyze the situation in question, balance the interests of the parties and the public, and reach a generalization as to what is prohibited and what is not — all for the purpose of determining whether the particular contract, combination, or conspiracy, or attempt to monopolize, in question, is legal or illegal. It must, in short, act as Lord Nottingham acted when he analyzed the limitations in the Duke of Norfolk's Case and reached a generalization which has become the basis for the modern rule against perpetuities. The Supreme Court of the United States might truthfully have said that it adopted the standard of the common law, but that since it was not bound by the decisions in other jurisdictions as to what the common law might be, it was the sole judge of that law for the purpose of applying the Sherman Act; that while it looked to the common-law decisions of other jurisdictions for aid and advice, it was its duty to approach all questions as to what the common law might be, with that exercise of reason which was the very essence of the court's function in establishing a common-law rule, before anything had been settled by actual decision.

The court explained that the Traffic Association cases only held that when an act was illegal because in restraint of trade it was useless to resort to various arguments and considerations in support of its reasonableness in order to justify it. This is the same as saying that after the interests have all been balanced and the decision is against the legality of the combination, it is useless to urge over again all those considerations which exist in favor of permitting the combination in order to upset the conclusion. If this is what the court had meant in the Traffic Association cases, it would have been easy enough to have so stated. If the court in the Traffic Association cases did not mean this — if it did mean what it certainly appeared to say, that the Sherman Act prohibited *every* contract, combination, or conspiracy which was (however slightly) in restraint

of trade, according to the literal meaning of that phrase, so that the prohibition of the act would be broader than any common-law rule of illegality — then it is overruled.

In *United States v. American Tobacco Co.*<sup>51</sup> the court, in dealing with the construction of the Sherman Act, said:

“Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words ‘restraint of trade’ at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.”

This passage again clearly states that the Sherman Act only prohibits conduct in restraint of trade which is determined by the court, by the application of some standard outside the act, to be illegal. It is confusing, however, to say that this *construction* of the act is reached by the application of the “rule of reason.” The phrase “rule of reason” has been used to describe the process by which the court determines what acts are illegal under the authority of the act. It would be well to retain this usage exclusively and consistently.<sup>52</sup>

#### IV

##### THE CONSTITUTIONALITY AND VALIDITY OF THE SHERMAN ACT

Suppose the Sherman Act prohibits every contract, combination, and conspiracy which is (however slightly) in restraint of trade according to the literal significance of those words, in accordance with the *dictum* of the court in the Trans-Missouri Freight Association Case. That would mean that some acts would be forbidden which were in restraint of trade but which at common law were legal and proper. If, however, the common law determined what acts in restraint of trade were legal or illegal on the balance of all the

<sup>51</sup> 221 U. S. 106, 179, 31 Sup. Ct. 632.

<sup>52</sup> In *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 34 Sup. Ct. 951, the *dicta* of the Supreme Court in the Standard Oil and Tobacco cases are quoted with approval.



considerations affecting the parties and the public, the supposed interpretation of the Sherman Act would cause it to prohibit acts which on a balance of all the proper considerations were not contrary to the interests of the parties or the public. Such a construction would mean that the act would be a blow, incalculable in extent, to the freedom to do business. Would it then be due process of law under the Fifth Amendment? Might it not be quite as violent an onslaught upon the fundamentals of the social structure as the acts held void in the *Lochner* Case,<sup>53</sup> the *Adair*<sup>54</sup> and *Coppage*<sup>55</sup> cases, and the *Upper Berth Case*?<sup>56</sup> But all this is now a moot question because such a construction of the Sherman Act has been finally repudiated. It is worth noting, however, that the Supreme Court of the United States undertook to sustain the constitutionality of the Sherman Act even when it was inclined to adopt the construction assumed.<sup>57</sup>

Now suppose (as seems settled) the act prohibits only contracts, combinations, and conspiracies which are illegal because in restraint of trade — the illegality being determined by some standard outside the act — *i. e.*, “the standard of reason which was applied at common law,” is the act valid? Certainly the act would not violate the Fifth Amendment. It would not fail to be “due process of law,” for *ex hypothesi* what is declared illegal by the act should on a balance of all the interests, be prohibited.<sup>58</sup> But why is not the act void for uncertainty, or because it is the delegation of legislative power to the court to define crime and acts which are prohibited by law?

If the statute is not void for uncertainty it must be because there

<sup>53</sup> *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539.

<sup>54</sup> *Adair v. United States*, 208 U. S. 161, 18 Sup. Ct. 277.

<sup>55</sup> *Coppage v. State of Kansas*, 236 U. S. 1, 35 Sup. Ct. 240.

<sup>56</sup> *Chicago, Milwaukee & St. P. R. R. v. Wisconsin*, 238 U. S. 491. See “Due Process the Inarticulate Major Premise and the Adamson Act,” by A. M. Kales, 26 *YALE LAW JOURNAL*, 519.

<sup>57</sup> *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25.

<sup>58</sup> *Standard Oil Company v. United States*, 221 U. S. 1, 31 Sup. Ct. 502. (“But the ultimate foundation of all these arguments [against the constitutionality of the Sherman Act] is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore, that the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.”)

is a sufficient standard to make the acts prohibited certain. In *International Harvester Co. v. Kentucky* <sup>59</sup> the legislation in question failed for uncertainty because there was no standard at all. The standard of real value of the article sold by the combination as compared with the price asked was purely illusory. In the case of the Sherman Act, however, there is a standard in the fiat of the court itself applying the rule of reason as at common law. This is a real standard because it makes every act prohibited just as definite and certain as was every common-law crime, or act held invalid because it was in restraint of trade, before the court had finally adjudicated the act to be a crime or to be illegal. Courts which are admittedly tied to the common-law system could not say that a statute which, in defining crime or illegal acts provided for the same degree of uncertainty — no more and no less — and the same basis of uncertainty which existed at common law before any authoritative determination had been made, was too uncertain to be valid.<sup>60</sup>

But if the source of uncertainty is the "standard of reason" applied by the court, why is not the act void because it is a delegation of power to define crime and illegal acts? Suppose, for instance, the act had in terms empowered the Supreme Court to determine what contracts, combinations, and conspiracies in restraint of trade were illegal and that in so doing it was to exercise its reason, and balance the interests of the parties and the public as the judges in common-law courts did upon making a decision before any authoritative adjudication had occurred upon the subject dealt with. Would such an act be a delegation of legislative power to define crime or illegal acts? Clearly not. The legislation enacted would merely cast upon the court its centuries-old common-law judicial function. The act would do no more than define a federal jurisdiction over interstate and foreign commerce into which it would conduct the court there to operate as common-law courts regularly operate in reaching decisions. It would do no more than is effected where, by the settlement of a colony or a territory from a common-law jurisdiction, the courts of the new jurisdiction begin to decide what is common law and to apply it on the ground that the settlers brought the common law with them.<sup>61</sup> The Supreme Court of the United

<sup>59</sup> 234 U. S. 216, 34 Sup. Ct. 853.

<sup>60</sup> *Nash v. United States*, 229 U. S. 373, 33 Sup. Ct. 780.

<sup>61</sup> *Railroad v. Keary*, 3 Ohio State, 201, 205; *Bloom v. Richards*, 2 Ohio State, 387,



States, when exercising its original jurisdiction in disputes between states, at once adopted the standard of reason which was applied at common law, and called the result interstate common law.<sup>62</sup> Surely Congress can give to the federal courts the power which courts have exercised without any act of any legislature. The federal courts in certain classes of cases where they obtained jurisdiction on the ground of diverse citizenship have, under the doctrine of *Swift v. Tyson*,<sup>63</sup> undertaken to apply what they conceive is the common-law rule. Their common-law rule not infrequently differs from the common-law rules of the state where the action arose and where the case is tried. No acts of Congress conferred this power.<sup>64</sup> By what rational process the federal courts secured it is still a mystery.<sup>65</sup> Surely what the federal courts can do in the way of declaring to be the common law in the exercise of their jurisdictions founded on diverse citizenship, Congress can confer upon the federal courts power to do in the jurisdiction which the federal constitution confers with respect to interstate and foreign commerce. Then we have the state statutes which declare generally that the common law shall be the rule of decision. We find cases attempting to describe what this means.<sup>66</sup> But no one ever attempted to call such acts unconstitutional because they were a delegation of legislative power to the courts to define crime, or the rights or liabilities of the parties. The parallel between such acts and the Sherman Act is complete. Both alike conduct the courts into a given jurisdiction and then authorize them to act within that jurisdiction the way courts administering the common law have been accustomed always to act. The only

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390. See also *State v. Cawood*, 2 Stew. (Ala.) 360, 362. In *Lyle v. Richards*, 9 Serg. & Rawle, 322, 330, the court states that our ancestors "brought with them the common law in general, although many of its principles lay dormant, until awakened by occasion."

<sup>62</sup> *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655.

<sup>63</sup> 16 Pet. 1.

<sup>64</sup> Indeed, it seems to have been established contrary to the terms of the Judiciary Act, U. S. Stat. 1789, ch. 20, par. 34, which provided that "the laws of the several states, except where the Constitution, pleadings, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply"; and under which it has been held that the rules of law determined by the decisions of the state as to the law of real property, for instance, shall be applied in the federal courts.

<sup>65</sup> JOHN C. GRAY, *THE NATURE AND SOURCES OF THE LAW*, §§ 535 *et seq.*

<sup>66</sup> *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 97 N. W. 246; *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674; *Sayward v. Carlson*, 1 Wash. 29, 23 P. 830.

difference is that the general statute adopting the common law is comprehensive as to subjects and territorial jurisdiction. The Sherman Act picks out a special jurisdiction — “interstate and foreign commerce” — and then as to that gives the federal courts authority to act (as common-law courts administering common law have been accustomed to act) only with reference to contracts, combinations, and conspiracies in restraint of trade, and monopolies, and attempts to monopolize.

## V

## PATENTS AND COPYRIGHTS

A patentee is given by law the exclusive right, for a limited period to “make, use, and vend” the invention, or license others to do so.<sup>67</sup> The holder of a copyright is given the “sole right and liberty of printing, reprinting, publishing, and vending” the copyrighted article for a term of years.<sup>68</sup>

These grants of privileges by Congress are, however, subject to the legislative power of the state to some extent — at least in the absence of any more explicit action by Congress. Thus the right given by letters patent to vend a patented improvement for burning oil was subject to the legislative power of a state which condemned the device as dangerous.<sup>69</sup> So the existence of the Bell Telephone and subsequent telephone patents which the Central Union Telephone Company was entitled to use in Indiana, did not avoid an act of the Indiana legislature providing for the regulation of rates to be charged by telephone companies.<sup>70</sup>

An important question which has arisen under the Patent and Copyright Acts is this: How far may the sale or the license to use the patented article, or the sale of a copyrighted article, be made subject to conditions or stipulations which, if not adhered to, will avoid the license or the sale and cause the continued use to be an infringement?

When, for instance, the patentee of the fundamental Bell telephone patent, which gave to the patentee a monopoly of the telephone business down to 1893, leased telephone instruments to

<sup>67</sup> REV. STATS., § 4884.

<sup>68</sup> 1 STAT. AT L., by PETERS, ch. 15, page 124. See also R. S. 4952, Act March 4, 1909, ch. 320, § 1.

<sup>69</sup> *Patterson v. Kentucky*, 97 U. S. 501, affirming, 11 Bush, 311, 21 Am. Rep. 220.

<sup>70</sup> *Hockett v. State*, 105 Ind. 250, 257, 5 N. E. 178.



telephone companies, it attempted to impose the restriction that the instrument should not be used by telegraph companies other than the Western Union. When telegraph companies other than the Western Union attempted to compel the Bell Telephone Company to render service, they were met with the defense that this was forbidden by the stipulation and conditions of the license and lease in question. This defense failed.<sup>71</sup> When the instruments were put into use by lease or license in a given public service business, the conduct of the business was required to be in compliance with the rules of law relating to that business — one of which was that all members of the public were entitled to be served without discrimination. The license to use the invention could not be so restricted as to interfere with this rule.

More recently attempts have been made to sell or license the use of a patented article with a stipulation that the vendee or licensee, and those who take from them, shall use, with the patented article, only certain unpatented accessories sold by the vendor or licensor.<sup>72</sup> Licenses have provided, both as to patented articles and copyrighted articles, that they shall not be resold by the vendee or licensee or anyone taking from them for less than a certain price.<sup>73</sup> In suits based upon the Patent and Copyright Acts to enjoin the use of the patented or copyrighted article where these stipulations have been violated by remote holders with notice, the United States Supreme Court has decided against both the patentee and the holder of the copyright.<sup>74</sup> These cases proceed primarily upon

<sup>71</sup> *State v. Bell Telephone Co.*, 36 Ohio State, 296; *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. 1071; *State of Missouri v. The Bell Telephone Company*, 23 Fed. 539; *State ex rel. Postal Telegraph Cable Co. v. Delaware & Atlantic Tel. & Tel. Co.*, 47 Fed. 633; *Delaware & Atlantic Tel. & Tel. Co. v. Delaware*, 50 Fed. 677; *Bell Telephone Company v. Commonwealth*, 3 Atl. 825, 827 (Pa.) (1886); *Chesapeake & Potomac Telegraph Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 399, 416, 7 Atl. 809; *State v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N. W. 237, 239; *Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co.*, 177 Fed. 726; *Bement & Son v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747 (*semble*); *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (*semble*); *Metropolitan Trust Co. v. Columbus Co.*, 95 Fed. 18 (*semble*).

<sup>72</sup> *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364; *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, 243 U. S. 502, 73 Sup. Ct. 416.

<sup>73</sup> *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722; *Bauer v. O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616; *Strauss v. Victor Talking Machine Co.*, 243 U. S. 490, 37 Sup. Ct. 412.

<sup>74</sup> See cases cited *supra*, notes 73, 74, except *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32

a construction of the Patent and Copyright Acts — namely, that the right to “vend” or “license” does not include the right to place upon the use by the licensee or vendee or others the conditions or restrictions in question. Underlying this, however, is the idea that there is something contrary to public policy in such conditions and stipulations; that they are, apart from any question of patents or copyrights, subject to condemnation because they are illegal restraints of trade or attempts at monopoly, and that the right to “vend” and “license” under the Patent Act and the right to “vend” under the Copyright Act must be subject to the further rule that no stipulations or conditions shall be attached to the sale or license of the patented article which would be illegal if attached to a non-patented or non-copyrighted article. An effort has been made elsewhere to show that there is, upon a proper balancing of all the interests, no ground for holding the stipulations or conditions in question void when attached to an unpatented or copyrighted article.<sup>75</sup>

How far does a patent which controls the carrying on of a given business during the life of the patent justify a combination of units in that business which, except for the patent, would be illegal? <sup>76</sup>

It is safe to say that a patent will not justify a combination which is arranged to extend beyond the life of the patent.<sup>77</sup> It seems quite as clear that if the control of the business is secured by the union or purchase of competing patents it will not only not be justified but an additional ground for illegality will exist.<sup>78</sup> Since each patent gives the patentee a monopoly for seventeen years of the

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Sup. Ct. 364, which sustained the suit of the patentee, but must now be regarded as overruled.

<sup>75</sup> A. M. Kales, “Contracts to Keep up the Price on Resale and to Buy or Use Other Articles in Connection with those Sold,” CORNELL L. QUART., January, 1918.

<sup>76</sup> *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, [1246] is often cited in this connection, but it does not in the least touch the problem because only a single contract was involved. The record did not disclose any combination for the court to pass upon, and the single contract before the court was unobjectionable even if there had been no patent.

<sup>77</sup> *Strait v. National Harrow Co.*, 18 N. Y. S. 224.

<sup>78</sup> *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555; *National Harrow Co. v. Hench*, 83 Fed. 36; *National Harrow Co. v. Hench*, 84 Fed. 226; *United States v. New Departure Mfg. Co.*, 204 Fed. 107; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 P. 581; *State v. Creamery Package Mfg. Co.*, 110 Minn. 415, 126 N. W. 126, 623.



use and disposal of his invention the field is absolutely closed to all others. It follows that the union of the only two properties which can be used to carry on a given business would make an actual monopoly. A union of two out of three, or even a union of any number out of any other number, would produce an illegal attempt at monopoly. The right to vend or license the use of an invention is subject to the general rules of law against monopoly to this extent, at least, that after property in an invention has been created and an exclusive privilege of vending or licensing given, it must, like other property, be kept out of combinations with other properties which constitute an attempt at monopoly in the conduct of the business.

If the patents or copyrights cannot be said to be of so fundamental a character as to exclude others from the business, they can hardly be used to justify a combination of competing units which has a preponderant position and an intent to monopolize by excluding others by unfair and illegal methods of competition.<sup>79</sup>

Suppose a single fundamental patent gave to the patentee a monopoly of doing a given business for seventeen years. Would that fact justify the combination, limited to the life of the fundamental patent, of units in the business which would otherwise be illegal solely because it was an attempt to monopolize?

In *Standard Sanitary Manufacturing Co. v. United States*<sup>80</sup> it appeared that the business of manufacturing enamel iron ware had been carried on by many competitors when the Arnott patent was issued which provided for so superior a process that it controlled the business. Competitors attempted to compete, but the effectiveness of the patent was such that the great majority were forced into a combination which was effected by license contracts to use the patents. These license contracts provided among other things for the elimination of all competition between the units combined so far as the fixing of prices was concerned. The United States Supreme Court held that the combination was without justification. The Patent Act which gave an exclusive right to vend or

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<sup>79</sup> *Straus v. American Publishers Association*, 231 U. S. 222, 34 Sup. Ct. 84. Where, however, the patents are not competing but are supplementary to each other — all being used together for the purpose of manufacturing a given commodity — there is no objection to the assembling in a single manufacturing unit many valuable patents. *United States v. Winslow*, 227 U. S. 202, 33 Sup. Ct. 253.

<sup>80</sup> 226 U. S. 20, 33 Sup. Ct. 9.

license the article patented did not give any special privilege to use that right for the ulterior purpose of forcing competitors into a combination which except for the patent would be illegal.

Suppose there had been no one at all in the business when the invention was made — as in the case of the telephone. Suppose the holders of a single fundamental telephone patent, which gave a monopoly of the telephone business, should organize that business for the period of the life of the patent as a combination of operating units, each a separate and distinct corporation, with separate and distinct bodies of stockholders with all competition between them eliminated under the terms of the license contract to use the patent. Would such a combination have been legal? Could a distinction be made between the using of a fundamental patent to suppress a competition which existed before the patent, and to force those units which had previously competed into a combination, and the using of a fundamental patent to create a business which had not before existed but which was organized on the basis of combining separate units which were not permitted to compete?

## VI

### WHO MAY INVOKE THE APPLICATION OF THE SHERMAN ACT?

Of course the Attorney-General of the United States may invoke the application of the act by a bill in equity or indictment in the federal courts. The individual may also do so in a suit for triple damages under section 7. But the stockholder of a corporation that could sue under section 7 cannot, in his own name, sue for triple damages,<sup>81</sup> nor can he sue in equity for triple damages even when the officers of the corporation refuse to do so and the corporation itself is made a party defendant.<sup>82</sup> Such an action would deprive the defendant who had wronged the corporation of trial by jury in a suit for a penalty. His right should not be affected by the refusal of the officers of the corporation to accommodate the stockholder. The stockholder might attempt to secure a decree directing the corporation to sue, and if it failed to do so, or could not properly be trusted to do so, ordering the corporation to permit the plaintiff to sue at law in its name and on its behalf. Perhaps

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<sup>81</sup> *Ames v. American Tel. & Tel. Co.*, 166 Fed. 820.

<sup>82</sup> *Fleitmann v. Welsbach Co.*, 240 U. S. 27, 36 Sup. Ct. 233.



in the suit by the stockholder against the corporation and the defendant alleged to have committed the damage, the court, after a preliminary investigation of the merits of the plaintiff's case and the existence of the refusal of the corporate officers to sue, and want of justification for such refusal, might properly send the issue of the violation of the Sherman Act and the damages to a court of law for trial by jury.

How far may the individual (apart from the suit for triple damages) invoke the operation of the court under the Sherman Act? Of course, he cannot take the place of the Attorney-General and institute such a suit as the government is authorized to bring.<sup>83</sup> The individual must in any case have a private right which is infringed by the conduct which under the Sherman Act is illegal. This usually means that he must have suffered some special damage — damage different from that suffered by the public at large.

Suppose, for instance, the complainant is a minority stockholder in a corporation, the majority of the stock of which is illegally and in violation of the Sherman Act being held by another corporation: Can there be any doubt that the minority stockholder can challenge the legality of that stockholding? Hardly. It is no answer that the government can do so, or that the stockholder might sue for triple damages. The Sherman Act makes the stockholding generally illegal, and the lawful stockholder may challenge in equity the control and acts of the illegal holder of stock,<sup>84</sup> just as he may where the stockholding is illegal at common law.<sup>85</sup> His private right to be associated only with legal stockholders has been infringed, he has suffered the special damage required.

Suppose the defendant's conduct in violation of the Sherman Act is a tort to the plaintiff for which he could recover triple damages. For instance, suppose as in *Loewe v. Lawlor*<sup>86</sup> the defendant has practiced the secondary boycott against the plaintiff and thereby

<sup>83</sup> *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 72, 24 Sup. Ct. 598.

<sup>84</sup> *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869 (1907); *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572; *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945; *De Koven v. Lake Shore & M. S. R. R. Co.*, 216 Fed. 955; *Geddes v. Anaconda Copper Mining Co.*, 222 Fed. 129; *Boyd v. New York, & H. R. R. Co.*, 220 Fed. 174; *Union Pacific R. R. Co. v. Frank*, 226 Fed. 906.

<sup>85</sup> *Dunbar v. American Telephone & Telegraph Co.*, 238 Ill. 456, 87 N. E. 521; *Harding v. American Glucose Co.*, 182 Ill. 551, 625-633, 55 N. E. 577.

<sup>86</sup> 208 U. S. 274, 28 Sup. Ct. 301; *Lawlor v. Loewe*, 235 U. S. 522, 35 Sup. Ct. 170.

damaged him. Suppose also the damage is irreparable and the remedy at law — even for triple damages — is inadequate, can the plaintiffs have relief by injunction? This question should be answered in the affirmative. No reason can be urged why the injunctive remedy is not available to prevent a tort merely because the tort is the creation of a statute, unless it can be said that the statutory remedies are exclusive. The cases which give the minority stockholder a right to proceed in his own name against the illegal stockholders indicate that the remedies provided by the statute are not exclusive. Furthermore, when it is remembered that the true function of the Sherman Act is not to make illegal any specifically described act, but merely to let the federal courts into a federal jurisdiction over interstate and foreign commerce, there to exercise the common-law court's function of deciding what contracts, combinations, and conspiracies in restraint of trade are illegal, and what monopolies and attempts to monopolize are illegal, there is reason enough for permitting all the remedial consequences of the court's action in finding certain acts to be illegal. The remedies provided by the statute are just those which the courts exercising the functions of the common-law courts could not grant. They are, therefore, in addition to the remedies which the court could grant if those special remedies had not been mentioned in the act. Hence, when under the authority of the statute the court finds that a tort has been committed, any remedy by injunction ordinarily available should be open to the plaintiff — possibly with the qualification that, if triple damages may be recovered, the complainant's bill for an injunction should make it clear that a judgment for triple damages is still an inadequate remedy at law. Recently, however, the Supreme Court, in *Paine Lumber Co. v. Neal*,<sup>87</sup> has taken a contrary view.<sup>88</sup> The majority of the court, by Mr. Justice Holmes, merely expresses its conclusion. Four justices dissented. The dissenting opinion of Mr. Justice Pitney seems not to have been met or to be answerable. In view of section 16 of the Clayton Act the precise question involved is now of less practical interest.

Suppose the defendant, when sued upon a contract for the sale

<sup>87</sup> 244 U. S. 459, 37 Sup. Ct. 718.

<sup>88</sup> Following the inclination of the lower federal courts in *Pidcock v. Harrington*, 64 Fed. 821, [1219]; *Blindell v. Hagan*, 54 Fed. 40; *Greer Mills & Co. v. Stoller*, 77 Fed. 1; *Southern Indiana Express Co. v. United States Express Co.*, 88 Fed. 659; *National Fireproofing Co. v. Mason Builders Association*, 169 Fed. 259.



of goods, defends upon the ground that the seller exists in violation of the Sherman Act. Clearly the defense fails. The mere existence of the seller is not a special damage to the defendant or an infringement of any private right which he may have. The buyer is affected only in the same way that the public generally is affected. He cannot, therefore, raise the illegality of the seller's existence as a business unit.<sup>89</sup> Suppose, however, the very contract of sale upon which the defendant is sued for the purchase price is itself illegal, because one of a scheme of contracts by means of which the illegal combination is secured, the Wall Paper Case, these facts were held to constitute a defense.<sup>90</sup> In the Corn Products Case<sup>91</sup> the decision in the Wall Paper Case was approved and distinguished on the ground that the holding there "was rested exclusively upon elements of illegality in hearing in the particular contract of sale in that case." In the Corn Products Case the contract sued upon was, taken by itself, legal. It did not appear that the scheme of contracts of which it was a part effected the illegal combination, but only that the seller which made the contract was an illegal combination and sought to perpetuate its power by the form of contract in question. This was insufficient and distinguished the case from the Wall Paper Case.

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<sup>89</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431.

<sup>90</sup> *Continental Wall Paper Co. v. Voight & Son Co.*, 212 U. S. 227, 29 Sup. Ct. 280. In the same way where a long-distance telephone company attempted to enforce specifically an exclusive contract for connection with local exchanges, and the exclusive contract was part of a scheme of contracts and all were illegal at common law and under the Sherman Act, these facts constituted a complete defense. *United States Telephone Co. v. Central Union Telephone Co.*, 202 Fed. 66.

<sup>91</sup> *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U. S. 165, 35 Sup. Ct. 398.

## PREMIUMS AND DISCOUNTS IN TRUST ACCOUNTS

WHEN a trustee has bought bonds, or other securities calling for the payment of a fixed sum at a fixed time, at a premium or at a discount, how should he account for the premium or the discount as between the person entitled to the income of the trust fund and the person entitled to the principal? It is assumed that the point is not covered by directions in the trust instrument, for such directions are of course conclusive. It is also assumed that the investment was a proper one for the trustee to make. The competing parties may conveniently be distinguished as life tenant and remainderman. The debtor's periodic payment may be called the coupon.

Is the coupon on a premium bond pure income, or is so much of it principal as is required to make good the decrease in the bond's value caused by the approach of maturity? Is the coupon on a discount bond the whole of the income, or is the increase in the bond's value caused by the approach of maturity a part of income also? Should premium and discount, in other words, affect only principal, decreasing it in the one case and increasing it in the other, or should the principal be kept constant while the effect of premium and discount is absorbed by income?

In dealing with premiums, and also in dealing with discounts, the possible courses are of three sorts. If the decrement and increment involved belong to principal, the matter is very simple: ignore the premium and the discount. Pay to the life tenant the full coupon on the premium bond, the coupon and no more on the discount bond. The life tenant will get the apparent income on both investments. At the maturity of the bonds the remainderman will find his fund diminished by the amount of the premium, and increased by the amount of the discount. If the decrement and increment do not belong to principal, there are alternatives. The full coupon on the premium bond may be paid into principal until the amount of the premium has been so paid, and to the life tenant



afterwards: or the premium may be amortized by paying out of the coupon into the fund, while the trust estate holds the bond, periodic contributions which will efface the premium in the time the bond has to run. In the case of the discount bond, the life tenant may be paid, in addition to the coupon, either the actual increment in value due to the approach of maturity, when the bond is sold or paid and the increment realized: or the theoretical periodic increment in value, without waiting for it to be realized.

The authorities regarding premiums are divided. Mr. Justice Holmes said in 1883, "The English cases go the whole length of deciding that, whenever a fund is held upon an authorized permanent investment, the tenant for life receives the entire actual income";<sup>1</sup> that is, the entire apparent or gross income. That is still the law of England.<sup>2</sup> When the question first arose in America, the

<sup>1</sup> *Hemenway v. Hemenway*, 134 Mass. 446, 450.

<sup>2</sup> *Meyer v. Simonsen*, 5 De G. & Sm. 723 (1852). *Dictum* that "Where the subject-matter of the bequest is either invested in the funds or in some security of which the court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is" (page 726).

*Hume v. Richardson*, 4 De G., F. & J. 29 (1862), answered in the affirmative inquiries whether trustees might retain certain investments, including East India stock received from the testator, and make more investments in the same securities; and "whether the tenant for life is entitled to the whole income arising from such investments" (page 33).

East India stock was an authorized investment for trustees, STAT. 22 & 23 VICT. c. 35, § 32 (1859). This "stock" amounted, for all purposes of this discussion, to bonds. STAT. 3 & 4 WILL. IV, c. 85, which withdrew from the East India Company the beneficial ownership of its property, had charged the Indian revenues with the payment of a fixed "dividend" of 10½ per cent to the holders of the stock (§ 11), and had provided that the stock should be subject to redemption by Parliament, on or after April 30, 1874, at the rate of two pounds sterling for every pound of stock. (§ 12). That the stock in the early sixties stood at a premium over its redemption value, see, *e. g.*, *Cockburn v. Peel*, 3 De G., F. & J. 170 (1861), and *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379 (1861), where counsel said: "East India stock is redeemable in about twelve years at a price 9 per cent below its present market value" (page 380).

*Brown v. Gellatly*, L. R. 2 Ch. App. 751 (1867). On both East India bonds and stock, and other securities which the testator had authorized as permanent investments, whether left by the testator or bought after his death, the "tenant for life is . . . entitled to the specific income of the securities, just as if they had been £3 per Cent Consols."

These were the cases chiefly relied on by Mr. Justice Holmes. The English practice is also shown by discussion in some cases of the "loss to the reversion," which these securities involve; the fact of such a loss means, of course, that the premium is not amortized. See *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379, and *Cockburn v. Peel*, 3 De G., F. & J. 170, in which the fact that a loss to the remainder-

tendency here too was to disapprove of amortization. In 1883 in *Hemenway v. Hemenway*<sup>3</sup> the Massachusetts court, while it distinctly refused to lay down any general rule, held that a trustee who had not gone out of his way to injure the remainderman had done well in paying the full coupon to the life tenant. In 1889 the Maryland court disapproved of investigation.<sup>4</sup> The Kentucky court in 1892 decided squarely that the life tenant was entitled to the whole coupon.<sup>5</sup> As recently as 1904 the Supreme Court of Pennsylvania followed an old decision of the Orphans' Court of Philadelphia<sup>6</sup> to the same effect, but lamented that "No rule on this subject can be stated that in all cases will produce an equitable result."<sup>7</sup> And in 1909 the Court of Appeals of the District of Columbia disapproved in general terms of amortization.<sup>8</sup> Slight evidence of a testator's intention that the life tenant shall have the full coupon has been accepted in Massachusetts<sup>9</sup> and in New York.<sup>10</sup>

But the tide turned long ago, and has set strongly in the direction of amortization. In 1886, three years after *Hemenway v. Hemenway*, the Massachusetts court approved of the action of trustees who had amortized premiums.<sup>11</sup> The *Hemenway Case* was

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man would be involved was the ground for refusing to direct an investment in East India stock.

The present Trustee Act (Trustee Act, 1893, 56 & 57 VICT. c. 53) evidently contemplates this state of law, for it does not authorize trustees to buy redeemable "stock" either (1) when it has less than fifteen years to run, or (2) at a premium of more than 15 per cent [§ 2 (2)].

<sup>3</sup> 134 Mass. 446.

<sup>4</sup> *Whitridge, Trustee, v. Williams*, 71 Md. 105 (1889). Apparently the bonds involved were not bought by the trustee, but received by him as part of the original trust fund; yet they seem not to have been set off to that fund by the testator himself, and their case is therefore very like that of bonds which the trustee buys. See note 18.

<sup>5</sup> *Hite's Devisees v. Hite's Executor*, 93 Ky. 257, 20 S. W. 778.

<sup>6</sup> *Furness's Estate*, 12 Phila. (Pa.) 130 (1878).

<sup>7</sup> *Penn-Gaskell's Estate* (No. 2), 208 Pa. 346, 57 Atl. 715 (1904).

<sup>8</sup> *American Security and Trust Co. v. Payne*, 33 App. D. C. 178. The court decided simply that a life tenant who had a power of appointment should not be charged with premiums — a proposition which is quite reconcilable with the practice of amortization where no power of appointment is involved. The court acted under the mistaken impression that the weight of authority disapproved of amortization (page 188), and its *dicta* went the full length.

<sup>9</sup> *Shaw v. Cordis*, 143 Mass. 443, 9 N. E. 794 (1887). (Direction to invest in particular bonds.)

<sup>10</sup> *Matter of Hoyt*, 160 N. Y. 607, 55 N. E. 282 (1899). See note 13.

<sup>11</sup> *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69.



not in terms overruled, but the whole reasoning of the majority was now counter to it. Judge Holmes, who had written the opinion in the earlier case, remained opposed to amortization and accordingly dissented strongly; and of the three other judges who sat in both cases, two concurred in his dissent. It was laid down by the majority that:

"There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par and is payable at the termination of a fixed time, deducting from such interest, as it becomes due, such sums as will at maturity efface the premium."<sup>12</sup>

The Hemenway Case, it was said, had merely held that the payment of the full coupon to the life tenant was not under the particular circumstances of that case an abuse of discretion. Amortization is now the rule in Massachusetts, though it is not clear that a trustee who should exercise an honest discretion in the opposite direction would be called to account.<sup>13</sup> In New York the change of front began between 1899, when slight evidence of an intention against amortization was allowed to preclude it,<sup>14</sup> and 1901, when evidence equally slight was accepted as showing an intention in favor of amortization.<sup>15</sup> The change was completed in New York in 1907, when it was decided, by four judges against three, that premiums must be amortized unless a contrary intent be "expressed in the very clearest manner."<sup>16</sup> Since 1900 three courts, those of Connecticut, New Jersey, and Wisconsin, have passed upon the question unprejudiced by previous decisions in their own states. All have decided in favor of amortization;<sup>17</sup> and

<sup>12</sup> *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 539.

<sup>13</sup> Cf. *PERRY ON TRUSTS*, 6 ed., 897, note.

<sup>14</sup> *Matter of Hoyt*, 160 N. Y. 607, 55 N. E. 282. The circumstances chiefly relied on were that the life tenant was the daughter of the testator, and was not provided for except by the trust fund, while the remaindermen were nephews and nieces of the testator.

<sup>15</sup> *New York Life Insurance and Trust Co. v. Baker*, 165 N. Y. 484, 59 N. E. 257. It is not clear upon what "language of the clause creating" the trust the court relied, perhaps on the phrase giving "the whole of said share" to the remaindermen.

<sup>16</sup> *Matter of Stevens*, 187 N. Y. 471, 476, 80 N. E. 358.

<sup>17</sup> *Curtis v. Osborn*, 79 Conn. 555, 65 N. E. 968 (1907). (Annual deductions from the coupons not having been made, as, it was said, might properly have been done,

that rule, which is distinctly the modern rule, is supported today by the clear weight of authority.

Nowhere does the approved course consist in deducting the whole amount of the premium from the first coupons. Trustees would seem to have experimented but little with that plan; but it lately came before the Appellate Division in New York, and was held not to be permissible.<sup>18</sup>

The rule does not apply to bonds assessed at a premium which were set off by the creator of the trust as part of the original trust fund. On such bonds the life tenant receives the full coupon, on the theory that, in their case, by "income" the testator meant apparent or gross income.<sup>19</sup>

It has been held that "the privilege of paying before maturity being a contingency for which no calculation can be made, the calling in of the bonds" before maturity "is a misfortune to be borne by the principal, to which the excess of loss over what would have been sustained if the bonds had run to maturity must be charged."<sup>20</sup>

An accidental increase or decrease in the value of trust property belongs, of course, to the fund.<sup>21</sup> But one who is entitled to receive

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the entire amount of the premium was directed to be paid into principal at the maturity of the bonds.)

*Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668 (1908).

*In re Allis's Estate*, 123 Wis. 223, 101 N. W. 365 (1904), although the trust will expire before the bonds mature (page 231).

<sup>18</sup> *In re Schaefer*, 165 N. Y. Supp. 19, 30, 176 N. Y. App. Div. 906 (1917).

<sup>19</sup> *Connecticut Trust and Safe Deposit Co., Trustee*, 80 Conn. 540, 69 Atl. 360 (1908); *Hemenway v. Hemenway*, 134 Mass. 446 (1883); *Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668 (1908).

The same has been held, namely, that the premium should not be amortized, of bonds received from a testator and set off to the trust fund by his executors. *Matter of Fanoni*, 88 N. Y. Misc. 442, 152 N. Y. S. 218 (1914). *Whitridge, Trustee, v. Williams*, 71 Md. 105 (1889), *semble*. But in *American Security and Trust Co. v. Payne*, 33 App. D. C. 178, 187 (1909), it was said that bonds which, "while a part of the testator's estate, were not set apart by him as a part of" the trust fund, must "be treated as securities purchased by the executor." This seems the sounder view, as the testators can hardly be regarded as having expressed an intention regarding such bonds.

The trust instrument may, of course, show an intention that premiums should be amortized even in the case of bonds left by the testator. *Estate of Wells*, 156 Wis. 294, 309-11, 144 N. W. 174 (1914).

<sup>20</sup> 39 Cyc. 420, note 82, *Farwell v. Tweddle*, 10 Abb. N. Cas. (N. Y.) 94 (1881), *there cited*.

<sup>21</sup> Profit on sale of stocks and bonds: *Stewart v. Phelps*, 71 App. Div. 91, 75 N. Y. S.



the principal of a trust fund is entitled, aside from business gains and losses, to have paid into the fund at the maturity of a bond exactly the amount which was taken out of it to buy the bond. And the tendency of bonds to fall or rise in value in consequence of having been bought at a premium or at a discount is not a matter of business gain or loss: it is a calculable feature of the thing bought. One who is entitled to the "income" or "interest" of a trust fund is entitled to the true interest on a trust bond. True interest on a bond bought at a premium or at a discount is not the amount of the coupons, but that amount minus the premium or plus the discount.<sup>22</sup> Bonds are regularly dealt in on this basis of net yield. The premium bond at maturity may by chance be worth far less than par, but it cannot by any chance be worth more than par. That it will depreciate to the extent of the premium is certain. If, therefore, a loss of principal be what is involved, it is a loss which is certain to occur, one which no combination of good luck and good management can avert. This inevitability means more than that the loss is a strange sort of loss: it means that it is not a loss at all. For people buy premium bonds, and no gambler, let alone a trustee whose investments must be approved by a court, will buy a certain loss. If \$120 is paid for a \$100 bond, and the promised \$100 is received for it at maturity, it is not that there has been a loss of \$20, in consequence of which the trust fund must stand reduced: it is that the coupons which have been paid from year to year have constituted not only interest but the repayment of what was taken out of the fund to pay the premium. Premiums should, therefore, be so accounted for as to leave the fund intact.

If wasting property — property, *i. e.*, that must in the course

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526 (1902); *aff'd*, on opinion below, 173 N. Y. 621. Of stocks: *Kemble's Estate*, 201 Pa. 523, 51 Atl. 310 (1902). As to profits, see 39 Cyc. 444; *PERRY ON TRUSTS*, 6 ed., § 546.

In 39 Cyc. 418, it is said: "The loss is to be apportioned between the life tenants and the remaindermen." The meaning is not, of course, that any portion of the decrease in the value of an investment is made up to principal out of income. The meaning is, on the contrary, that principal suffers not only the whole of the loss in the value of the investment, but is also obliged, when that loss has been accompanied by a loss of income, to make a contribution to income. See *Meldon v. Devlin*, 31 N. Y. App. Div. 146, *aff'd* in 53 N. Y. S. 172, 167 N. Y. 573.

<sup>22</sup> Accountants look at the matter in this light. Cf. *WILLIAM MORSE COLE, ACCOUNTS, THEIR CONSTRUCTION AND INTERPRETATION*, rev. ed., 185, 195; *ERNEST BROWN SKINNER, MATHEMATICAL THEORY OF INVESTMENT*, 133, 134.

of time be exhausted, like leaseholds, tangible personalty, or terminable annuities — is part of a trust estate, and it is impossible to spell out an intent that the life tenant shall have its gross annual produce, it is the trustee's duty (pending conversion) to pay him only so much of that produce as is equal to normal interest on the value of the property, and to treat the balance as principal.<sup>23</sup> This is because it is "assumed in the absence of direction to the contrary that the testator intended that all the beneficiaries should enjoy the whole property in succession."<sup>24</sup> This principle would seem to cover premiums, and require their amortization in some form, when no contrary intention is expressed. It may be not unreasonable to assume an intent against amortization when the bonds are left by the testator,<sup>25</sup> but there is no more suggestion of such an intent regarding bonds which the trustees buy than regarding any sort of wasting property, and yet the English and some American courts refuse amortization even in the case of such bonds. A difference of an external sort between premium bonds and what are recognized as wasting investments is that premium bonds are often a perfectly proper investment for a trustee to make; indeed, except when they are so, the question discussed in this article does not arise: while wasting property, so far from being a proper investment, must in the absence of special authority be converted by the trustee into a "permanent" form.<sup>26</sup> Irrelevant as this distinction is, it seems to lie behind the English cases. When investments in premium bonds began to be authorized in England,<sup>27</sup> the courts disliked the statute and frequently

<sup>23</sup> *Howe v. Earl of Dartmouth*, 7 Ves. 137 (1802). *In re Carter*, 41 W. R. 140 (Ch. Div. 1892); *Wentworth v. Wentworth*, 1900, A. C. 163; *In re Woods*, 1904, 2 Ch. 4; *Cairns v. Chaubert*, 9 Paige (N. Y.) 160 (1841); *dictum* in *Frankel v. Farmers' Loan and Trust Co.*, 152 N. Y. App. Div. 58, 61, 136 N. Y. S. 703 (1912). PERRY ON TRUSTS, 900, note.

It has been held in England that the rule of conversion does not apply to trusts created by deed; 28 HALSBURY, LAWS OF ENGLAND, 32. A specific bequest is treated as showing an intent that the life tenant shall have the full produce; see PERRY ON TRUSTS, 6 ed., §§ 451-56, 547; 28 HALSBURY, LAWS OF ENGLAND, § 1.

<sup>24</sup> 28 HALSBURY, LAWS OF ENGLAND, 31.

<sup>25</sup> And set off by him as part of the trust estate. See note 18. Bonds so set apart by the testator correspond, of course, to wasting property which is specifically bequeathed; it is therefore consistent (see note 22) to give their gross produce to the life tenant.

<sup>26</sup> 28 HALSBURY, LAWS OF ENGLAND, 31; PERRY ON TRUSTS, § 547.

<sup>27</sup> STAT. 22 & 23 VICT. c. 35, § 32 (1859), authorized trustees who were not for-



exercised their discretion<sup>28</sup> by refusing to direct trustees to invest in them;<sup>29</sup> but when they felt obliged to recognize the propriety of the investment in a given case, it did not occur to them that there was anything that could still be done for the remainderman. They apparently reasoned — These investments, being declared to be proper, are proper with all their obvious incidents; but one of their incidents is that they involve a diminution of principal; therefore a diminution of principal, when so produced, is proper and should not be obviated.<sup>30</sup> The reasoning is inadequate, for to authorize a given investment is quite a different thing from directing that it be treated in such a way as to involve a loss to principal. There was nothing to prevent the courts from resorting to amortization to avoid the loss. And the result of the course they took is curious. A "wasting investment" is prevented from involving a loss to principal, and yet must be converted; while a premium bond is made to involve a loss to principal, although it is a proper investment for a trustee to make.<sup>31</sup>

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bidden to do so by their trust instruments to invest, among other things, in East India stock, which was redeemable, sold at a premium, and amounted for present purposes to bonds. See note 2.

(The Trustee Act, 1893 (56 & 57 VICT. c. 53), § 2, expressly authorizes investment in certain securities referred to (described as stocks), "notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.")

<sup>28</sup> Under STAT. 23 & 24 VICT. c. 38, § 10 (1860).

<sup>29</sup> *E. g.*, *Cockburn v. Peel*, 3 De G., F. & J. 170 (1861); *Waite v. Littlewood*, 41 LAW J. REP. (N. S.) CHANC. 636 (1872); LAW REP. 8, CHANC. 70.

<sup>30</sup> *Cf.* *Equitable Reversionary Interest Society v. Fuller*, 1 J. & H. 379 (1861), where the question was simply whether to make an order for investment in East India stock: "The difficulty I have felt throughout is, that there is a considerable injury to those interested in the capital in all investments of this description. . . . In the course of a few years, East India stock may be redeemed at a reduction of 9 per cent upon its present market value, which will be a clear loss of capital. On the other hand, if I do not grant this application, there is no possible case in which it could be done. . . . I feel myself bound to give some effect to the intention of the Legislature, in compliance with which the judges have sanctioned these investments. . . . As the change of investment is a clear loss to the reversion, the costs must come out of the income." (Sir W. Page Wood, V. C.)

In *Cockburn v. Peel*, 3 De G., F. & J. 170 (1861), in which an order for investment in East India stock was refused because of the loss to the remainder that would result, Lord Campbell said: "An offer is made to guard against this peril by a sinking fund; but I do not think that this would be authorized by the statute under which the transfer is asked, and I do not think that the transfer ought to be directed where such an expedient is necessary."

<sup>31</sup> This idea that, when once an investment is authorized by law, its whole apparent income should go to the life tenant, may have grown out of the circumstance that

As to the form which the amortization of premiums should take: it seems clear that there should be, as under the prevalent American practice there are,<sup>32</sup> periodic contributions to principal out of the coupon while the trust estate holds the bond. The alternative course of paying the full coupon into the fund until the amount of the premium has been paid in, and to the life tenant afterwards, equally protects the fund from loss, but it may be a great hardship to the life tenant while the deductions are being made. It is sure to be if the bonds are a substantial part of the trust estate. And if the life tenant dies before he has received any income from the bond, injustice as well as hardship has been inflicted on him;<sup>33</sup> for there is no logic in attributing the first coupons entirely to principal and the later ones entirely to income. It is more rational as well as more convenient to regard each coupon as embodying both a payment of interest and a payment of principal.

To determine how much is interest and how much principal, the trustees should begin by finding the rate of interest which the money invested in the bond will actually earn while it remains invested, assuming that the promised payments of coupon and principal are made when they fall due.<sup>34</sup> The bond calls for the payment of a

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for long, in England, the regular trust investment was one on which the apparent income was the real income, namely, 3 per cent consols. As these were permanent, their being bought at a premium resulted in no tendency to diminish in value, and, consequently, the life tenant was entitled to the whole of the periodic payment. *New England Trust Co. v. Eaton*, 140 Mass. 532, 539, 540, 4 N. E. 69.

<sup>32</sup> In *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69; *Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668; and *In re Allis's Estate*, 123 Wis. 223, 101 N. W. 365, a course of gradual amortization had been adopted by the trustees and was approved by the court. In *Matter of Stevens*, 187 N. Y. 471, 80 N. E. 358, it was held that gradual amortization should have been adopted, and depreciation to the date of the account was charged to income. In *Curtis v. Osborn*, 79 Conn. 555, 65 N. E. 968, the bonds had matured and been paid before any allowance to principal on account of premium had been made. It was said that "it would have been proper" to make annual deductions from coupon; "the facts in the case at bar do not require us to decide whether the trustees failed in duty in not making such annual deductions," as the whole depreciation can be made up in a lump out of the income of the trust fund. *In re Schaefer*, 165 N. Y. Supp. 19, 176 N. Y. App. Div. 906, deduction of the whole amount of the premium from the first coupons was disallowed.

<sup>33</sup> Cf. *In re Schaefer*, 165 N. Y. Supp. 19, 30, 176 N. Y. App. Div. 906.

<sup>34</sup> The following discussion of the several methods by which the gradual amortization of a premium may be effected is based upon WILLIAM MORSE COLE, ACCOUNTS, THEIR CONSTRUCTION AND INTERPRETATION, rev. ed., chap. 12.

For his criticism of the following discussion, and of the discussion of the calcula-



principal amount at a fixed date and of a definite number of smaller amounts, annually, semi-annually or quarterly, in the meantime. Each one of these amounts has, on the basis of any given rate of interest, a certain present worth; that is, corresponding to each amount there is a certain sum which, invested at compound interest at a given rate, will produce the amount by the time it falls due. This present worth is simply the amount less compound discount at the given rate. The sum of the present worths, at any given interest rate, of the periodic interest payments and the principal sum, is the present worth of the bond at that rate. Extended tables have been worked out showing the present worths of bonds at each of a great variety of assumed rates of interest.<sup>35</sup> The tables take into consideration, necessarily, the nominal interest the bond bears, the number of interest payments per year, and the number of years the bond has still to run; since the number, amount and time of the several payments that are still to be made are the essential factors — together with the assumed rate of interest — in determining present worth. These tables can be worked forward and backward. That is, instead of looking up in the table a given market or other rate of interest and learning the present worth of the bond at that rate, one may look up in the table a given present worth or purchase price and find the rate of interest which the bond will pay. The exact sum paid for the bond can seldom be found in the table, because market quotations are in eighths of one per cent, while theoretical present worths end in all sorts of figures; but the slight difference between the price paid and the nearest present worth to be found in the table (and also the discrepancy caused by buying bonds between interest dates) can readily be accounted for.<sup>36</sup>

The rate of interest which the bond is really to earn is called the basis or basic rate. The basic rate is not the rate at which the bond will pay interest, throughout the term, on the sum originally invested; it is the rate at which it will pay interest on the sums that remain invested from time to time. For the first interest period, interest at this rate will be earned on the whole purchase

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tions involved in the accumulation of discount, I am indebted to Donald English, Assistant Professor of Economics in Cornell University.

<sup>35</sup> *E. g.*, CHARLES EZRA SPRAGUE, *EXTENDED BOND TABLES*.

<sup>36</sup> See COLE, *ACCOUNTS*, 179, 184, 195 *ff.*

price of the bond; but the excess of the first coupon over this interest will be a repayment of principal, and the amount that remains invested in the bond — its book value — will be reduced to the extent of this repayment. The next coupon will contain interest at the basic rate on this reduced value only; the remainder will be a repayment of principal.

When the trustee has found the basis, he may effect the gradual amortization of the premium in one of three ways. (1) The correct method is, clearly, to pay the life tenant interest at the basic rate on the book value of the bond — which is of course a decreasing value; put into the amortization fund what remains of the coupons after deducting this interest; pay the life tenant whatever interest the amortization fund earns; and allow the amortization fund to accumulate arithmetically, without interest, for the remainderman. The life tenant will receive a decreasing income from the bond and an increasing income from the amortization fund, and the sum of these will always be the income that is actually earned. Since what is subtracted from the book value of the bond, and no more, is added to the amortization fund, the sum of the amortization fund and the current book value will be constant, and the total income will tend to be constant: it will vary only to the extent that the amortization fund earns interest at a different rate from the bond. And since the rate of interest which the bond pays on the money that remains tied up in it has been determined at the start, it follows by hypothesis that, if interest at that rate on that amount is paid to the life tenant out of the coupons, the balance of the several payments which the bond debtor makes will in the aggregate just replace the principal. Under this method, therefore, the amortization fund at maturity will amount exactly to the premium. "This scheme is perfect."<sup>37</sup>

A comparatively rough and ready method is (2) to pay to the life tenant, out of the coupon, interest at the basic rate on the amount originally invested in the bond, and pay the balance of the coupon into the fund which is to amortize the premium. The interest which the amortization fund earns is then paid into that fund, and not to the life tenant. This method has the advantage of giving the life tenant an unvarying income. If the amortization fund happens to earn interest at exactly the basic rate, the life

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<sup>37</sup> COLE, ACCOUNTS, 189.



tenant's share will evidently be the same as under the first method, since he will receive interest at the same rate on the same total amount. It follows that the amortization fund's share will be the same as under the first method;<sup>38</sup> which is to say that the premium will be just wiped out at maturity. But all this assumes that the amortization fund will always earn the same rate of interest that the bond earns, and this second method is just only when that coincidence occurs. For in whatever form the trust fund is invested, the life tenant is entitled to the interest which the fund actually earns, and the remainderman to no more nor less than his principal. But, as the amortization fund grows and the book value of the bond is reduced by the successive amortizations, the whole sum that was once invested in the bond is no longer invested in it: the amount of the several amortizations has been repaid by the bond debtor and stands invested in other ways. The amortization fund is as much a part of the trust estate as any other, and the life tenant should receive the interest that it earns. If it is earning four or six per cent, the fact that it would be earning five if it were still invested, as it is not, in the bond, is no reason for paying the life tenant five instead of the four or six that it is earning. The principal, too, is practically certain to be either more or less than replaced if its replacement is made to depend, as it does under this second method, on the uncertain interest which the amortization fund can earn.

A third method, in some use because of its simplicity, is (3) to amortize the entire premium in equal periodic instalments; as, for example, a ten-dollar premium on a bond with ten years to run is amortized at the rate of a dollar a year. The interest on the amortization fund is paid to the life tenant, as it should be, and the principal is exactly replaced at maturity, as it should be. But in

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<sup>38</sup> Under the first method the amortization fund receives the whole of the coupon less interest on the latest book value of the bond; under the second, it receives the coupon less interest on the purchase price of the bond. The amount it receives from the coupon is therefore less, under the second method, to the extent of interest at the basic rate on the difference between purchase price and last book value. But that difference is exactly what the amortization fund already contains; and interest on the amortization fund, under the second method, is paid into the fund. The amortization fund therefore receives in one form what is denied to it in another, so long as the fund earns interest at the basic rate.

For a tabular illustration of the identity of the two methods while the fund earns interest at the basic rate, see COLE, ACCOUNTS, 186, 188.

the early years, before amortization has gone far, more money is invested in the bond, and consequently a larger fraction of the coupon consists of interest than in the later years. It follows that this method of equal and unsupplemented payments to the life tenant gives him first less interest than the bond is earning, and then more; first too little and then too much. Even if he lives till the maturity of the bond, so that the deficiency is matched by the excess, having a larger income than he is entitled to in the later years may be no compensation to him for having a smaller income than he is entitled to in the earlier; and, if he dies before the bond matures, he is not made even mathematically whole.

The decided cases are obscure and conflicting as to the particular variety of gradual amortization which should be adopted,<sup>39</sup> and contain little or no discussion of the point.

With respect to accounting for discounts, there are practically no authorities. Forty years ago, before the modern doctrine concerning premiums was developed, the Surrogate of New York County held that the remainderman and not the life tenant was entitled to profit from the maturing of bonds bought at a discount. No distinction between the gains in suit and any purely accidental increase in the value of an investment occurred to the court.<sup>40</sup>

<sup>39</sup> The method approved in Massachusetts and Wisconsin is either (1) or (2); *i. e.*, one of the two methods which involve the use of bond tables, and appears to be (1), as nothing is said of paying interest on the amortization fund, or anything but the successive deductions from coupon, into that fund. *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69; *In re Allis's Estate*, 123 Wis. 223, 230, 101 N. W. 365.

(2) The second method seems to be the one to which the Connecticut court leans: "It would have been proper for the trustee to have paid to the life tenants annually out of this \$600 such sum only as would leave a balance which, when properly invested year by year, would have amounted to" the premium at maturity. *Curtis v. Osborn*, 79 Conn. 555, 560, 65 N. E. 968. This was *obiter*, however.

(3) The third method seems to have been approved in New Jersey. The trustees had "set aside out of each installment of interest received from said bonds a sum sufficient, with other like installments similarly retained, to make up at the maturity of the said bonds a sum equal to the premium." As to bonds bought by the trustees, this course was approved. *Ballantine v. Young*, 74 N. J. Eq. 572, 70 Atl. 668.

It is by no means evident that any court would insist upon any particular one of the three methods if a different method of gradual amortization were presented to it for approval.

<sup>40</sup> *Townsend v. U. S. Trust Co.*, 3 Redfield Sur. 220 (1877). A trustee had invested for each of three life beneficiaries \$5,000 in United States bonds; and "when said stock became due and payable, the said trustee sold the same and realized therefor the sum of \$5,400 upon each of said three trust funds of \$5,000." He thereupon invested \$4,962.50, for each beneficiary, in \$5,000 of United States bonds, which



This was parallel to the early and now superseded tendency regarding premiums, and furnishes practically no evidence of the present law of New York.<sup>41</sup> Mr. Justice Holmes, speaking for the Massachusetts court in *Hemenway v. Hemenway*,<sup>42</sup> said *obiter* that no rule for discounts, and certainly none which would give the benefit of them to life tenants, could be laid down; but this was interwoven with what was said in that case, and in effect overruled in *New England Trust Co. v. Eaton*,<sup>43</sup> against the amortization of premiums. When *New England Trust Co. v. Eaton* established the amortization rule for premiums, the dissenting opinion repeated the *dicta* of *Hemenway v. Hemenway* concerning discounts, and indicated that they fell with the rest of *Hemenway v. Hemenway*. The Court of Appeals of Kentucky, which dissents from the amortization rule as to premiums, has delivered a *dictum* against giving life tenants the benefit of discounts.<sup>44</sup>

The tendency of a discount bond to rise to par as it approaches maturity is less regularly visible than the tendency of a premium bond to fall to par, because unfavorable business or market conditions may counteract it and prevent the bond from rising; but the tendency is always present. The bond bought at 90 is some entity's obligation to pay 100; and obligations have a tendency, other things being equal, to be discharged. The case is not like that of stock in the modern sense of that word. Stock bought at 90 is nobody's obligation to pay 100. If stock is worth 90 today, and all conditions remain as they are, it will be worth 90 in ten years. If a bond with ten years to run is worth 90, and all conditions remain as they are, it will be worth 100 in ten years. The stock which stands below par has on that account no more a tendency to rise than it has a tendency to fall. The bond which stands below

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rose in value above par. The life beneficiaries petitioned for an order directing the trustee to pay them the two gains of \$400 and \$37.50. The court denied the petition on the ground that the gains belonged to principal.

<sup>41</sup> In *Matter of Gerry*, 103 N. Y. 445, 451, 9 N. E. 235, the Court of Appeals said of *Townsend v. U. S. Trust Co.* and another case, "These decisions accord with our views"; but the court of appeals was not passing upon, or apparently intending to discuss, gains resulting from discounts.

<sup>42</sup> 134 Mass. 446 (1883).

<sup>43</sup> 140 Mass. 532, 4 N. E. 69 (1886).

<sup>44</sup> *Hite's Devises v. Hite's Executor*, 93 Ky. 257, 269, 20 S. W. 778 (1892).

PERRY ON TRUSTS, 6 ed., § 546, says: "If the securities mature or are sold, the increased value belongs to the remainder," but his citations include no cases of discount.

par may fall, but it has a tendency to rise, since if nothing untoward occurs it will rise. If this constituted a tendency to yield a profit, discount bonds would be so popular that they would soon cease to be discount bonds. If \$90 is paid for a bond, and the promised \$100 is received for it at maturity, it is not that there has been a profit of \$10, in consequence of which the trust estate should stand increased: it is that the coupons which have been paid from year to year have been only a part, and the \$10 are the rest, of the income which the bond was expected to produce and has produced.

The real cause of the failure of some courts to recognize that the coupons on premium bonds contain principal, and that the sale or redemption price of a discount bond contains income, is the circumstance that periodic payments are commonly income and a lump payment is commonly principal. Nothing could be more accidental or less significant. There is nothing to prevent an arrangement by which a part of a principal sum — or the whole of it, as in the case of true annuities — is repaid in periodical instalments, or an arrangement by which a part or the whole of income is withheld and accumulated for years and paid in a lump. If it were practicable to divide each coupon on a premium bond into two coupons, one labeled interest and one principal, and to divide the sum received on the sale or redemption of a discount bond into two checks, one labeled principal and the other accumulated interest, no one would have difficulty in recognizing that the sums were what they were called. The fact that the dividing and labeling is left for the recipient to do does not affect the nature of the payments. That which in fact constitutes a repayment of purchase price is principal, and that which is an expected increase over purchase price is income.

The disapproval of the accumulation of discounts has all emanated from courts which certainly or probably took the anti-amortization view of the premium question. It therefore strengthens rather than weakens the presumption that courts which amortize premiums will give life tenants the benefit of discounts. That presumption is strong. The two processes are not only essentially alike: the arguments against them are alike, and a logical court which finds these arguments insufficient as to premium should also find them insufficient as to discount. Thus:



1. It may be said that a discount does not necessarily mean that the coupon is small so that the life tenant, if he is not given the benefit of the approach to maturity, will get a small return. But it was said with great force by Mr. Justice Holmes, in *New England Trust Co. v. Eaton*,<sup>45</sup> that a premium does not necessarily mean that the coupon is large so that the life tenant, if the premium is not amortized, will get a large return. The answer to both arguments is of the same sort. When a given proper investment has been made, the life tenant is entitled, not to a small, moderate or large income from the investment, but to the income which it happens to bring in. Payments should be made out of the coupon into principal to amortize a premium, not because the coupon is too large for the life tenant's good, but because it is not all income. Similarly, the amount of a discount, if it is realized, should be paid to the life tenant in addition to his coupon, not on any theory that the coupon is small, but because, however large it is, it is not the whole of the income.

2. It may be said that bonds sell at a discount not so often or so much because the interest rate is low as because of inferiority in respect to safety, marketability and term; and that the increment of value should therefore profit the remainderman, who chiefly suffers from the disadvantages which that increment offsets. What force there is in this argument is equally present in the corresponding objection to the amortization of premiums — the objection, namely, that bonds sell at a premium not so much because the interest rate is high as because of superiority in safety, marketability and term, and that the decline in the value of the bond should therefore fall upon the remainderman, who chiefly profits from the advantages which the decline offsets. The Pennsylvania court is impressed by this argument, and refuses to amortize premiums.<sup>46</sup> Similarly Justice Holmes said in the dissenting opinion in *New England Trust Co. v. Eaton*,

"Within a few years the first mortgage four per cent bonds of a flourishing railroad have sold at eighty-five, while at the same time United States four per cents stood at one hundred and twenty or more, and city fours of a high rank stood at about par."<sup>47</sup>

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<sup>45</sup> See note 42, *supra*.

<sup>46</sup> *Penn-Gaskell's Estate* (No. 2), 208 Pa. 346, 57 Atl. 715 (1904).

<sup>47</sup> 140 Mass. 532, 547, 4 N. E. 69.

These great differences in price he accounted for largely by differences in supposed safety; and his conclusion was that the burden of premiums should fall on remaindermen rather than on life tenants. These objections to amortization and accumulation make of trust accounting a matter of rewards and penalties: rewards for risks and penalties for safety. If that attitude were defensible, it would not follow that the whole retribution should fall upon the remainderman, for the life tenant also is concerned with safety. But the attitude is indefensible. The duty of trustees and of the courts which supervise them is not to reward those who bear more risk or penalize those who bear less, but to turn over principal to whom principal is due and income to whom income. The coupon on a premium bond being part principal, that part should go to the remainderman, however safe the investment, however largely the premium was paid for safety, and however much more important safety may be to a remainderman than to a life tenant. The increase in the value of a discount bond being income, that increase should go to the life tenant, however unsafe the investment, even if the discount reflects the unsafety. In the same opinion Mr. Justice Holmes said: "The necessary premise for casting the whole burden of repaying premiums upon interest is that the premium is paid solely for interest above the market rate." Not at all. It should by all means be granted that the trustee who buys a premium bond is likely to pay something for safety; but that is merely to say that he makes an investment on which the income is less than it would be if it were less safe. It is none the less this very income, and not that something more which the coupon represents, which should go to the person entitled to income. If a trustee is, as may well be granted, influenced by the idea of a liberal income in buying a discount bond, the life tenant is none the less entitled to the whole of the income, and not merely to that part of it which comes in the shape of coupons.

3. On account of business conditions general or particular, the value of a bond bought at a discount may not increase for a time or at all. This is true, but not truer than that the value of a bond bought at a premium may not diminish for a time or while the trust estate holds it, one of the considerations which led the Pennsylvania court to reject amortization.<sup>48</sup> But in *New England Trust*

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<sup>48</sup> See note 44, *supra*.



*Co. v. Eaton*,<sup>49</sup> income was properly charged with premiums although the bonds had actually increased in value. The life tenant got no right to a part of the remainderman's principal from the fact that the remainderman had made a profit and did not appear to need the money. If the expected increase in the value of a discount bond is not realized, a question arises; but if the increase is realized, the life tenant should not be deprived of it on the ground that it might not have come in. The fact that it may not come in no more makes it profit than the fact that a premium bond may rise for a time prevents its coupons from being part principal. If whatever is uncertain were profit, nothing would be income.

4. It is sometimes suggested that amortization is unnecessary because, if trustees are impartial, premiums and discounts and their accompanying advantages and disadvantages will tend to balance each other, and, if trustees are not impartial, they can be called to account. Thus, Judge Holmes, speaking for the Massachusetts court in *Hemenway v. Hemenway*, said:

"Our refusal to lay down a general rule does not put the capital in danger of being exhausted. . . . The answer to the extreme cases supposed on behalf of the remaindermen is, that, if they were conceivable where the trustee was acting in good faith, they would be inconsistent with that reasonable discretion which he must exercise at his peril. . . . We have no reason to doubt that, taking the whole administration of the trust into account, the balance has been evenly held between the two parties, and the relation between the remaindermen and the life tenants is such that there is less call than there might be in some other cases for treating the life tenants with great strictness."<sup>50</sup>

This suggestion of a balancing of course has validity only if there is no good reason for regarding life tenants and remaindermen as definitely entitled to accumulation and amortization, and it is submitted that there is excellent reason for regarding them as so entitled.

One objection which is made to the amortization of premiums becomes an argument, as far as it goes, in favor of giving life tenants the benefit of discounts. It is suggested in some cases that a wish

<sup>49</sup> See note 42, *supra*.

<sup>50</sup> *Hemenway v. Hemenway*, 134 Mass. 446, 452, 453 (1883). Cf. *Hite's Devises v. Hite's Executor*, 93 Ky. 257, 269, 20 S. W. 778 (1892); *American Security and Trust Co. v. Payne*, 33 App. D. C. 178, 188 (1909).

on the part of the creator of a trust to provide for someone now is more impressive and presumably more earnest than a wish to provide for someone else later: in other words, that other things being equal, life tenants should be preferred to remaindermen. The Pennsylvania court and the Massachusetts court have been influenced by this idea.<sup>51</sup> To favor the life tenant, of course, while it requires that premiums be not amortized, requires that discounts be accumulated.

Discounts as well as premiums should, then, be prevented from changing the size of the trust fund. Which of the alternative means of reaching the result should be adopted in the case of discounts — the payment of increments to the life tenant when they are realized, on the sale or payment of the bond, or periodically as they theoretically accrue — is another open question. The periodic payment accords, in the superficial matter of periodicity, with the practice by which premiums are amortized, and a decent argument may be made in support of it. It may be said: There is in theory a fatal tendency for the value of the bond to rise to par as it approaches maturity. If the tendency were sometimes present and sometimes absent, its occasional operation would result in an accidental increase in the value of the estate, by which the remainderman should profit. Since the tendency is always present, so that no profit is involved and the increment belongs to the life tenant, he should have the increment though the trustee, by not selling the bond, prevents it from being realized, and even though counteracting conditions prevent the value of the bond from rising. This course of annual payments will lead, undoubtedly, to sales of trust property from time to time to procure money for the life tenant, and occasionally to a decrease in the whole trust fund. But if the theoretical annual increase in the value of the bond has taken place, there will be no decrease in the value of the whole fund, and when the theoretical increment has failed to take place in a particular year, but is made up later, the decrease in the value of the fund will be only temporary. If the bond fails ever to regain its theoretic value, and neither is nor can be redeemed or sold at that value, the

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<sup>51</sup> "The life tenant . . . is the primary and immediate object of the testator's bounty." *Penn-Gaskell's Estate* (No. 2), 208 Pa. 346, 348, 57 Atl. 715 (1904). The life tenants, the testator's sons, were "the prominent objects of his bounty." *Shaw v. Cordis*, 143 Mass. 443, 446, 9 N. E. 794 (1887).



principal of the fund will indeed suffer a permanent loss. But this loss will be due to business or market accidents. The bond has not done what was expected of it. Preferred stock is expected to be worth as much ten years from now as now, and if it fails to be, the loss is a loss of principal. A discount bond is expected to be worth more ten years from now than it is now, and if it fails to be, the loss is equally a loss of principal. If it is so treated, and the life tenant is allowed his full theoretic interest, has he profited at the expense of the remainderman? Is the case not rather that he has come out even and the remainderman is suffering from an unfortunate investment?

The reasons for rejecting this argument are overwhelming. The reduction of the trust fund as a whole by the sale of other securities, in order that an income which has not come in may be paid to the life tenant, is as objectionable theoretically as it is practically. When is the process to stop? If the discount bond stops paying interest altogether, is the imaginary appreciation in its value, and the amount of the worthless coupon as well, to be paid to the life tenant out of the trust estate? The bond ought to have produced it, and if produced it would have been income. No more than that can be said for awarding an imaginary appreciation to the life tenant, at the expense of the estate, in any case. In spite of the analogy between premiums and discounts, there is a great difference between periodic amortization and periodic accumulation. When premiums are amortized out of coupons, cash which has actually come in from an investment is put to the account of the person who theoretically ought to have it — the remainderman. If the bond has risen in value, he may not seem to need the money, but at least the money has come in. On the other hand, if the life tenant is given periodic sums to efface a discount, he is given either money which has not come in from the investment but will later, or money which the investment not only has not produced but never will produce. Neither theory nor analogy requires the payment to the life tenant, on account of an investment, of money which that investment has not brought in. The only theory which has been or should be adopted in respect to premiums or discounts is a theory for disposing of money which comes to the trustee. The regular annual enrichment of the life tenant to efface a discount would be analogous not to the mere amortization of a premium out of the cou-

pon on the premium bond, but to the amortization of a premium out of independent items of income when the coupon has not been paid.

The calculations involved in accumulating discounts correspond to those in amortizing premiums, with the difference that the accumulation is realized in a lump and should therefore be paid to the life tenant in a lump, while the premium is recovered in instalments and should therefore be restored to principal in instalments. The rate of interest which the bond will earn should first be determined from a table of bond values. The first coupon, instead of containing, like the coupon on a premium bond, more than interest at this rate, contains less. The difference should be added to the book value of the bond, and, for the second interest period, interest should be reckoned on this increased principal. The value of the bond should be gradually written up, instead of being written off as in the case of premiums; and, just as in the case of premiums, interest should always be reckoned on the current book value. This gives the life tenant interest on his forced savings as well as on the original investment. As some of this reckoned interest — all in excess of the coupon — remains tied up in the bond till it matures or is sold, only the coupon should be paid to the life tenant in the meantime; the rest of the interest should be allowed to accumulate for him and be paid to him, or to his representatives if he is dead, if and when it is realized. This corresponds as closely as the case permits with the first method for amortizing premiums. If the life tenant lives to see the trust estate realize on the bond; or if the trustee disposes of it on the life tenant's death, as he should if practicable;<sup>52</sup> the whole accumulation of earned interest should be turned over to the life tenant or his representatives. If more than the theoretical value of the bond is realized, the excess is of course a profit and belongs to the remainderman. If the trustee retains the bond after the death of the life tenant, so much accumulated interest as is ultimately realized may well be divided between the life tenant's representatives and the remainderman, in the proportion which the period during which the life tenant was entitled to the income from the bond bears to the period during which the remainderman was entitled to it; though, if the bond has a market, an alternative course is evidently to pay to the representatives of the life tenant

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<sup>52</sup> In order to determine what income can actually be realized for the period during which the life tenant was entitled to the income.



so much of the interest earned at his death as could then have been realized on sale.

If the rate of accumulation were determined by applying the basic rate of interest always to the purchase price of the bond, instead of to its growing book value, the process would be too slow to be correct in theory or just to the life tenant, and the accumulated interest would not amount to the discount by the time the bond matured. The result would be that some of the life tenant's interest would be paid, when realized, to the remainderman. The withheld increments of interest are tied up in the bond waiting to be paid, and the life tenant is as much entitled to interest on them — when it is realized — as on any other fund. This second, and erroneous, method would correspond to the second method for amortizing premiums, except that the discount bond gives rise to no separate interest-earning fund to correct the error.

To accumulate the entire discount in equal periodic instalments would be as objectionable as to amortize an entire premium in equal periodic instalments, though for a converse reason. As the book value of the discount bond is less in the early years than in the later, less interest is earned at first than later. It follows that if the life tenant is credited with a uniform amount of interest, he is in the early years credited with too much; so that, if the bond were sold at a profit during these early years, a part of what was really profit would appear to be due to the life tenant as interest, and injustice would be done to the remainderman.

The gradual payment to the life tenant of the theoretic increase in the value of the discount bond, without waiting for it to be realized, was the method which presented itself to Judge Holmes as called for if premiums were to be amortized. Naturally he found it inadmissible.<sup>53</sup> If the entire consistency of gradually amortizing

<sup>53</sup> "Again, if the fiction of safety be adopted" (the fiction, *i. e.*, that all trust investments are equally safe, and premiums and discounts reflect differences in rate of interest — a fiction on which the amortization of premiums seemed to Judge Holmes to rest), "I still do not see why it does not follow that, if a bond is bought below par, the tenant for life is equally entitled to an annual increment on the interest received by him as the bond gradually approaches maturity. This was argued in *Hemenway v. Hemenway*, but I must believe that such a doctrine would disconcert trustees not a little. Of course, it would call for sales of capital from time to time to produce funds for the tenant for life beyond the amount received on the bonds." Holmes, J., in *New England Trust Co. v. Eaton*, 140 Mass. 532, 547, 4 N. E. 69 (dissenting opinion).

premiums, and at the same time paying life tenants the increment resulting from discounts only when that increment is realized, had been fairly presented to him, one may doubt whether he would have been led to reject the whole principle of amortization and accumulation.

In summary: 1. The clear weight of authority and the present tendency of the law support the amortization of premiums. 2. Regarding discounts, there is practically no authority. 3. Sound theory requires both the amortization of premiums and the accumulation of discounts. 4. The connection between amortization and accumulation is so close that it may confidently be hoped that accumulation, in some form, will be adopted. 5. The amortization of premiums should, and does, take the form of a series of deductions from coupons for the benefit of principal. These deductions should consist of the difference between the coupon and interest at the basic rate on the latest book value of the bond. 6. Discounts should be accumulated by reckoning interest at the basic rate on the latest book value of the discount bond; but the accumulation should be paid to the life tenant in a lump when, and to the extent that, it is realized on the sale or payment of the bond.

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# HARVARD LAW REVIEW

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STATUS OF ALIEN ENEMIES<sup>1</sup> IN COURTS OF JUSTICE. — "The authorities show that, though an alien enemy cannot sue in the courts of this country, he can be sued." The Attorney-General, as *amicus curiae*, in *Porter v. Freudenberg*, [1915] 1 K. B. 857, 863, thus summed up the situation of alien enemies in the courts of justice.<sup>2</sup> There are so many circumstances under which the question of the status of alien enemies<sup>3</sup>

<sup>1</sup> The expression "alien enemies" is not a happy one. The persons intended to be described by it are not necessarily aliens; they may be neutrals or even subjects of the home state. See note 3. "Enemy aliens" is no better, for the same reason. "Enemy" is more accurate, but is perhaps likely to be understood in a more popular sense of an opposing military force or of a hostile state. "Enemy" is the term used in the Trading with the Enemy Act enacted by Congress and approved October 6, 1917.

<sup>2</sup> The Lord Chief Justice in delivering the opinion of the Court of Appeal gave the following reasons for the rule (page 880): "To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be . . . to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. *Prima facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy."

<sup>3</sup> Who is an alien enemy? "Its natural meaning indicates a subject of enemy nationality, that is, of a State at war with the King, and would not in any circumstances include a subject of a neutral State or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. . . . It is clear law that the test [for the purpose of the enforcement of civil rights] is not nationality but the

may arise that a more detailed examination seems desirable. For example, in considering the rule that an alien enemy cannot sue, does it make any difference whether the suit is brought before or after the outbreak of war? In *Le Bret v. Papillon*, 4 East, 502, the plaintiff in an action of assumpsit was an alien friend at the time he brought the action, but war broke out before the plea was filed. Lord Ellenborough held the plaintiff barred from further maintaining his action.<sup>4</sup> In each of two recent cases, *Plettenberg v. Kalmon*, 241 Fed. 605, District Court, S. D. of Ga., and *Stumpfs v. Schreiber Brewing Co.*, 242 Fed. 80, District Court, W. D. of N. Y., an action was brought before the war by a German subject, in the first case to recover a balance of account for goods sold, and in the second case for the infringement of letters patent. In each case the court ordered a suspension of the proceedings until peace, and not a dismissal of the action.<sup>5</sup>

Under the English and American law, therefore, an alien enemy cannot begin an action, nor, if the action had been begun before the outbreak of war, can he continue its active prosecution.<sup>6</sup>

Such was also the French law until the close of the Napoleonic wars.<sup>7</sup>

place of carrying on business." [1915] 1 K. B. 867, 868. It will be noticed that the test is not whether the party is personally present in (a) enemy territory or (b) the home or neutral territory, but the place of carrying on business. That is to say, one may be an alien enemy, and yet be present in the home territory. This is to be borne in mind in considering on the one hand the possibility of securing service of a writ on an alien enemy, and on the other hand the possibility of his appearing and defending an action against him. However, the typical case of an alien enemy is one who is carrying on business in hostile territory, and is present there. *Ibid.*, 869.

By section 15 of the British Trading with the Enemy Amendment Act, 1916, the expression "enemy subject," as used in the Act, is defined as the subject of a state for the time being at war with the King.

<sup>4</sup> In *Robinson v. Continental Ins. Co.*, [1915] 1 K. B. 155, counsel contended that the decision in *Le Bret v. Papillon* must be taken to have been reversed by *Flindt v. Waters*, 15 East, 260. But the last-mentioned case seems to have turned on a point of pleading.

<sup>5</sup> Where, however, the alien enemy is present in the home country by permission of the sovereign of the latter, he may maintain an action; *Princess of Thurn & Taxis v. Moffitt*, 31 Times L. R. 24.

In *Sparenburgh v. Bannatyne*, 1 B. & P. 163, a prisoner of war was allowed to sue in assumpsit for wages earned by him while a prisoner.

*Plettenberg v. Kalmon*, *supra*, was followed in *Speidel v. Barstow Co.*, 243 Fed. 621 (District Court, R. I.), where all the plaintiffs were German subjects, but some of them lived in Germany, and others in the United States.

<sup>6</sup> The extraordinary misunderstanding in regard to the meaning of article 23 (h) of the Regulations Respecting the Laws and Customs of War, annexed to IV Hague Convention (1907) is discussed in [1915] 1 K. B. 874-80. Article 23 (h) states that: "In addition to the prohibitions provided by special Conventions, it is particularly forbidden . . . (h) To declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings." Germany and France maintained that the acceptance of this article compelled the United States and Great Britain to abolish their rule that enemy subjects may not sue. But the United States and Great Britain maintained (and so the Court of Appeal held) that the article had nothing to do with the municipal law of these countries but concerned only the conduct of armies in occupied territory. See 2 OPPENHEIM, INT. LAW (2 ed.) 134.

<sup>7</sup> In 1704 the Parliament of Douai decided that "pendant la guerre un sujet d'une domination ennemie ne pouvait agir contre un sujet du Roy, d'autant plus que Sa Majesté défendait par ses édits et déclarations d'avoir aucune communication avec les ennemis." Pinault des Jaunaux, tome 3, § 62. See also MERLIN, RÉPERTOIRE, MOT "GUERRE."



But "in fact, never, since this epoch, even during the Franco-Prussian war of 1870-71, has the French Government prohibited the nationals of the States with which we were at war from exercising in France the same rights as in times of peace, unless, of course, their acts were of such a nature as to imperil the interests of the national defense."<sup>8</sup>

If, however, it be true that such a relaxation of the former rule had been established before the present war, it is at least doubtful whether the milder view prevails today. Conflicting opinions have been expressed by the French tribunals. A judgment of the court of Paris (fourth chamber), April 20, 1916, is favorable to the alien enemy, admitting his right to appear but suspending the execution of a judgment in his favor if the result of carrying it out would be injurious to France. On the other hand, an opinion by the Tribunal of the Seine, May 18, 1916, denies to alien enemies the right to appear in a court of justice.<sup>9</sup> In the last-mentioned case the court laid stress on the "numerous, tragic, and cynical violations by Germany" of the obligations resting upon belligerents.<sup>10</sup>

According to a judgment of the *Reichsgericht*,<sup>11</sup> October 26, 1914, the German law provides for alien enemies the same protection which is accorded to foreigners in time of peace. But in view of the principle of reciprocity (which is favored in the law of continental Europe) it seems probable that the rights of alien enemies in German courts will as far as possible be placed on the same basis as the rights accorded to German subjects (being alien enemies) in the courts of the various countries with which Germany is at war.<sup>12</sup>

War legislation has also affected this subject. For example, the German government, on September 30, 1914, prohibited the payment of sums due in Great Britain and Ireland, and, on October 20, 1914, of sums due in France. It is said that this does not prevent a creditor domiciled in Great Britain or France from instituting an action, but he cannot secure payment of his debt.<sup>13</sup> The legislation appointing an official (known in England as the Custodian of Enemy Property; in France, as the *séquestre*; in Germany, as the *Vertreter*; in the United

<sup>8</sup> Professor VALÉRY (University of Montpellier), 42 CLUNET, 1012.

<sup>9</sup> Both are reported in 23 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 380-386.

<sup>10</sup> French writers give the same explanation for the refusal to extend to alien enemies in the present war the right to appear in French courts of justice, "Tenons donc pour acquis qu'à l'heure actuelle l'accès de nos tribunaux est interdit aux ressortissants des États ennemis. Mais il est clair que cette règle n'ayant été établie qu'en haine de ces personnes, nos nationaux ne doivent pas avoir à souffrir de son application," VALÉRY, in 42 CLUNET, 1015. So COURTOIS, *ibid.*, 513.

Compare with this Marshall, C. J., in *The Nereide*, 9 Cr. 388, 422: "The court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government, not of its courts."

<sup>11</sup> 42 CLUNET, 785.

<sup>12</sup> On the eve of his departure from London, in August, 1914, the German Ambassador informed the British Foreign Office that "in view of the rule of English law, the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No such undertaking was given. See [1915] 1 K. B. 879.

<sup>13</sup> 42 CLUNET, 790.

States, as the Alien Property Custodian) to take over the property of alien enemies, should also be noted. In so far as this official has authority to collect the property of enemy aliens, it seems only proper that he should have the right to bring and defend actions in connection therewith.<sup>14</sup>

The most difficult questions seem to arise under the second part of the Attorney-General's summary, namely, that an alien enemy can be sued. This statement is reiterated almost without a dissent.<sup>15</sup> But perhaps certain distinctions should be made. If an alien enemy happens to be present in the home country, he may be served with process. But in most instances he is not only resident in hostile territory but he is actually there. How can he be reached by legal process? If he has property within the home jurisdiction, that property may be seized and adjudicated upon in his absence. To be sure, it is customary to give notice by publication in some form, and a distinction may be drawn between such a notice in time of peace (when, if it reaches the defendant, he may appear and answer) and in time of war (when he has no right, because of the rule of non-intercourse, to come into court). However, it is not the publication of notice which confers jurisdiction, but the presence of the property within the jurisdiction.

Where the defendant had an agent in the home country, appointed before the outbreak of war, the Court of Appeal in *Porter v. Freudenberg*<sup>16</sup> was of opinion that substituted service might be made on the agent, though it left open to the judge at chambers to impose further terms as to advertisement or other means of communication. But this places the agent in an awkward position, for if he desires additional instructions from his principal, how is he to obtain them except by communication across the line of war? And suppose (as is more likely to be the case) there is no pre-appointed agent? The court in *Porter v. Freudenberg*<sup>17</sup> is quite clear that the alien enemy may be sued, although it admits that there was no direct decision to that effect until the case of *Robinson v. Continental Ins. Co. of Mannheim*.<sup>18</sup> But the court also points out (page 887) that the alien enemy is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against

<sup>14</sup> Section 12 of our Trading with the Enemy Act provides that the custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession. As to France, see 42 CLUNET, 1019. As to England, see *Cotinho Caro & Co. v. Vermont & Co.* [1917] 2 K. B. 587.

<sup>15</sup> Dr. Baty, with characteristic independence of mind, enters a protest. "It is perfectly inconsistent with the whole doctrine of the suspension and cancellation of contracts, as well as with the substantial reason for non-intercourse (namely, the danger of permitting communication) and the historical reason (namely, the want of a *persona standi in judicio*), that an alien enemy should be capable of being sued during war. How can he properly defend himself? His position would be most unfortunate and most unjust." BATY AND MORGAN, WAR, 288.

<sup>16</sup> [1915] 1 K. B. 857, 890.

<sup>17</sup> *Ibid.*, 882.

<sup>18</sup> *Ibid.*, 155. In that case a British subject had brought an action against a German insurance company, and the pleadings had been closed, before the outbreak of war. An application was made by the defendant to stay the action during the war. The application was refused.

According to *Halsey v. Loewenfeld*, [1916] 1 K. B. 143, while an alien enemy may defend a suit brought after the outbreak of war, he cannot have process to bring in third parties who he claims should indemnify him.



him,<sup>19</sup> and (page 890) that "there is little, if any, value in obtaining judgment in our courts in default of the appearance of the defendant resident in an enemy State, unless there is property in this country which can be reached in execution of the judgment."<sup>20</sup>

By the Legal Proceedings against Enemies Act (5 GEO. V, c. 36), where a British subject brings an action against an alien enemy claiming a declaration as to the effect of the present war on rights or liabilities of the plaintiff or defendant under a contract entered into before the outbreak of war, leave may be given to issue a writ of summons for service out of the jurisdiction under certain circumstances.<sup>21</sup>

What is the situation as to appeals brought after the outbreak of war? In *Porter v. Freudenberg*<sup>22</sup> a distinction was drawn between an appeal by an alien enemy defendant and by an alien enemy plaintiff. In the first, the right to appeal followed as an incident of the fundamental right of the defendant to appear and defend.<sup>23</sup> But in the second, the right of appeal was denied on the same principle which prohibits the alien enemy from bringing an action.

The difficulties by which the courts are faced in cases where an alien enemy is a party arises out of the desire of the judges (by training and experience, and on principle) to do justice between the parties litigant,<sup>24</sup> and the impossibility of dealing fairly with both sides under the abnormal conditions of war. Suppose the plaintiff claims a lien on property within the home jurisdiction, but the owner is an alien enemy in hostile territory. The property is within the jurisdiction of the court, and may be dealt with by it; but under the rule of non-intercourse, the owner

<sup>19</sup> By our Trading with the Enemy Act, § 3, par. (c), it is unlawful to send, take, or transmit out of the United States any letter or other writing, or any telegram, cablegram or wireless message or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy. Provision is made for licenses by the President. It seems, therefore, that in the absence of license, it is unlawful to send a notice to a defendant in Germany. But suppose that in some way the defendant in Germany becomes aware of the suit pending, may he appoint counsel in the United States to represent him? Section 2, par. (c) of the act includes in trading with the enemy, the performing of "any contract, agreement, or obligation." This language appears broad enough to prohibit counsel from accepting the charge of litigation. It is, of course, open to judicial interpretation by which a license might be implied permitting intercourse for purposes of litigation.

<sup>20</sup> French writers, while insisting that an alien enemy is liable to be sued, have felt the same difficulty as to the effect of a judgment by default against him. See COURTOIS, 42 CLUNET, 512; VALERY, *ibid.*, 1019.

<sup>21</sup> "No relief other than a declaration is asked for, and it would appear that no other relief could be given, for on the whole I think the plain intention of the act is to limit the relief which can be granted to some form of declaration of rights. The result appears to be that, though rights can be conclusively declared by the Court, the British subject must wait until the end of the war before the Court can enforce those rights, and then, apparently, he must proceed by a second action, and again serve his ex-enemy defendant, in order that the Court may make orders enforcing rights which it has already authoritatively ascertained and which it cannot alter. I find it difficult to understand the principle underlying this legislation, but my duty is to act upon it." Atkin, J., in *Stevenson & Sons, Ltd. v. Aktien-Gesellschaft*, [1916] 1 K. B. 763, 766.

<sup>22</sup> [1915] 1 K. B. 857, 883-884.

<sup>23</sup> See *McVeigh v. United States*, 11 Wall. 259, commented on in BATY AND MORGAN, *WAR*, 289.

<sup>24</sup> "We should be anxious to give the Russian plaintiff, though an enemy, every advantage which the law of England gives him." Lord Campbell, C. J., in *Alcinous v. Nigreu*, 4 E. & B. 217 (1854).

cannot be reached with notice to come and defend. To proceed, seems an injustice to the enemy; but to postpone the litigation until the close of the war will be unjust to the loyal plaintiff. Under the circumstances, it is only to be expected that the court will proceed.<sup>25</sup> The case where an attempt is made to secure a merely personal judgment against the alien enemy does not offer serious difficulty. Since such a judgment is admittedly valueless,<sup>26</sup> the court should apply the ordinary rule, and confess that it has no jurisdiction.

The position of an alien enemy in a prize court has been discussed in English cases during the present war. In the first case decided by the Prize Court<sup>27</sup> the question was mentioned, but it was not necessary to decide it.<sup>28</sup> But in *The Moewe*<sup>29</sup> an appearance was entered by the German owners of the captured vessel, who claimed her under VI Hague (1907). The Attorney-General, on behalf of the Crown, admitted that in a prize court an alien enemy might appear if he could show that "*pro hac vice* he stood in a position which relieved him from the pure enemy character."<sup>30</sup> The President of the Prize Court, while convinced that in the days of Lord Stowell and Dr. Lushington the right of an enemy claimant to appear was limited,<sup>31</sup> extended the right to anyone who conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions. This is right. Prize courts are instituted for the express purpose of deciding upon questions of private rights arising out of the existence of a maritime war. Their proceedings are *in rem*, and their judgments are conclusive as to the title of the property before them.<sup>32</sup> It is, therefore, proper that anyone who claims an interest in the *res* should be permitted to appear.<sup>33</sup>

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RACE SEGREGATION ORDINANCE INVALID. — The opinion in *Buchanan v. Warley*<sup>1</sup> reflects the confusion and difficulty of that troublesome prob-

<sup>25</sup> But in *Haymond v. Camden*, 22 W. Va. 180, the court, after the civil war, set aside the enforcement of a purchase-money lien on land, the enforcement having been obtained during the war.

That a power of sale under a deed of trust may be exercised during war, see *University v. Finch*, 18 Wall. 106. Where a debtor went over the line into the Confederacy, attachment proceedings against his property were held valid. *Ludlow v. Ramsey*, 11 Wall. 581. But where he was sent across the line by the federal military authorities, held, no foreclosure of a mortgage made by him should be allowed; *Dean v. Nelson*, 10 Wall. 158; *Lasere v. Rochereau*, 17 Wall. 437.

<sup>26</sup> See note 20.

<sup>27</sup> *The Chile*, [1914] 212.

<sup>28</sup> So also *The Marie Glaeser*, [1914] 218.

<sup>29</sup> [1915] 1.

<sup>30</sup> "A claimant in a prize court is not in a position analogous to that of a defendant, but rather to that of a plaintiff." Sir Samuel Evans, [1915] 1, 17.

<sup>31</sup> In *The Hoop*, 1 C. Rob. 196, Lord Stowell mentions: coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts the enemy in the King's peace. To these Story adds a license or a treaty; 1 Wheat. (App.) 500.

<sup>32</sup> Marshall, C. J., in *The Fortitude*, 7 Cr. 423.

<sup>33</sup> Does this imply a license to communicate across the line of war for the purpose of litigation? That point was not discussed in the above cases. Perhaps it was not necessary to consider it, since the master is always present and he may represent the interests of all parties concerned with the captured ship or its cargo.

<sup>1</sup> October Term, 1917, No. 33.



lem, the place of the negro race in the United States, with which the case and the segregation ordinance of Louisville discussed therein are essentially concerned. The decision by a unanimous court reverses the holding of the Kentucky Court of Appeals,<sup>2</sup> and declares that the ordinance violates the Fourteenth Amendment. This result is reached by one of those anomalous and objectionable devices which characterize our methods of solving fundamental constitutional questions. The case arose upon a bill for specific performance of a contract, whereby the plaintiff, a white man, agreed to sell, and defendant, a colored man, agreed to buy certain real estate situated in a block in which the majority of houses were occupied by white people. The defense was based upon a provision of the contract to the effect that the purchaser should not be required to perform unless he had "the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence," and upon the ordinance above referred to.

That ordinance, approved May 11, 1914, in effect prohibits any colored person to move into and occupy, as a residence, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied for such purposes by white people than by colored people. Another section contains the converse of this prohibition; and by still another the location of residences and of places of assembly made, and the continued occupancy of such premises begun by white or colored persons, prior to the approval of the ordinance, are expressly excepted from the scope and effect thereof. It would be difficult to frame an ordinance which should accomplish any measure of segregation, with more restricted scope or less effect upon property rights than this one. If the present decision shall stand, therefore, it would seem that race segregation by legal compulsion, at least in cities, must be abandoned as a vain effort.

Doubtless this is a desirable result to reach. Quite possibly, if indeed not probably, race segregation of the block or "checker-board"<sup>3</sup> type would aggravate the very evil which its sponsors aim to cure. Be that as it may, it is difficult to feel convinced that the result has been reached by sound canons of judicial review. It is apparent that the primary, the real, interests involved in the ordinance are certain civil rights of the negro race guaranteed by the Fourteenth Amendment, and yet that the invalidity of the ordinance was determined professedly solely with reference to the property right of a white man. Here is an ordinance embodying a policy of immense potential importance to the negro race, which in terms treats both races alike, but which it requires no argument to show, in fact discriminates heavily against the negro;<sup>4</sup> and yet we are treated to the strange and disquieting spectacle of having the argument against the validity of the ordinance presented only by a white man, while a negro stands forth as its only proponent. True, as the ordinance was declared unconstitutional, the negro race cannot complain of the result. True, also, that the Supreme Court, under settled rules of practice, had no choice but to pass upon the one issue legally presented to it;

<sup>2</sup> 165 Ky. 559, 177 S. W. 472.

<sup>3</sup> See *THE NEW REPUBLIC*, December 8, 1917, an article on the South African situation.

<sup>4</sup> See 27 *HARV. L. REV.* 270.

namely, as to whether the ordinance, if enforced, would deprive the white plaintiff of rights guaranteed by the Fourteenth Amendment. This criticism is directed not at the result reached in this particular instance, nor at the Supreme Court for following a long-established rule of practice in constitutional cases, but rather at that rule or system which permits of the entertaining and determination of legal and political questions of the most profound importance to the entire country, upon such a casual, oblique and unscientific presentation of the real interests involved.<sup>5</sup>

Conceding, however, that under established practice the court had no option but to pass upon the case as presented, can the reasoning of the court by which its decision is reached be reconciled, with the long settled principle that courts shall declare legislation invalid, only when its unconstitutionality is clear beyond any reasonable doubt? Though this principle has from the beginning of our constitutional history been constantly asserted,<sup>6</sup> courts have seemingly found it difficult to determine what is meant by it in application to particular cases, and it has not by any means always been adhered to.<sup>7</sup> The rule stated repeatedly and in various forms by the Supreme Court has perhaps never been more accurately expressed than by J. B. Thayer:<sup>8</sup> "It [the court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question. That is the test which they apply — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it."

Had the instant case involved an act of Congress or even a statute of a state legislature, it scarcely could be contended that the court had observed this rule of caution, and it is at least doubtful if it gave sufficient weight to the presumption of validity attaching to the act of even such a subordinate legislative body as a city council. The Supreme Court has not formulated a scale by which to weigh the presumptions of validity attaching to the acts of Congress, of state legislatures and of subordinate legislative bodies respectively, but it may be conceded courts do, as a matter of practice and not without reason, attach somewhat less weight to the presumption of validity as to the acts of inferior officers and bodies than to those of coordinate rank. Nevertheless, if the subordinate legislature has authority to pass any act of this character, a strong presumption of its reasonableness arises,<sup>9</sup> and the opinion in the present case is

<sup>5</sup> This defect in our system by which important questions of constitutional law have frequently been decided upon the basis of subsidiary questions only is partially responsible for the recent agitation for that misconceived "reform" the "recall of judicial decisions."

<sup>6</sup> See THAYER, *LEGAL ESSAYS*, 13-19, for a citation of the earliest cases enunciating this rule.

<sup>7</sup> See address by Roscoe Pound, *TRANSACTIONS, MARYLAND BAR ASSOC.*, 1909, 301, citing FREUND, 17 *GREEN BAG*, 416; DODDS, 24 *POL. SCI. QUARTERLY*, 193.

<sup>8</sup> *Id.* 21. See also for a most helpful analysis of the rule, COOLEY, *CONSTITUTIONAL LIMITATIONS*, 7 ed., 227-46.

<sup>9</sup> *In re Anderson*, 18 Cal. App. 593, 123 Pac. 972; *In re Berry*, 147 Cal. 523; *Miller v. Birmingham*, 151 Ala. 469; *C. & Q. Ry. Co. v. Averill*, 224 Ill. 516; *State v. Trenton*, 53 N. J. L. 132. See DILLON, *MUNIC. CORP.* (5 ed.) § 649.



not convincing in its effort to show that the doubtful element therein is anything other than its reasonableness. The court says: "its solution cannot be promoted by depriving citizens of their constitutional rights and privileges"; and again, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."

But the only constitutional right which the court holds is violated is that guaranteed by the Fourteenth Amendment, that property shall not be taken without due process of law, and the property taken in this case, according to the court, is that of the white plaintiff. The court does not hold that any right of the negro has been violated. The injury done to the white man consists of the restriction imposed by the ordinance upon the sale of property. But inasmuch as it has been held repeatedly that property may be taken or its use or disposition restricted for reasonable police purposes, it is apparent that in deciding a case upon the mere assertion that property has been taken without due process the court has come dangerously near to begging the whole question.

That question, then, is simply whether the taking of property by the ordinance was reasonable, and it is difficult to see on what basis the court, could have declared it so clearly lacking in reasonableness as to be unconstitutional. In the first place, the ordinance had already been declared reasonable and valid by the Kentucky Court of Appeals,<sup>10</sup> and very similar ordinances have been sustained in other states.<sup>11</sup> In all of the cases cited in notes 10 and 11 the segregation ordinances passed upon have been declared reasonable exercises of the police power, because they would tend to prevent race friction, disorder and violence. The ordinance in question recites that it is passed for this purpose. While opinions may well differ as to the efficacy and ultimate consequences of such measures, can it be said that there is no reasonable and appropriaterelation between the end sought and the means adopted? The Supreme Court of the United States must find it difficult to say that there is no such relation, for it had already sustained state legislation requiring railway companies to provide in their coaches equal, but separate, accommodations for the two races,<sup>12</sup> and a state statute requiring the separation of the races in schools.<sup>13</sup> Many state courts have upheld similar legislation.<sup>14</sup> State courts have also sustained legislation forbidding the intermarriage between races.<sup>15</sup> There are three cases holding segregation ordinances invalid, but two of them are clearly distinguishable from the present case. In *State v. Gurry*, 121 Md. 534, such an ordinance was held invalid, but upon the express ground that it did not except from its operation rights of occupancy acquired before the ordinance was enacted.<sup>16</sup> In *State v. Darnell*, 166 N. C. 300, a similar ordinance,

<sup>10</sup> 165 Ky. 559, 177 S. W. 472.

<sup>11</sup> *Ashland v. Coleman*, 19 Va. LAW REG. 427; *Harden v. Atlanta* (Ga.), 93 S. E. 401; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139.

<sup>12</sup> *Plessy v. Ferguson*, 163 U. S. 537.

<sup>13</sup> *Berea College Case*, 211 U. S. 45.

<sup>14</sup> *Roberts v. City of Boston*, 5 Cush. (Mass.) 198; *Lehew v. Brummiell*, 103 Mo. 546, 15 S. W. 765.

<sup>15</sup> *State v. Gibson*, 36 Ind. 389. Cf. *Pace v. Alabama*, 106 U. S. 583.

<sup>16</sup> Counsel for both parties admitted that there had been "more or less friction re-

but making no exception as to occupancy already established was declared invalid as exceeding the charter powers of the city council. In *Cary v. Atlanta*, 143 Ga. 192, the ordinance was declared invalid on the ground that it worked such a deprivation of property as to violate both the Federal and State constitutions.

In this view of the case it is difficult to resist the belief that perhaps the court's decision was in reality consciously or sub-consciously based upon the conviction that the restriction imposed by the ordinance upon the plaintiff's right to dispose of his property was not clearly unreasonable in relation to the possible benefit to the public welfare, but rather upon the feeling that the ordinance, while equal and reciprocal in phraseology, as regards the two races, does in reality, the facts of life being what they are, discriminate heavily against the negro race, and that the restrictions thus put upon its rights to acquire, use and sell property with all the consequences entailed are altogether greater than any possible good to be derived by the general public therefrom. Possibly the court foresees that the line has now been reached where the dangers suggested by Justice Harlan in his strong dissenting opinion in the Civil Rights Cases, 109 U. S. 3, has been reached.<sup>17</sup> The court may have felt that even conceding that the ordinance, if sustained, might tend to prevent conflicts between individuals or small groups from the two races, its ultimate effect in building up wholly black and wholly white communities in the same city would almost certainly produce far greater and more menacing conflicts than those which the present ordinance is supposed to prevent.

It may well be that by a process of unexpressed reasoning, the court has reached a sound result in this case; but clearly the real question involved ought to be settled only after careful consideration of the *facts*, as to the effect of propinquity and intermingling of the races. Perhaps there is sufficient danger in such contacts as to justify this legislation, perhaps not. It is regrettable that the whole problem could not have been brought before the court, by the aid of briefs such as those filed by Mr. Brandeis and Professor Frankfurter in the Oregon cases.<sup>18</sup>

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LIABILITY OF CHARITABLE CORPORATIONS FOR TORT. — The belief in the reality of corporate persons only slowly makes its way into the

sulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people." "With this acknowledgment," says the court, "how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" See page 547 of the opinion.

<sup>17</sup> Cf. *McCabe v. Atchison, etc. Ry. Co.* 235 U. S. 151.

<sup>18</sup> *Muller v. Oregon*, 208 U. S. 412; *Stettler v. O'Hara*, 243 U. S. 629. As to the importance of presenting scientific and dependable data bearing upon the facts and conditions affected by legislation regulating social and industrial relationships, see the following articles: "Hours of Labor and Realism in Constitutional Law," by Felix Frankfurter, 29 HARV. L. REV. 353; "Limitation of Hours of Labor and the Federal Supreme Court," by Ernst Freund, 17 GREEN BAG, 411; "Due Process, the Inarticulate Major Premise and the Adamson Law," by Albert M. Kales, 26 YALE LAW J. 519; "Liberty of Contract," by Roscoe Pound, 18 YALE LAW J. 454.



general body of Anglo-American law.<sup>1</sup> Its progress is at every stage impeded by the general refusal of the courts to recognize the corporate character of the trust. It is nearly thirteen years since Maitland demonstrated with all his profound scholarship, and even more than his wonted charm, that the trust has, above all things, served historically as a screen to promote the growth of institutions which, for a variety of reasons, have found inadvisable the path of corporate adventure.<sup>2</sup> The result has been peculiarly unfortunate in the realm of charitable trusts. "A trust," said Bacon three centuries ago,<sup>3</sup> "is the tendency of the conscience of one to the purpose of another," and we have stringently adhered — the possibilities of *cy près* notwithstanding — to the rigid enforcement of that purpose without due regard to the category of time or the interests involved. The doctrine, in its legal perspective, is most largely a supposed deference to the rights of property; and it has paid but little attention to the admirable remark of John Stuart Mill<sup>4</sup> that no man ought to exercise the rights of property long after his death. This tendency to emphasize the purpose enshrined in the trust and not the life that trust engenders has received an interesting illustration in a recent Maryland decision.<sup>5</sup> A fireman who was engaged in extinguishing a hospital fire was injured through the defective condition of the hospital fire escape. He sued the hospital for damages, and relief was denied on the ground that the doctrine of *respondet superior* does not apply to charitable institutions. The result of the case might be justified on the ground that there is no liability for an injury sustained by a licensee, when the injury is brought about by a condition of the premises. The basis of the decision however seems to be the opinion that the funds of a charity are not provided to liquidate the damages caused in its defective administration; and those funds are therefore not applicable to the redemption of the torts committed by the agents or servants of the charity.<sup>6</sup> This doctrine, indeed, is not worked out with entire consistency in other parts of the law, since a charitable institution is liable in an action for breach of contract. Nor is it an universal doctrine since it is not applied by the English courts.<sup>7</sup> What in reality it involves is a whole series of assumptions. It starts out from the belief that a charitable institution is in a different position from other institutions from the fact that its purpose is not one of profit. But this is entirely to ignore the administrative aspect of the problem. To fulfill the purpose of a charity involves all the usual features of an ordinary corporate enterprise. The charitable institution acts by agents and servants. It harms and benefits third parties exactly as they are harmed or benefited by

<sup>1</sup> Cf. Laski, 29 HARV. L. REV., 404 ff.

<sup>2</sup> Cf. 3 COLL. PAPERS, 321 ff.

<sup>3</sup> READING ON THE STATUTE OF USES, 9.

<sup>4</sup> "Essay on Corporations and Church Property" in vol. I of his DISSERTATIONS AND DISCUSSIONS.

<sup>5</sup> Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital (1917), 100 Atl. 301.

<sup>6</sup> Overholser v. National Home for Disabled Soldiers, 68 Ohio St. 236; McDonald v. Mass. General Hospital (1876), 120 Mass. 432; Jensen v. Maine Eye and Ear Infirmary (1912), 107 Me. 408; Downes v. Harper Hospital (1894), 101 Mich. 555.

<sup>7</sup> Duncan v. Findlater, 6 Cl. & Fin. 894 (1839), was decided in American fashion; but since Mersey Docks Trustees v. Gibbs (1866), 1 H. L. 93, the rule has been the other way.

other institutions. Where fault is involved it is difficult to see why the exception should be maintained. It is small comfort to an injured fireman to know that even if he has to compensate himself for his injuries, he is maintaining the strict purpose of the founder of the charity. To him the case appears simply one of injury, and he suffers not less, but, in the present state of the law, actually more, from the sheerly fortuitous fact that his accident has occurred not at a factory, but at a hospital. The thing of which the law ought to take account is surely the balance of interests involved; and the hospital is far more likely to look to the condition of its ladders if it pays the penalty of its negligence, than if it saves a certain percentage of its income. It would, in fact, be an intolerable situation if the only protection afforded the public against the torts of charities were that of the pockets of agents and servants.<sup>8</sup> Those who founded the charity intended it to be operated; and they, or their representatives, must, logically enough, pay the cost of its operation from the funds provided for that purpose. There are, indeed, some signs that the courts are beginning to appreciate this. Relief has been granted to a claimant against the Salvation Army which negligently allowed one of its vans to run wild.<sup>9</sup> The inadequate protection of dangerous machinery has suffered its due and necessary penalty.<sup>10</sup> The injury which resulted from the employment of an unskilful nurse has not gone unrequited.<sup>11</sup> Not, indeed, that any of these decisions really touch the central problem that is raised. We have in fact a twofold problem, in the first place, we have to inquire whether the creation of a charitable trust does not involve the creation of a corporate person exactly as the creation of any business enterprise; in the second place, the question is raised as to whether there is any ground for the exclusion of a charity from the ordinary rules of vicarious liability. The answer to the first question is clearly an affirmative one. The Salvation Army, an orphan asylum, a great hospital are just as much persons to those who have dealings with them as a private individual or a railway company. Differentiation, if it is to be made, cannot be made on the ground of character. If it is, the courts will go as fatally wrong in the results of litigation as did the House of Lords in the great Free Church of Scotland Case.<sup>12</sup> It was the insistence of the Lords upon the nature of the church as a pendant to a set of doctrines which made it fail to see that more important was the life those doctrines called into being.<sup>13</sup> The life of the Salvation Army, is, in precisely similar fashion, more important than the doctrines it teaches; and we must legally judge its life by what in actual fact it is, and not by the theories it proclaims. Herein is found the answer to the second inquiry. The only reason why a charity should not be liable for fault is its public character. But that, clearly enough, is no adequate reason at all. It is probably a simple analogy from the irresponsibility of the greatest charity by

<sup>8</sup> Cf. *Laski*, 24 *YALE LAW JOURNAL*, 124 ff.

<sup>9</sup> *Hordern v. Salvation Army* (1910), 199 N. Y. 233.

<sup>10</sup> *McMerny v. St. Luke's Hospital* (1913), 122 Minn. 10.

<sup>11</sup> *St. Paul's Sanitarium v. Williamson* (1914), 164 S. W. 36.

<sup>12</sup> See the special report by ORR and the comment by Dr. FIGGIS, *CHURCHES IN THE MODERN STATE*, 19 ff.

<sup>13</sup> Cf. 36 *CANADIAN LAW TIMES*, 140 ff.



which the public is served — the state; and an end is rapidly being made of that noxious dogma.<sup>14</sup> It is the merest justice that if the public seeks benefit, if men search to benefit the public, due care should be taken not to harm those interests met in the process which are not directly public also. A charity's personality will suffer no less detriment if it is allowed to be irresponsible than a private enterprise. A hospital, for instance, ought to be forced to take as much care in the selection of its nurses as a banker in the selection of his cashiers. We have found that the enforcement of liability is the only adequate means to this latter end, and it is difficult to see why the same is not true in every other sphere. French law has not hesitated to hold a county asylum liable for the arson of an escaped lunatic; and we may be sure that the prefect of the department concerned will take due care that the superintendent of his asylum is not a second time guilty of negligence.<sup>15</sup> The whole problem is an illustration of the vital need of insisting as much on the processes of institutions as on their purposes. A negligently administered charity may aim at inducting us all into the Kingdom of Heaven, but it is socially essential to make it adequately careful of the methods employed. It is only by the recognition of the personality involved in the trust, and of its consequences, that this end may be satisfactorily achieved.

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**BOYCOTTS ON MATERIALS.**<sup>1</sup> — When one man by the free exercise of his faculties prevents a similar exercise by another, a justiciable question arises. The law meets it by weighing the social value of the two ends in view and allowing to prevail the action directed toward the more socially valuable.<sup>2</sup> Where the ends are of equal social value, the loss must lie where it falls. Hence trade competition will justify an intentional injury, where individual interests alone are balanced, there being no injury to society.<sup>3</sup> But spite, malice, injury for its own sake are not ends which the law can recognize.<sup>4</sup> The history of labor litigation is the history of a broadening conception of this principle.

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<sup>14</sup> Cf. Barker, "The Rule of Law," *POLITICAL QUARTERLY*, May, 1914, and DUGUIT, *LES TRANSFORMATIONS DU DROIT PUBLIC*, chap. 8.

<sup>15</sup> 3 *SIREY*, 1908, 98, with note by M. Hauriou.

<sup>1</sup> "The salient characteristic of the boycott on materials is its appeal to organized labor. Its essence is organized disapproval of certain implements and materials with which men work." *WOLMAN, THE BOYCOTT IN AMERICAN TRADE UNIONS*, 43. In this class of boycott the disapproval is by those who work with the materials, and not by those who consume them.

<sup>2</sup> See "Interests of Personality," Roscoe Pound, 28 *HARV. L. REV.* 343, 445. Examples of the application of this principle of the balancing of interests are: The rules of liability for animals; the rule of liability without fault; the so-called Fletcher v. Rylands doctrine; the rules of privileged communications in libel and slander. See also Keeble v. Hickeringill, 11 East, 574, where defendant is liable for maliciously frightening ducks from the plaintiff's decoys. See also 31 *HARV. L. REV.* 193, for the principle applied to contracts to refrain from doing business.

<sup>3</sup> Blake v. Lanyou, 6 T. R. 221; Adams v. Bafeald, 1 Leon. 240; Mogul Steamship Co. v. McGregor, Gow & Co. (1892), A. C. 25.

<sup>4</sup> "How far an Act may be a Tort because of the Wrongful Motive of the Actor," James Barr Ames, 18 *HARV. L. REV.* 411. See Mills v. U. S. Printing Co., 99 N. Y. App. Div. 605, 613.

The individualism of the nineteenth century had affected the method of approach to labor disputes before they became problems for the courts. Adult male workers were considered independent retailers of the same commodity in competition with one another.<sup>5</sup> Furthermore, the first cases in which the courts discerned more than the property right of the master in his servant<sup>6</sup> tended to conceal the true economic interests involved. They were largely suits between workers.<sup>7</sup> It is not strange, then, that at first the courts required advancement of the individual interest of the worker as justification for a strike.<sup>8</sup> This conception of justification, strengthened, perhaps, by the hesitancy of the unions to incorporate, proved inadequate when extensive attempts at unionization began. To some courts there seemed to be a valid distinction between strikes for the discharge of fellow workers, where the motive was to get more work for oneself and where it was to replace them with members of one's union.<sup>9</sup> Other jurisdictions, however, recognized the interest of all union men of a shop in unionization as a lawful end for acting and weighed it equally with the self-interest of the person whom that action injured.<sup>10</sup> The growth of organizations with which to further this new aim soon raised a new problem. A union gave notice to an employer that it would call out his employees, unless he ceased dealing with another employer, against whom members of the same union were striking for unionization. This outraged an individualistic sense of justice. The first employer was considered a neutral. To protect him the courts reasoned that the interest of his employees in the struggle was secondary, and so was outweighed by his direct self-interest.<sup>11</sup>

<sup>5</sup> This is well shown in English labor legislation. The first acts were called forth by epidemics among the pauper apprentices who were farmed out by the Poor Laws under shocking circumstances. They deal with the health and hours of labor of the children. 42 GEO. III, c. 73; 59 GEO. III, c. 66; 60 GEO. III; 1 GEO. IV, c. 5; 6 GEO. IV, c. 63; 10 GEO. IV, c. 51; 10 GEO. IV, c. 63; 1 & 2 WILL. IV, c. 39; 3 & 4 WILL. IV, c. 103. The same protection was extended to adult women in 1844. 7 & 8 VICT. c. 15. This act required the fencing of machinery, but it required another interpretative act to make it clear that the most dangerous machinery must be fenced in parts of the factory where only men were employed. 19 & 20 VICT. c. 38. Men employed in factories which did not employ women or children were not the subject of consideration until 1878. 41 VICT. c. 16; 46 & 47 VICT. c. 53; 52 & 53 VICT. c. 62; 54 & 55 VICT. c. 75. These acts prohibited only certain conditions dangerous to health. The adult was still thought a free agent to work as he chose. For a more recent application of this idea, see *Lockner v. New York*, 198 U. S. 45.

<sup>6</sup> For this early type of case see *Walsby v. Auley* (1861), 30 L. J. (M. C.) 121. See persistence of this theory. *Brennan v. United Hatters*, 73 N. J. L. 728, 743.

<sup>7</sup> *Allen v. Flood* (1898), A. C. 1; *Walker v. Cronin*, 107 Mass. 555; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753; *Curran v. Galen*, 102 N. Y. 33.

<sup>8</sup> Cases under note 7, *supra*. *Berry v. Donovan*, 188 Mass. 353, 78 N. E. 753.

<sup>9</sup> *Pickett v. Walsh*, 192 Mass. 572, 584, *supra*; *Lucke v. Clothing Cutters & Trimmers Assembly*, 77 Md. 396, 26 Atl. 505; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327. In *Plant v. Woods*, *supra*, "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition."

<sup>10</sup> *National Protective Society v. Cummings*, 170 N. Y. 315, 63 N. E. 369; *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389; *National Fireproofing Co. v. Mason Builders Ass'n*, 169 Fed. 259; *Roddy v. United Mine Workers*, 41 Okla. 621, 139 Pac. 126; *Plant v. Woods*, *supra*.

<sup>11</sup> *Pickett v. Walsh*, *supra*; *Purvis v. United Brotherhood of Carpenters and Joiners*,



But this is not a true statement of the principle of law upon which these decisions rest. When a man interferes with the liberty of action of society, as well as of individuals, the social value of his end in view must justify also the social inconvenience of his means of attaining it.<sup>12</sup> The law is obviously lost when it attempts to value as primary or secondary an interest for which a man will sacrifice money and employment. The man himself must be the only judge of that. But the law can weigh the social value of a stronger union with the social loss involved in a widened struggle.

A recent decision of the New York Court of Appeals illustrates the common confusion of these two principles and the attempt to lay down a rule of law which shall at once mark the limits of both. *Bossert v. Dhuy*.<sup>13</sup> The court holds that a strike, or threatened strike, by reason of the refusal of union men to work upon materials, in the manufacture of which there has been "unfairness"<sup>14</sup> to their union, is lawful, because the men have a "primary interest" in the subject matter of the dispute, *i. e.*, securing work for union men upon the materials in the earlier stages of production. In recognizing the union as a whole, as a unit in which the men had a vital interest, instead of merely the shop, the court was not, as it thought, laying down a rule of law, but admitting an established fact. The effect of the decision, however, is to lay down a most important rule of law based upon the second principle outlined above. The social loss entailed by this means of advancing the union is now considered outweighed by the social value of the end.

There appears to be no reason why the principle of this decision should not legalize the boycott on materials of labor in all its forms. If legal, when the materials are bought from an "unfair" firm, it should be equally so, when they are to be sold to an "unfair" firm. The interests involved are all the same; likewise in the so-called collateral boycott on materials. When an employer takes work to tide over another employer whose union men are striking, the legality of a strike by the former's employees should depend upon the legality of that of the latter's. It may be suggested here that the unconscious tendency of the courts is toward the view, that the social loss resulting from the widened struggle is justified in those cases where, figuratively speaking, the employer

214 Pa. St. 348, 63 Atl. 585; *Booth v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226; *cf.* *Atkins v. W. A. Fletcher Co.*, 65 N. J. Eq. 658, 55 Atl. 1074; *Burnham v. Dowd*, 217 Mass. 351, 104 N. E. 841; *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663. But *cf.* *Boyer v. Western Union Tel. Co.*, 124 Fed. 246.

<sup>12</sup> For example, trade competition will not justify inducing a breach of contract. (*Lumley v. Guy*, 2 E. & B. 216; *Hitchman Coal & Coke Co. v. Mitchell*, U. S. Sup. Ct., decided December 10, 1917, nor intimidation, *Tarleton v. M'Gawley* (1794), *Peake*, N. P. C. 270. Keeping out trespassers will not justify spring guns. *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *State v. Moore*, 31 Conn. 479, 83 Am. Dec. 159. But *cf.* *Glott v. Wilkes*, 3 B. & Ald. 304, to see that it is always a matter of the opinion of the times as to values.

<sup>13</sup> See page 493, *infra*.

<sup>14</sup> "The words 'fair' and 'unfair' are frequently used. . . . The difference between them is the classic distinction between orthodoxy and heterodoxy. 'Fair' means what is pleasing to the parties using the word, and 'unfair' means whatever they do not like." Hough, J., in *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 114, note. Unfairness is used in this note to mean anything which would give the unfair person's union employees the right to strike.

has committed a breach of neutrality.<sup>15</sup> An employer is guilty of a hostile act against a union when he has dealings with materials as the subject matter of labor in the immediate past, future, or in the present manufacture of which there has been "unfairness" to the union. A recent Connecticut case suggests a variation of this formula. *Cohn & Roth Electric Co. v. Bricklayers, Masons & Plasterers Local Union No. 1*.<sup>16</sup> Upon the facts of this case it might be maintained that an employer commits a hostile act against a union when he employs a subcontractor who is "unfair" to the union in any of his work. It will be seen that the purely sympathetic strike is at the very end of this road.

As in any branch of the law the historical development of the litigation largely explains the method of treatment. The social interest crept into the struggle while the courts were searching for a criterion with which to measure the conflicting interests of individuals. Vaguely feeling this, the courts tried to recognize it in language adapted to the individual interest. Now that the social significance has become the dominating factor, this language is seriously misleading. Any attempt to suggest the future of this field of the law must clearly distinguish the application of these two principles.<sup>17</sup> As to what purpose of labor the law will recognize in balancing its interest with that of the employer, the fact of the interest of all workmen in their betterment as a class will inevitably be admitted. This would mean that a strike would be lawful whenever an employer was "unfair" to any labor, or whenever he was connected by his product or by employment with any other employer who was similarly "unfair."<sup>18</sup> In considering what further social damage from the development of the strike and boycott will be considered justified by the end, other factors are involved. It is not merely a question of the value placed upon a highly organized working class with the attendant betterment of conditions, but the law must be convinced that the employment of such drastic means is justified by the absence of any reasonable substitute. At this point we emerge into the open country of economic and political speculation.<sup>19</sup> In such a country the law has never been a pioneer.

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PROCEEDINGS *IN FORMA PAUPERIS*. — The California Political Code<sup>1</sup> makes the common law of England, so far as not inconsistent with the

<sup>15</sup> *Master Builders Ass'n v. Damascio*, 16 Colo. App. 25, 63 Pac. 782; *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Gill Engraving Co. v. Doerr*, 214 Fed. 111; *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177. See also cases cited in note 10.

<sup>16</sup> See page 494, *infra*.

<sup>17</sup> For a clear conception of the difference, see opinion of Shaw, C. J., in *Commonwealth v. Hunt*, 4 Met. (Mass.) 111.

<sup>18</sup> "Workingmen cannot be compelled to work when by doing so their position as workingmen will be injured simply because if they do not continue their work the manufacturing employer will not be able to sell as large a quantity of material as he otherwise would and thus his good will, trade or business may be affected." *Bossert v. Dhuy*, *supra*.

<sup>19</sup> "The doctrine of the just cause or excuse inevitably operated so as to leave to judges and juries the decision of questions not so much of law and fact as of ethics and economics." *GELDART, THE PRESENT LAW OF TRADE DISPUTES AND TRADE UNIONS*, 24.

<sup>1</sup> § 4469.



constitution and laws of the state, the rule of decision in all courts. Under the well-settled construction of that provision in other states, English statutes prior to colonization and such English statutes subsequent to colonization, as were received as common law in this country prior to the Revolution, are included in the term "common law" of England.<sup>2</sup> Hence the statutes of Henry VII and Henry VIII<sup>3</sup> as to proceedings *in forma pauperis* would be common law in this country so far as applicable. The former, entitled "A Mean to help and speed Poor Persons in their Suits," provided that the pauper should have writs, subpoenas, counsel and other requisite officers without fee; the latter excused the defeated pauper from paying costs, but provided that the court in its discretion might punish him. It is doubtful whether this meant more than that he was to be punished in the discretion of the court if, having sued *in forma pauperis*, he did not go on and prosecute his action, since his conduct would amount to a fraud on the court, that is, to a contempt. But there are seventeenth-century statements that, where a pauper was non-suited, costs should be taxed and the option given him of discharging them or submitting to be whipped.<sup>4</sup> Blackstone says the latter practice was disused in his time,<sup>5</sup> and according to Tidd this punishment does not appear ever to have been inflicted.<sup>6</sup> As early as 1697, Lord Holt in denying a motion that a non-suited pauper be whipped for failure to pay costs said that he had never known it to be done, observing that the court had no officer to whip the pauper.<sup>7</sup> Even if the power to permit such proceedings rested simply on the statutes cited, and those statutes called for whipping of the non-suited pauper, it would seem that the inapplicable part could be rejected exactly as in case of common-law doctrines of judicial origin.<sup>8</sup> As the election to be whipped is at most a judicial gloss resting on a statement made to the court in a case in the reign of Charles II as to what had been the usual practice,<sup>9</sup> this gloss might obviously be rejected as inapplicable, the more as English decisions and English writers had pronounced it obsolete prior to the Revolution.

The right to sue *in forma pauperis* was doubtless an indulgence arising out of the humanity of the judges, and, indeed, the English courts are agreed that it existed at common law apart from statute, and that the statutes were simply regulatory.<sup>10</sup> These decisions although rendered since the Revolution may well be taken to establish the common law

<sup>2</sup> Patterson v. Winn, 5 Pet. 233; Spaulding v. Chicago R. Co., 30 Wis. 110; Kreitz v. Behrensmeyer, 149 Ill. 496.

<sup>3</sup> 11 HEN. VII, c. 12; 23 HEN. VIII, c. 15.

<sup>4</sup> Munford v. Pait, 1 Sid. 261; Anonymous, 2 Salk. 507; Anonymous, 7 Mod. 115.

<sup>5</sup> 3 BLACKSTONE, COM. 400.

<sup>6</sup> 1 TIDD, PRACTICE, 8 ed., 93.

<sup>7</sup> Anonymous, 2 Salk. 507.

<sup>8</sup> Van Ness v. Pacard, 2 Pet. 137.

<sup>9</sup> Munford v. Pait, 2 Sid. 261: "Et sur inquiry del practice in tiel case fuit certifiee que le usual voy est par taper costs & si le cost ne soit pay que le plaintiff sera whip."

<sup>10</sup> Brunt v. Wardle, 3 Man. & G. 534, 542, and the cases cited therein. Cf. Y. B. 15 EDW. IV, 26b (1476): "Note that at the beginning of this term, one John Brown was present to be the presignator for the poor in the Common Pleas and . . . it was said that . . . if any poor man would swear to him that he was not able to pay for the entry of the pleas in the rolls then he ought to enter the pleas without taking anything for his labor, *quod nota*, and this was done by the advice of the justices."

for our purposes.<sup>11</sup> Hence those courts<sup>12</sup> which hold that proceedings *in forma pauperis* can be had only where authorized by state statute would seem to be in error, and the California court,<sup>13</sup> correct in its decision that such proceedings are inherent in common-law courts of record, and exist unless expressly taken away by statute. That the California Code of Civil Procedure<sup>14</sup> specifically provides that in justices' courts payment of certain costs in advance shall not be required of paupers is no argument that the legislature intended thereby to restrict courts of record in their common-law power. Justices' courts are dependent upon the legislature for their authority, and such a provision is nothing more than conferring upon them in part that which belongs inherently to courts of record.

It is suggested in the opinion of the California court that as the section of the Political Code was adopted in 1850, general acts of Parliament in amendment or improvement of the common law up to that date may be common law in California. A similar argument was made in *Williams v. Miles*<sup>15</sup> and rejected by the court. In the present case the suggestion is a mere *dictum* and is disclaimed by two of the justices in a concurring opinion.

## RECENT CASES

**ADMINISTRATIVE LAW — POWER OF ADMINISTRATIVE OFFICER TO REVERSE A PRIOR RULING.** — The federal Meat Inspection Law (34 STAT. 676) provides that manufacturers may market meat products under a trade name which is not deceptive and is approved by the Secretary of Agriculture. The Secretary of Agriculture approved plaintiff's trade name, "Cremo Oleomargarine," under which plaintiff thereafter extensively advertised and sold his product. Seven years later the secretary withdrew his approval and notified plaintiff to discontinue the use of the trade name. *Held*, that the secretary having approved the name he cannot reverse his ruling. *Brougham et al. v. Blanton Mfg. Co.*, 243 Fed. Rep. 503.

Ordinarily determinations of fact by administrative agencies within their proper jurisdiction are conclusive. *United States v. Ju Toy*, 198 U. S. 252; *Bates and Guild Co. v. Payne*, 194 U. S. 106; *Public Clearing House v. Coyne*, 194 U. S. 497; *Hilton v. Merritt*, 110 U. S. 97. But a court may review such determinations where parties interested have not been given an opportunity to be heard, or where there has been fraud or an abuse of discretion, so that there is a denial of due process of law. *Turner v. Williams*, 194 U. S. 279; *Chin Yow v. United States*, 208 U. S. 8; *The Japanese Immigrant Case*, 189 U. S. 86. The secretary's finding that the name "Cremo Oleomargarine" is deceptive is as much a finding of fact as his prior decision that it was not, and it should not be reversed in the absence of a denial of due process of law. The prior contrary ruling is not in itself sufficient evidence of fraud or abuse of discretion to establish a denial of due process.

The successful application of statutory law by administrative agencies depends almost entirely on the ability of such agencies to discriminate, unhampered by precedent, between subtle differences of fact and circumstance.

<sup>11</sup> *Chilcott v. Hart*, 23 Colo. 40; *Williams v. Miles*, 68 Neb. 463. See POPE, "English Common Law in the United States," 24 HARV. L. REV. 6.

<sup>12</sup> *Hoey v. McCarthy*, 124 Ind. 466; *Campbell v. Chicago R. Co.*, 23 Wis. 490.

<sup>13</sup> *Martin v. Superior Court*, SAN FRANCISCO RECORDER, October 18, 1917.

<sup>14</sup> § 91.

<sup>15</sup> 68 Neb. 463, 470.



It would be very unfortunate, indeed, to apply the doctrines of *stare decisis* and *res adjudicata* to administrative rulings; and the Supreme Court of the United States has so held. *Pearson v. Williams*, 202 U. S. 281. Under this decision the present case is difficult to support.

ADMIRALTY — JURISDICTION — WORKMEN'S COMPENSATION LAW CONFLICTS WITH MARITIME LAW. — An award was given under the Workmen's Compensation Law of New York to the dependants of a stevedore accidentally killed while in the employ of the defendant. The case came to the United States Supreme Court on the ground (*inter alia*) that the Act conflicts with the general maritime law. CONSTITUTION, ART. III, § 2, ART. I, § 8. JUD. CODE, §§ 24, 256. *Held*, that in so far as the Act extends to matters under admiralty jurisdiction, it is unconstitutional. Holmes, Brandeis, Pitney, Clarke, JJ., dissenting. *Southern Pacific Co. v. Jensen*, 37 Sup. Ct. Rep. 524. Services of stevedores are maritime in their nature. *Atlantic Transportation Co. v. Imbroke*, 234 U. S. 52. Congress has exclusive power to legislate concerning maritime matters. *The Roanoke*, 189 U. S. 185. See CHAPLIN, PRINCIPLES OF THE FEDERAL LAW, § 529. The states have a sphere of legislative power where uniformity is not essential, subject to supersedure by federal legislation, illustrated in the following cases. *Cooley v. Board of Wardens*, 12 How. 299; *The Lottawanna*, 21 Wall. 558; *Steamboat Co. v. Chase*, 16 Wall. 522. Since Congress has not legislated on the liability of the water carrier to the employee, it would seem that the states are at liberty to legislate in this field. See *Second Employers' Liability Cases*, 223 U. S. 1; *The Minn. Rate Cases*, 230 U. S. 352, 408. Workmen's Compensation acts have been sustained, as not in conflict with federal maritime jurisdiction. *Kennerson v. Thames Towboat Co.*, 89 Conn. 367; *Lindstrom v. Mutual S. S. Co.*, 132 Minn. 328; *Northern Pacific S. S. Co. v. Industrial Acc. Commission*, 163 Pac. 199 (Cal.); *Keithley v. Northern Pacific S. S. Co.*, 232 Fed. 255. Cf. *Berton v. Tietjen & Lang Dry Dock Co.*, 219 Fed. 763. But see *Schuede v. Zenith S. S. Co.*, 216 Fed. 566. *Neff v. Industrial Commission*, 164 N. W. 845 (Wis.) (following principal case), *contra*.

A secondary ground of the decision is that the Compensation Act attempts to give a remedy inconsistent with the clause of the judiciary act "saving to suitors . . . the right of a common-law remedy." This has been construed to mean a right to proceed *in personam* in a common-law court as distinguished from the right to proceed *in rem* according to the course in admiralty. *Knapp, etc. v. McCaffrey*, 177 U. S. 638; BENEDICTS' ADMIRALTY, 4 ed., § 128. In view of that construction the *dictum* of the principal case would seem to be erroneous. That it is at least undesirable is shown by the immediate action of Congress in amending the Judiciary Act so as to save "to claimants the rights and remedies under the Workmen's Compensation Law of any State," (S 2916) approved October 6, 1917. In view of the primary ground of the decision the validity of this amendment may well be questioned.

ADOPTION — RIGHT OF INHERITANCE — EFFECT OF A SUBSEQUENT ADOPTION ON THE RIGHT TO INHERIT UNDER A PRIOR ADOPTION. — A statute provides that the adopted "child shall . . . become . . . an heir at law" of the adopting parent, the same as if he were in fact the child of such parent. A child, legally adopted, was readopted by others with the consent of the first foster father. Upon the death of the latter, the right is claimed to inherit under the first adoption. Mich. C. L. 1897, § 8780. *Held*, that the readoption during the life of the first foster father destroyed the right to inherit from him. *In re Klapp's Estate*, 164 N. W. 381 (Mich.).

The right to inherit is not a necessary incident of the relation of parent and child. See *Calhoun v. Bryant*, 28 S. D. 266, 276, 133 N. W. 266, 271, 8 HARV. L. REV. 161, 162, 165. But that right is generally conferred on the

ground of consanguinity; in absence of express provision to the contrary, that right is not prejudiced by the artificial relation created by adoption. *Wagner v. Varner*, 50 Iowa, 532; *Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761. See *In re Darling's Estate*, 159 Pac. 606, 607 (Cal.). The adoption does not place the child in a position as of the blood of the foster parents so as to give a general right to inherit. *In re Burnett's Estate*, 219 Pa. 599, 69 Atl. 74; *Wallace v. Noland*, 246 Ill. 536, 92 N. E. 956; *Hockaday v. Lynn*, 200 Mo. 456, 95 S. W. 585. However, as in the principal case, adoption statutes generally confer a right to inherit from the adopting parent. *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127; *Ryan v. Foreman*, 262 Ill. 175. Such right exists, even though after the death of the adopting parent the child is readopted. Cf. *Russell's Adm'r v. Russell's Guardian*, 14 Ky. L. R. 236; *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993. But if prior to the death of the foster parent that statutory status is abrogated, all rights and obligations existing because of that status would seem to be at an end, including the statutory right to inherit.

**BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — CHOSE IN ACTION — ASSIGNMENT OF FUTURE BOOK ACCOUNT.** — The owner of an established business made an assignment to the plaintiff, as security for a loan, of book accounts to come into existence in connection with that business. Held, that equity would not enforce this assignment against the trustee in bankruptcy of the assignor. *Taylor v. Barton-Child Co.*, 117 N. E. 43 (Mass.).

A mortgage of after-acquired chattels, unless the mortgagee has taken possession, is not enforceable in Massachusetts. *Jones v. Richardson*, 10 Metc. (Mass.) 481. The decision in the principal case is based on an analogy between the assignment of a *chose in action* and a mortgage of chattels. Legal title to chattels to be subsequently acquired cannot be transferred without further action of the parties. Taking the view that the assignment of a *chose in action* is the transfer of a legal right, this would be as true of a *chose in action* as of a chattel, and the same rules should apply to each. But if an assignment merely creates an irrevocable power of attorney to collect, there seems to be no reason why such a power cannot be given as well for a future as a present debt, on the same rules applied to future as to present assignments. See Samuel Williston, "Transfers of Personal Property," 19 HARV. L. REV. 557, 562. But the doctrine of the principal case has been generally followed. Most American jurisdictions, following the English rule, hold a mortgage of future property to be enforceable in equity whether or not the mortgagee has taken possession. *Holroyd v. Marshall*, 10 House of Lords Cases 191; *Mitchell v. Winslow*, 2 Story (U. S.) 630. In such jurisdictions an assignment like that in the principal case is enforceable in equity as against the general creditors of the assignor. *Tailby v. Official Receiver*, 13 A. C. 523; *Burdon Cent. Sugar Refn. Co. v. Payne*, 167 U. S. 127; *Field v. City of New York*, 6 N. Y. 179.

**COMMON LAW — STATUTES — PROCEEDINGS IN FORMA PAUPERIS.** — The statutes of California make no provision for proceedings *in forma pauperis* and require payment of certain costs in advance. Upon application for leave to sue *in forma pauperis* held, that power to allow such a proceeding is inherent in common-law courts and exists unless expressly taken away by statute. *Martin v. Superior Court*, SAN FRANCISCO RECORDER, October 18, 1917. See Notes.

**CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — EXTRATERRITORIAL EFFECT OF DIVORCE — DOMICILE OF MARRIED WOMAN.** — The husband left the wife in New York, alleging her cruelty as cause, and went to Maine to secure a divorce. The Maine court subsequently granted him a decree upon mere constructive service of the wife. She now sues for a divorce in New



York. *Held*, that the Maine decree is not a bar to the action. *Rontey v. Rontey*, 166 N. Y. Supp. 818.

A decree rendered at the domicile of the libellant — when not also the matrimonial domicile — upon mere constructive service of the libellee is not binding on other states by virtue of the "full faith and credit" clause of the federal Constitution. *Haddock v. Haddock*, 201 U. S. 562. But *cf. Ditson v. Ditson*, 4 R. I. 87. But most states recognize such a decree on principles of comity. *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684; *Felt v. Felt*, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071; *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792; *Shafer v. Bushnell*, 24 Wis. 372. *Contra, People v. Shaw*, 259 Ill. 544, 102 N. E. 1031. New York, however, has consistently refused to recognize the extra-territorial validity of such decrees. *People v. Baker*, 76 N. Y. 78; *Tysen v. Tysen*, 140 App. Div. 370, 125 N. Y. Supp. 479. In the principal case the court asserts that even where the husband was justified in separating from the wife, the state of the husband's new domicile cannot render a decree binding on other states. This view seems untenable, for it is the law even in New York that when the wife is at fault her domicile follows that of her husband. *Hunt v. Hunt*, 72 N. Y. 217; *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709. *Contra, Chapman v. Chapman*, 127 Ill. 386, 21 N. E. 806. See J. H. Beale, "Domicile of a Married Woman," 2 So. L. QUAR. 100. And clearly a decree at the domicile of both parties is entitled to "full faith and credit" in other states. *Cheever v. Wilson*, 9 Wall. (U. S.) 108. The New York court admits the validity of this reasoning where the wife abandons the husband without cause. *North v. North*, 47 Misc. Rep. 180, 93 N. Y. Supp. 512; *aff'd*, 111 App. Div. 921, 96 N. Y. Supp. 1138. No sufficient reason appears for distinguishing from that case one where the wife, by her cruelty, gives the husband cause to separate from her. *Cf. Gleason v. Gleason*, 4 Wis. 64. The result may be supported, however, since the court fortifies its conclusion by finding that in fact the allegation of the wife's cruelty was untrue. The contrary determination of this fact by the Maine court is not binding on the New York court when the domicile of the wife and, as a result, the validity of the Maine decree are in question. *Haddock v. Haddock*, *supra*.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LIMITATION OF POLICE POWER — PROHIBITION OF EMPLOYMENT AGENCIES. — A Washington statute made it a crime to take a fee from any person seeking employment for furnishing him with employment or information leading thereto. *Held*, that the statute violates the due process clause of the Fourteenth Amendment. *Adams v. Tanner*, 37 Sup. Ct. Rep. 662.

It has long been settled that a business may be prohibited and property confiscated without infringing on due process where the object is to secure the health or safety of the community. *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Mugler v. Kansas*, 123 U. S. 623; *Austin v. Tennessee*, 179 U. S. 343. The power of a state to forbid and suppress any business or use of property injurious to the morals of the community is also well established. *Booth v. Illinois*, 184 U. S. 425; *Otis v. Parker*, 187 U. S. 606; *Murphy v. California*, 225 U. S. 623. Legislation prohibiting a particular kind of business, not intrinsically harmful, because of the tendency to defraud the public in its exercise, has likewise been held constitutional. *Powell v. Pennsylvania*, 127 U. S. 678; *Plumley v. Massachusetts*, 155 U. S. 461. *Contra, People v. Marx*, 99 N. Y. 377. See FREUND, POLICE POWER, § 62. Anti-trust laws, avowedly interfering with the liberty of contract, enacted to further the general economic welfare of the community, have also been held not to violate the due process clause. *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Northern Securities Co. v. United States*, 193 U. S. 197. Finally, the Supreme Court went so far as to hold that statutes in effect prohibiting the sale or use of trading stamps

are a valid exercise of the police power. *Tanner v. Little*, 240 U. S. 369; *Rast v. Van Deman & L. Co.*, 240 U. S. 342. By these decisions the Supreme Court was thought to have committed itself to a liberal view of the power of a state to legislate in the interest of the economic welfare of the community. See 29 HARV. L. REV. 779. But in the principal case the court seems to have retraced its steps. The decisions in the trading stamp cases have been greatly weakened, if not completely overthrown. The principal case in effect decides that the mere enhancement of the economic welfare of the community is not sufficient reason for depriving a man of the liberty to follow any calling he may choose to engage in. If a proper interpretation of due process requires this conclusion, that is unfortunate. On the basis of prior decisions alone, the particular statute involved might well have been sustained as a reasonable measure for the prevention of fraud. Cf. *Powell v. Pennsylvania*, *supra*; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948. But aside from this, it is doubtful whether the right of individual liberty has ever been construed to be free from limitation by reasonable enactments in the interest of the common welfare. See *California Reduction Company v. Sanitary Reduction Works*, 199 U. S. 306, 318; *Barbier v. Connolly*, 113 U. S. 27, 31. Whether or not a particular statute is reasonable must then depend on the enormity of the evil and the fitness of such legislation to afford a remedy. See *McCray v. United States*, 195 U. S. 27, 64; *Adams v. Tanner*, *supra*, 666. Prohibiting a particular business, however, generally involves a destruction of private property as well as an interference with personal liberty. *Dent v. West Virginia*, 129 U. S. 114. And it is at least doubtful whether the enhancement of the general prosperity of the community should be held sufficient cause for depriving one, without compensation, of property acquired under the sanction and protection of the law. See *Wynehamer v. People*, 13 N. Y. 378. But if, as in the principal case, private establishments are in effect legislated out of existence, their business to be taken over by public agencies, compensation to the owners may well be required, on the ground that such legislation involves an exercise, not of the police power, but of the power of eminent domain. Cf. *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, 74 N. E. 601. See McGEHEE, DUE PROCESS OF LAW, 205.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CHANGE OF REMEDY — APPOINTMENT OF SPECIAL TAX COLLECTOR. — Plaintiff secured a judgment against a county on county bonds. When the bonds were issued a statute required that one person be appointed to collect all county taxes. A subsequent amendment permitted the designation of a separate collector to collect special taxes levied to satisfy such a judgment. *Held*, that the amendment violates the constitutional prohibition against impairing the obligation of contracts. *Hendrickson v. Apperson*, U. S. Sup. Ct. Off., No. 427 (1917).

It is clear that an obligee has no vested right to any particular remedy merely because that remedy existed when the contract was made. *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122. It is equally clear that a state cannot deprive one of all means of enforcing his rights under an existing contract. *White v. Hart*, 13 Wall. (U. S.) 646; *Louisiana v. Police Jury*, 111 U. S. 716; *Goodale v. Fennell*, 27 Ohio St. 426. But as to how far the remedy may be rendered less effective by subsequent legislation, the law is in considerable confusion. See BLACK, CONSTITUTIONAL PROHIBITIONS, § 133 *ff.* Some courts have held that the remedy may be made appreciably more tardy and more difficult to pursue without impairing the obligation of the contract. *James v. Stull*, 9 Barb. (N. Y.) 482. Cf. *Oshkosh Waterworks Co. v. City of Oshkosh*, 109 Wis. 208, 85 N. W. 376, *aff'd*, 187 U. S. 437. While other courts have held that the substituted remedy must be as speedy and efficacious as the old one. *Townsend v. Townsend*, Peck (Tenn.) 1; *March v. State*, 44 Texas 64. The



Supreme Court has vacillated from one extreme to the other. Cf. *Bronson v. Kinzie*, 1 How. (U. S.) 311, and *South Carolina v. Guillard*, 101 U. S. 433, with *Edwards v. Kearzey*, 96 U. S. 595. The principal case is a strong authority for the latter view. See also *Edwards v. Williamson*, 70 Ala. 145; *Blair v. Williams*, 4 Litt. (Ky.) 34. And it would seem that on principle this position is unassailable. The aim of the prohibition is to prevent the lessening of the value of existing obligations by legislative action. See *Planters' Bank v. Sharp et al.*, 6 How. (U. S.) 301, 330. And certainly from a legal viewpoint, the binding force of legal obligations and the value of legal rights are, in the last analysis, dependent upon and commensurate with the remedy afforded by the law for their enforcement. See *Edwards v. Kearzey*, *supra*, 600.

CORPORATIONS — CORPORATE POWERS — GUARANTY OF BONDS. — An Ohio railroad corporation, one of four owners of all the stock of a Canadian railroad, jointly with the other stockholders purchased an issue of bonds of the Canadian corporation. The Public Utilities Commission approved an agreement whereby the Ohio company with the other bond owners jointly and severally contracted to guarantee the payment of these bonds. Minority shareholders objected. *Held*, that the Ohio corporation has implied power to guarantee the payment only of the bonds which it severally holds. *Pollitz v. Public Utilities Commission*, 117 N. E. 149 (Ohio).

A contract of guaranty is generally foreign to the objects for which a corporation is created. *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1; *Davis v. Old Colony R. Co.*, 131 Mass. 258. See 1 CLARK AND MARSHALL, PRIVATE CORPORATIONS, § 184. A public utility company is especially prohibited from risking its funds in enterprises which its stockholders, its creditors, or the state have no reason to anticipate from its charter. See *Louisville, etc. Ry. v. Louisville Trust Co.*, 174 U. S. 552, 567; *Marbury v. Ky., etc. Land Co.*, 62 Fed. 335, 342. See 1 ELLIOTT, RAILROADS, 2 ed., § 481; 3 COOK, CORPORATIONS, 7 ed., § 775. A railroad, however, may contract to accomplish a purpose reasonably implied from charter or statutory authority. See JONES, CORPORATE BONDS AND MORTGAGES, 3 ed., § 281. See also C. B. Labatt, "Power of Corporation to Execute Guarantees," 31 AM. L. REV. 363. Thus a railroad having the right to lease a subsidiary may guarantee the bonds of the leased corporation. *Low v. Cal., etc. R. Co.*, 52 Cal. 53. But see D. L., "Ultra Vires," 16 AM. L. REG. (N. S.) 513. A corporation having railroad and banking powers may guarantee the bonds of a railroad corporation of which it is a majority stockholder. *Central R. & Banking Co. v. Farmers', etc. Co.*, 114 Fed. 263. In the principal case it was conceded that the Ohio company might acquire the stocks and bonds of the Canadian corporation. The financial responsibility of the other joint guarantors was not questioned. The joint guaranty, it seems, would enhance the value of the bonds held by the Ohio company. A joint agreement for the issue of equipment trust certificates by some of the same companies had been upheld. *Venner v. N. Y. C. & H. R. Co.*, 81 Misc. (N. Y.) 208, 143 N. Y. S. 211; *id.* 160 App. Div. (N. Y.) 127, 145 N. Y. S. 725. It is submitted that the court took an unduly contracted view of the admitted powers of the corporation in denying to it the right to secure, by a joint arrangement, the economic advantage which was the object of this transaction.

EQUITY — EXERCISE OF JURISDICTION — SUSPICION OF IMPROPER MOTIVE AS GROUND FOR REFUSING RELIEF. — Defendant created an irrevocable trust, providing that the income was to be paid to himself during his life, and the property to be given at his death to such persons as he should by will appoint. The trust was declared not subject to claims of creditors; but by statute such a trust fund could not be exempted from claims of creditors. (N. J. Comp. St. 1910, 2617.) Plaintiff had on three prior occasions loaned

money to defendant, obtained a judgment at law against him, and obtained equitable execution against the trust fund. He now seeks to use the same process again. *Held*, that relief be denied. *First National Bank v. Parker*, 101 Atl. 276 (N. J.).

The decision rests on the suspicion of the court that the creditor was conniving with the settlor to enable him to regain the *corpus* of the fund. The court assumes that the trust was irrevocable, so the settlor could not have obtained the *res* directly. Equity will not aid a party to do indirectly what he could not do directly. *Huntington v. Jones*, 72 Conn. 45, 43 Atl. 564. See *Bergmann v. Lord*, 194 N. Y. 70, 75; 86 N. E. 828, 830. But the court refused to exercise its jurisdiction because of a mere suspicion of improper motive, thus carrying the "clean hands" doctrine to a startling extreme. It would seem that this doctrine has already been carried far enough. *Foll's Appeal*, 91 Pa. St. 434; *Christie v. Davey*, (1893,) 1 Ch. 316; *Edwards v. Allouez Mining Co.*, 38 Mich. 46. But see *Offley v. Garlinger*, 161 Mich. 351, 357, 126 N. W. 434, 436. This decision introduces into the law an element of the greatest uncertainty. The sensitiveness of the particular chancellor's conscience becomes the measure of a man's rights.

EXTRADITION — INTERSTATE EXTRADITION UNDER THE UNITED STATES CONSTITUTION — FUGITIVE FROM JUSTICE: PRISONER BROUGHT FROM REQUISITIONING STATE BY EXTRADITION PROCEEDINGS. — Petitioner was arrested in Texas, charged with a crime against that state. Before trial, he was extradited to California on requisition from the governor. The California charge was not pressed; and the governor of California, acting on requisition from Texas, issued a warrant to extradite him to Texas. He applies for a writ of *habeas corpus*. *Held*, prisoner must be discharged. *In re Whittington*, 167 Pac. 404 (Cal.).

Since there is no state statute covering the question, extradition is governed solely by the provisions of the federal Constitution. *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825; *In re Kopel*, 148 Fed. 505. The Constitution provides only for the surrender of persons who "flee from justice." CONST. Art. IV, § 2. *State v. Hall*, 115 N. C. 811, 20 S. E. 729; *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458. It is the function of the executive to deal with the problems of extradition, and hence to determine whether the person requisitioned is a fugitive. *Ex parte Reggel*, 114 U. S. 642; *Katyuga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679. But the courts have jurisdiction to pass on the validity of the imprisonment, and the finding of the governor is not conclusive, but may be treated by the court much as the finding of a jury. *Bruce v. Rayner*, 124 Fed. 481; *Robb v. Connolly*, 111 U. S. 624. Wherever the accused leaves the state of his own free will, he is conclusively regarded as a fugitive from justice, and his real motive for leaving will not be inquired into. *People v. Pinkerton*, 17 Hun (N. Y.) 199. Even where he was extradited from the state, he may yet be treated as a fugitive. *Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141. But it is difficult to conceive of a man, taken from a state by the arm of the law and continuously in custody, as a fugitive from that state. Hence the result reached by the court would seem to be sound. The case raises the same difficulty as the case of the extradition of a person for a crime which he committed, without being physically present in the state. *Ex parte Hottslot*, 180 Fed. 240; *Wilcox v. Nolze*, 34 Ohio St. 520. The best remedy in such cases would seem to be state legislation. See 21 HARV. L. REV. 224.

INJUNCTIONS — BOYCOTTING COMBINATIONS — TRADE UNIONS. — Appeal from a decree granting an injunction. Because the plaintiff maintained an open shop the defendant union sent notices to contractors, requesting them not to buy the plaintiff's material, and suggesting labor troubles as an alternative possibility. As a result plaintiff's business was injured. *Held*, judgment



reversed. The defendants have a primary interest in securing work for members of their union and may refuse to work on non-union materials. *Bossert v. Dhuy*, 58 N. Y. L. J. 177.

For discussion of this case see Notes, page 484.

**INJUNCTIONS — BOYCOTTING COMBINATIONS — TRADE UNIONS.** — The defendant union refused to work upon any building upon which non-union men were employed. It ceased work on several buildings upon which plaintiff's non-union men were employed, and in one instance, upon five buildings constructed by a single general contractor, because the plaintiff was employed on one of them. *Held*, members of unions may refuse to work with non-union men. In the one instance it was not an abuse of discretion to refuse an injunction. *Cohn & Roth Electric Co. v. Bricklayers, Masons, and Plasterers' Union, No. 1*, 101 Atl. (Conn.) 659.

For discussion of this case see Notes, pages 485.

**PUBLIC OFFICERS — LIABILITY FOR PRIVATE MONEYS.** — By order of the court the defendant in his official capacity of clerk of court received money paid into court. The defendant deposited this in a solvent bank, which later failed, whereby the money was lost without his fault. *Held*, that the defendant is liable on his official statutory bond, though the funds deposited were private ones. *People for Use of Hoyt v. McGrath*, 117 N. E. 74.

The authorities are in conflict regarding the liability of a public officer for the non-negligent loss of funds intrusted to him. The majority rule holds him liable as an insurer. Some courts base this absolute liability upon the strict and unconditioned terms of the bond. *The District Township of Union v. Smith*, 39 Iowa 9. Others regard him, in effect, a debtor, and as such, obligated in his official capacity to pay at any event. *Perley v. Muskegon County*, 32 Mich. 132; *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. 375. This must mean that the official, much like a *del credere* factor, is a trustee, held to the rigid accountability of a common-law debtor. A third line of decisions, in view of the danger of fraud, maintains that considerations of public policy demand the strict rule. *United States v. Prescott*, 3 How. 578; *United States v. Dashiell*, 4 Wall. 182. Exception is made in case of loss due to acts of a public enemy. *United States v. Thomas*, 15 Wall. 337. The minority rule regards the officer as "a bailee resting under special obligations," bound only to exercise due care. *Cumberland County v. Pennell*, 69 Me. 357; *Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437. The principal case accords with the great weight of authority. It correctly refuses to recognize any distinction between private and public funds. *Northern Pacific Ry. Co. v. Owens*, 86 Minn. 188, 90 N. W. 371. See also *Havens v. Lathene*, 75 N. C. 505; *contra*, *Garley v. People*, 28 Colo. 227, 64 Pac. 208.

**TAXATION — PROPERTY SUBJECT TO TAXATION — ALIMONY NOT SUBJECT TO INCOME TAX.** — The question arose whether alimony is "income" within the meaning of the Federal Income Tax Law (38 STAT. AT L. 114, 166). *Held*, that it is not. *Gould v. Gould*, U. S. Sup. Ct. Off., October Term, 1917; No. 41.

It may be argued that alimony is taxable within the term "income derived from any source whatever." It was so considered in a ruling of the Treasury Department. Rulings of the Treasury Department, No. 209c (December 14, 1914). But the court was impressed by the fact that alimony "is regarded rather as a portion of the husband's estate to which the wife is equitably entitled." See *Audubon v. Shufeldt*, 181 U. S. 575, 577. It is not an allowable deduction in the husband's return and hence is taxed with his general income. Rulings of the Treasury Department, No. 2090, *supra*. To tax it again, in the form of alimony, would be double taxation of the most obvious sort. It is undoubtedly this consideration which led the court to the present

conclusion. In England, it would seem that the husband is allowed to withhold the amount of the tax on such payments as reimbursement for the tax on that portion of his general income. *Cf. Dalrymple v. Dalrymple*, 39 Scot. L. R. 348.

WAR — STATUS OF ALIEN — ENEMIES IN COURTS OF JUSTICE. — An action was brought by a German subject resident in Germany. Before the case reached the stage of judgment, war broke out between the United States and Germany. *Held*, the action will not be dismissed, but it will be suspended until peace shall be established. *Plettenberg v. Kalmon*, 241 Fed. 605 (District Court, Ga.), and *Stumpf v. Schreiber Brewing Co.*, 242 Fed. 80 (District Court, Western District of New York). See Notes, page 471.

WILLS — CONSTRUCTION — DISPOSITION OF ANNUITY ON DEATH OF ANNUITANT. — Testator left the residue of his estate to trustees to pay part of the income to A. annually, and the rest to B. Distribution of the principal was to be made when certain children reached the age of twenty-one years. A. died before the time for distribution. *Held*, that until time for distribution, income reserved for A. should be added each year to that paid to B. *Norman v. Prince*, 101 Atl. 126 (R. I.).

Upon the death of a beneficiary before the termination of a trust, his income is not paid to his estate, if there were no words of inheritance. *Weston v. Weston*, 125 Mass. 268; *Bates v. Barry*, 125 Mass. 83; *In re Taber* [1882], L. J. Ch. (N. S.) 727. But *cf. In re Follett*, 23 R. I. 409. And the questionable rule, that a lapsed residuary bequest shall not go to increase the rest of the residue, would seem to be outweighed by the strong policy in favor of the rule of construction against a partial intestacy. *Weston v. Weston*, *supra*; *In re Bensen*, 96 N. Y. 499. There is little authority as to whether the lapsed bequest should go to increase the principal of the trust fund, or be added to the income of the other beneficiaries. The latter would seem to be proper, unless there is an express provision to the contrary. *Vigor v. Harwood*, 12 Simons 172; *Wakefield v. Small*, 74 Me. 277; *Buller v. Buller*, 101 Atl. 115 (R. I.). *Cf. Angus v. Noble*, 73 Conn. 56, 46 Atl. 278. It seems that the result reached by the court effectuates the manifest intent of the testator.

For a discussion of another question in this case, see the February number of this REVIEW.

WILLS — EXECUTION — PUBLICATION BY INTERPRETER. — A statute provides that the testator shall "declare" that the instrument is his will to "two attesting witnesses," who must sign at his "request" (1910, Okla. Rev. L. § 8348). Testatrix was a Creek Indian who understood no English. Her declaration and request were interpreted to witnesses who understood no Creek. *Held*, that the will is invalid. *Hill v. Davis*, 167 Pac. 465 (Okla.).

Similar statutory requirements are not uncommon. See 1909, N. Y. Laws, c. 18, § 21. See also 1 JARMAN, WILLS, 6 Am. ed., 112, note 1. The case overrules one decided less than two years previously in the same court. *Pell v. Davis*, 155 Pac. 1132 (Okla.). The decision has the support of a *dictum*. See *Stein v. Wilinski*, 4 Redf. (N. Y.) 441, 448. *Cf. Hunn v. Case*, 5 N. Y. Sur. 307; *Van Hooser v. Van Hooser*, *ibid.* 365. But there is little authority applicable to the question. Attestation has been defined as "the act of witnessing in its full legal import." See SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS, 5 ed., § 330. Where there can be a publication, it would seem to follow that there can be an attestation. A will has been held published by signs and sounds of a testator stricken with partial paralysis of the vocal organs. *Lane v. Lane*, 95 N. Y. 494. And where the testator has the power to understand what is said, the declaration clearly may be made by a third party. See *Heath v. Cole*, 15 Hun (N. Y.) 100, 103. See also *Robbins v. Robbins*, 50 N. J. Eq. 742, 744. In cases where there is a publication by an interpreter, it be-



comes merely a question of how strictly it is desirable to construe the statute. As a matter of language, publication and attestation could be found in such a case without distorting the words of the statute. The decision would seem to be unduly strict. Cf. PAGE, WILLS, § 226.

## BOOK REVIEWS

THE LIFE OF JOHN MARSHALL. By Albert J. Beveridge. Volumes I (Frontiersman, Soldier, Lawmaker) and II (Politician, Diplomatist, Statesman). Houghton Mifflin Company. 1916. \$8.00 net. pp. 506, 620.

This is the first installment of what promises to be the standard biography of John Marshall, and one of the best biographies of any American statesman. Senator Beveridge has undertaken a comprehensive task. These two goodly volumes are in a sense introductory; they cover only the preliminary activities of the great chief justice. Only at the end of volume two does the author induct his subject into the high office where he made his reputation.

It was well, in a definitive work, to give the full story of Marshall's life down to 1801; a life not only varied and interesting in itself, but necessary for a proper understanding of the judicial career. Furthermore, "in order to make clear the significance of Marshall's public activities, those episodes in American history into which his life was woven have been briefly stated." But, in addition, there is one chapter each on Community Isolation, Popular Antagonism to Government, the Struggle for the Ratification of 1788 (outside Virginia), and the Influence of the French Revolution in America. Sound and very readable chapters they are; one is glad they were written, but one remembers what became of Trevelyan's "Life of Charles James Fox." The story of Marshall's career as chief justice, covering thirty-five of the most pregnant years of our national development, the decisions alone touching nearly every aspect of it, offers innumerable and interesting byways to the historical explorer. Senator Beveridge must stick to the main road henceforth, if he wishes to attain Carlyle's "indispensable beauty in knowing how to get done."

No professional historian could surpass the thoroughness with which Senator Beveridge has treated Marshall's life to 1801. His task was unusually difficult, for there was no body of Marshall documents, published or unpublished, upon which to base the work. There was no short cut to it; the traces Marshall left behind him had to be sought out laboriously in the manuscript collection of the larger libraries, of private individuals, and in numerous Virginia attics. Almost every scrap of printed material on the federalist period has been carefully combed. The author has used every tool of the scientific method in history; and the result must be an agreeable surprise to his academic acquaintances, who for some years past have watched with interest and not a little amusement the senator's joyous gallop along the trail of the chief justice.

Unfortunately — and this is the one defect of the book — the author has adopted some of the vices of the doctoral dissertation, along with its virtues of thoroughness and impartiality. He has not resisted the temptation, so seductive to the Ph.D. aspirant, to make the footnotes an "omnium gatherum" for material accumulated at such trouble, that one cannot bring oneself to discard it; and there is too much piecing together of quotations. It has been done with great skill in the chapters on the Virginia Ratifying Convention, making the most dramatic and lively account of that body ever written. Elsewhere this method proves a poor substitute for a well-digested narrative in the author's own words. At times the pages are fairly spotty with quotes, leaders, italics, brackets, etc.:

"Here [Philadelphia]," wrote Jefferson, "*the unmonied farmer . . . his cattle & corps [sic] are no more thought of than if they did not feed us.*" Script

& stock are food & raiment here. . . . The credit & fate of the nation," etc. (II, 85).

From Boston Jonathan Mason wrote Otis that "war for a time we must have and our fears . . . are that . . . you [Congress] will rise without a proper *climax*. . . . We pray" (II, 342).

Not only is this sort of thing very annoying to read, but it gives an impression of immaturity and cramming that does injustice to the book. For Senator Beveridge has acquired a firm grasp of America in her awkward age; he understands the underlying forces of the federalist era; he has an admirable sense of proportion. The narrative is full of life and movement; the characterizations are invariably felicitous — (Fisher Ames, "the bilious but keen-eyed watchman on the ramparts of New England Federalism") — and almost invariably just. Jefferson has received more fair and intelligent treatment than from any previous federalist biographer, although Marshall was Jefferson's enemy in a sense more complete than even Hamilton.

Members of the legal profession will value this book most of all for its convincing and lifelike description of the simple and thoroughly human person who became chief justice in 1801; and law students may note this analysis of Marshall by a contemporary: "His mind is not very richly stored with knowledge, but it is so creative, so well organized by nature, or disciplined by early education, and constant habits of systematic thinking, that he embraces every subject with the clearness and facility of one prepared by previous study to comprehend and explain it" (II, 178).

S. S. MORRISON.

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MENTAL CONFLICTS AND MISCONDUCT. By William Healy, Director Psychopathic Institute, Juvenile Court, Chicago. Little, Brown and Company. 1917.

This book presents a detailed record of cases of juvenile delinquency and aims to throw light upon one type of causation of misconduct, namely, "uncontrolled anti-social motivation or impulse." The author finds revealed in these cases "potent subconscious mechanisms," and "types of hidden early experience which definitely evoke these mental processes that are the forerunners of misconduct." Further than this, he urges that mere pious admonition and punishment as effectual preventives should be discarded in favor of "inducing in the offender self-directed tendencies toward more desirable behavior."

The method of investigation was simply a "sympathetic and patient approach" to the source of the mental conflict, — a modified form of psychoanalysis as practiced on adults. In children the original experience is less remote, fresher in their minds, and less confused with a myriad of later impulses, as well as less disguised than in older persons; and the youthful misdoer is both more aware of his subconscious stimulations to misconduct and more ready to delve into his mind for the causes of his errors than is the adult. It is incumbent on the sympathetic and wise analyzer neither to be shocked by the revelations of the patient, nor to insist on getting information "when strong barriers to further progress are raised." He should not lay stress on the delinquency as such, nor evoke a feeling of shame, — two faults which Dr. Healy finds not infrequently in parents and preachers. The best results come from getting the offender to analyze himself, and to dig up the earliest knowledge of his offense with the fewest promptings possible. By all means one should never regard youthful delinquency as *ipso facto* producing more harm than might later eventuate, if an abnormal psyche were developed out of chronic repressions. While following Freud in general, the author found no value in evoking the Freudian sex-symbolism, nor in analyzing any dreams.

The mental characteristics of the delinquent show up a curious error on the part of many common judgments about him. The standard mental tests



exhibited (1) no specially neurotic type, (2) no necessary hereditary influences bearing him toward crime, (3) no special "rough" as a temperamental type of offender, (4) no special assertiveness or ego-centricism in delinquents, and (5) in general ability, in psychomotor control, in control of association processes, as well as in the powers of apperception and memory, there were no indications of anything not normal. In the individual cases presented in this book, plainly the evidence points to a suppressed idea or complex as the chief cause of the disorder, and this suppression appears to be completely dis severed from what the delinquent knows or feels he ought to do.

Especially do we note the "dynamic quality of hidden mental reactions." There is often a "distinct inner urge toward misdoing," an "untoward drive" dis severed from reason or prudence. The "determining factor of action arises and recurs with a show of strength out of all proportion to any readily perceivable source of motive power." Often delinquents feel their actions to be "forced, as it were, by something in themselves, but not of themselves." Such actions do not need in any way to feel pleasurable. Superficial observations are often thoroughly misleading in regard to the antecedents of such action, on account of the deeply repressed, but "highly emotional import of the original experience." The delinquency, however personal its causes may be, can always be accentuated by (1) memory and habit, (2) being confronted with the already achieved reputation, (3) old associations in delinquency, (4) companions known while under detention, (5) police surveillance, and (6) an unfavorable family attitude.

Considering delinquency as an effect, Dr. Healy urges the application of common sense and scientific principles to the cause. Personal, sympathetic coöperation with the patient, with a view to "sublimating" the suppressed complex appears to be reputable as a "first aid." Better than cure, however, is complete prevention, the accomplishment of which requires (1) sex education, (2) close confidence between parents and children, (3) elimination of lying and misrepresentation to the young, (4) the re-education of both parent and child, (5) the altering of the connotation of words and pictures that have stimulated to the "overt act," and (6) being removed from previous environmental conditions.

No permanent cure can be "taken out of a bottle"; the problem here presented is a large slice of the problem of evil, and it is discussed in these pages in a very tangible manner. The book claims to present more cases of the kind than have ever appeared together before, and this is, perhaps, its chief merit, for it adds very little to the methodology of the subject.

ROBERT CHENAULT GIVLER.

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MANUEL DE DROIT CONSTITUTIONNEL. By Leon Duguit. Paris: Boccard.

That a third edition of M. Duguit's admirable manual should be called for within ten years of its original publication is sufficient testimony to its merit. It is, indeed, a remarkable effort from whatever point of view it is regarded. Not only does it afford an admirably clear view of the main features of French constitutional law, but it contains also a succinct outline of M. Duguit's own theory of the state not less solidly based on a sober study of the facts than his larger works. It is a volume that is in its way unique; for Esmein's brilliant essay is to be compared rather to M. Duguit's great treatise than to this textbook. It has been brought up to date by the incorporation of comment on the most recent French changes; and, as in earlier volumes, account is taken of the drift of opinion and statute in foreign countries.

The account of parliamentary government in France during the war is particularly good. It is, indeed, to be doubted whether M. Duguit has exactly seized the nature of constitutional change in England. The very remarkable changes for which Mr. Lloyd George has stood sponsor, however admirably

conceived, have hardly stood the test of administrative application. The French Chamber has stood the test of war far better than the British Parliament. The former has gone through three periods. In the first, the complete authority of the government, especially in the Bordeaux period, went practically unchallenged. In the second, which roughly ended with the fall of M. Briand's ministry, was a period in which the chamber coöperated with the administration by means of parliamentary commissions. The third and present period seems to be one in which the normal control of the deputies has been restored. M. Clémenceau is the first Prime Minister since 1914 who has come into office as a result of a definite parliamentary refusal of confidence. In England the process has been different. No ministry has been made or unmade in the House of Commons. Parliament has been an organ of deliberation almost as distinct from executive action as is Congress from the President. The evolution of cabinet supremacy has been rapidly completed; and it will need little less than a revolution on the part of the private member to restore the balance of power. No student of the English constitution can afford to neglect the great debates in the House of Commons during April, 1917, in which the possibility of such a revolution was clearly indicated.

A reader of M. Duguit's brilliant essay can hardly refrain from the inquiry as to why such books are not produced in America. There is, I think, only a single treatise in the English language — Professor Dicey's "Law of the Constitution" — which in any real degree challenges comparison with this book. It is not merely a discussion of laws and ordinances, cases and debates, but, at the same time, a concise and coherent philosophy of law. Our American treatises fail exactly at this point. Whatever books we take up — Willoughby, Curtis, Story, Foster — tends to be little else than a more or less acute comment on the clauses of the constitution with a discussion of the cases they have evolved. The point is not perceived that constitutional law is not merely law, but, as John Chipman Gray used ironically to complain, is politics as well. A writer on the theory of American constitution can no more afford to neglect Jefferson and Hamilton than M. Duguit could venture to neglect Benjamin Constant and Royer-Collard. The point is that any adequate theory of constitutional law involves also a theory of the state. The assumptions will be there in tacit fashion, however carefully the commentator may guard against their presence. The English constitution is different because Mr. Gladstone lived to be eighty-nine; and that is why a writer on the law of the English constitution will study Lord Morley's biography hardly less closely than he studies the contemporary English Reports. For the simple fact is that the key to the English Reports is in Mr. Gladstone's life. That has been realized in France, and the result is here in books like this of M. Duguit. It makes the study of the constitution a subject that is not merely a discipline but also a liberal education. It is greatly to be hoped that the study of it will inspire some competent observer to undertake a similar work for the United States. The material, at any rate, is not wanting, and the result would be a contribution to the understanding of federal institutions such as has hardly been made in our time.

H. J. L.

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WAIVER DISTRIBUTED. By John S. Ewart. Cambridge: Harvard University Press. 1917. pp. xx, 304. 8vo.

The full title of this book is "Waiver Distributed among the Departments Election, Estoppel, Contract, Release," and this is a serviceable explanation of the author's purpose and points of view. "Waiver" itself void, voidable, forfeiture and election, and "Waiver" in the spheres of contract, Landlord's Tenant, Vendor and Purchaser, and Insurance are all passed in review, each running the gauntlet.



This is a usable book in the first place and scarcely less a readable book. The author asserts that its purpose is to improve the existing state of the law, and the reviewer most cordially concurs in the idea that there is much in the book which will tend toward this good end. But the book ought to have even greater usefulness in improving the mind of the practicing lawyer who wants light, in helping him to keep business men out of trouble, and in helping both lawyers and business men to think accurately about commercial and property rights. It may be that the book will make judge-made law a little more sensible. But whether that happens or not, and indeed whether the book itself is much read or used, it bids fair to be very well worth while as an aid to the legal profession. The author is occasionally wrong in his conclusions about given cases. He is never wrong in his aims and ideals. And so he has made a book which is like a stone thrown into a pool and should have an ever-widening circle of influence.

One might make a fairly good review of this book by quoting or paraphrasing the illuminating introduction by Dean Pound, but perhaps it would be wiser to leave that as a kind of dessert for the diligent reader of reviews and the books which are reviewed.

Another aspect of the book also claims notice in a review. For the purpose of comment upon Mr. Ewart's results, text-books may be divided into three classes. There is first the text-book whose author has the same aims and often the same lack of intelligence as the quicksilver on the back of a mirror. Whatever he thinks the court has decided he mirrors in his book. There is next the author whose work is a complete essay upon the branch of the law which he serves. "Blackburn on Sale" is a good example of the ideal way to write a complete essay on a legal subject. "Pothier on Suretyship" seems to the writer the perfect treatise of this kind. Beyond these there is a third class of books in which the author is riding not merely a hobby, but a war horse, which needs to be ridden hard. The fewer text-books of the mirror class that come into the world, the better the legal profession will be served. One cannot expect books like "Blackburn on Sale" from every publisher in every season. But there ought always to be somebody ready to write the war-horse book, and provided it is not a hobby horse, the profession profit greatly. "Gladney on the Patent System of Price Restraint" is an excellent example of this sort of thing, except that it approaches dangerously near to the hobby-horse type. Mr. Ewart deserves great praise for producing a book which is not open to that suspicion and which makes war on many stupid and many foolish pieces of ambiguity. Anyone who wants to know about the meaning of "void," "waiver," "election," "estoppel," or the things an insurance policy does not mean, in spite of what it says, can educate himself by accepting Mr. Ewart's assistance.

RICHARD W. HALE.

A TREATISE ON THE POWER OF TAXATION. By F. N. Judson. St. Louis: F. H. Thomas Co. [To be reviewed.]

ESSENTIALS OF AMERICAN CONSTITUTIONAL LAW. By F. N. Thorpe. New York: G. P. Putnam. [To be reviewed.]

A TREATISE ON CONVERSION. By R. D. Bowers. Boston: Little, Brown and Company. [To be reviewed.]

ROMAN LAW IN THE MODERN WORLD. By Charles Sherman. 3 vols. Boston: Boston Book Company. [To be reviewed.]

ALSACE-LORRAINE. By Daniel Blumenthal. New York: G. P. Putnam.

EQUITY IN ITS RELATIONS TO COMMON LAW. By W. W. Billson. Boston: The Boston Book Company. [An elementary essay.]

BANKRUPTCY ACT OF 1898. Collier Edition. Albany: Matthew Bender Co.

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## NOTICE PLEADING \*

THERE is little doubt that lawyers, the country over, form one of the most conservative elements of our population. The bankers, the large manufacturers, capitalists generally, are naturally fearful of changes the effect of which they cannot wholly foresee. It is almost equally natural that their legal advisers, thrown into intimate contact with them, and thus learning to see and appreciate their point of view, should share their conservatism. The men who give character to the American bar are these legal advisers. The rest of the bar largely follows their lead. Again, the daily training of a lawyer, the eternal hunt for precedent, the desire to be able to advise with certainty, the fulsome flattery of the common law in legal treatises old and new, — all these incline the lawyer to look to the past and trust it only, or at least, mainly. Therefore, in urging a proposed change upon the profession, one must expect even a strong case to receive scant recognition, and must be willing to state the facts as one sees them, and to be satisfied if time and a slowly altering professional opinion finally produce results. It is in this chastened spirit that I venture to propose again<sup>1</sup> the adoption of a system of pleading, based upon the principle of giving notice of the opposing claims of the parties, in contradistinction to the present principle requiring a complete

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\* The writer wishes to acknowledge his indebtedness to his colleagues, Dean Huston and Professor Cathcart, for valuable suggestions which have been of service.

<sup>1</sup> See "Judge Gilbert and Illinois Pleading Reform," 4 ILL. L. REV. 174.



allegation of all the ultimate facts which must be proved at the trial in order to establish their claims.<sup>2</sup>

## I

Perhaps a short statement, attempting to visualize notice pleading, may be useful. The general idea seems to be easily comprehended, but it has been said that the concrete sort of pleading it would require is vague. Equally general and indefinite, however, is the conception of pleadings requiring an allegation of the essential facts; it is only our knowledge of numerous applications of the principle that gives it any concreteness. Apparently, therefore, the simplest way to remove this lack of definiteness in our notions of notice pleading is by a few illustrations.

Let us compare an ordinary special count on a contract, a common count for work and labor, a count for a negligent personal injury, and a count for libel with corresponding pleadings under a notice system. A special count on a contract contains four allegations which in the ordinary case are essential: the statement of the defendant's promise, the statement of the consideration for that promise, the averment of the performance of conditions, and the allegation of the breach. To be sufficient in substance and avoid a variance, the promise must be alleged with considerable accuracy. The consideration must be alleged fully and truthfully, and must be on its face a legally sufficient consideration. The performance of conditions may by statute now usually be alleged in general terms, but an excuse for non-performance must be specifically alleged. The breach must carefully fit the promise alleged and be on its face actionable.

Under notice pleading, to take a concrete example for the sake of definiteness, the complaint would merely allege that the plaintiff claims damages because the defendant failed to complete the purchase of the plaintiff's dwelling, 501 Prospect Avenue, St. Louis, as he had agreed, about July 1, 1916, to do. Under such a pleading

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<sup>2</sup> This is the general rule. The modern English system permits notice pleading in many cases as an optional alternative: see HEPBURN, *THE DEVELOPMENT OF CODE PLEADING*, 211-25. Michigan has adopted notice pleading: see Sunderland, "The Michigan Judicature Act of 1915," 14 MICH. L. REV. 551 (part four of the entire article). The Municipal Court of Chicago has adopted notice pleading: see 4 ILL. L. REV. 512.

no question can arise (a) whether the promise is truthfully alleged; (b) whether express conditions to the promise which qualify it are stated; (c) whether the consideration alleged is legally sufficient; (d) whether it is the entire consideration; (e) whether it is the exact consideration; (f) whether the allegation of the performance of conditions is made; (g) whether an allegation of such performance will suffice when really performance did not take place but was excused; (h) whether the breach alleged is a breach of the promise alleged, not to mention many other questions of the same character. Yet it notifies the defendant of the cause of action he will have to meet, and enables him, it would seem, to state and prepare his defenses. His answer might be: The defendant says (1) that no promise to purchase the said property was made by the defendant; (2) that the plaintiff was unable to convey a merchantable title to said property; (3) that the claims of the parties concerning the alleged contract of purchase were referred to arbitrators whose award was that the defendant was not in any way liable. Under notice pleading no objection can be made on the ground that an allegation is a conclusion of law, unless it is also too indefinite to give the plaintiff adequate notice of the defense relied on. Though this may sound like a new proposition, it is in truth not such. Our present pleadings are full of allegations of law, averments which are compounds of law and fact, and not purely statements of fact. That is the reason why instructions must be given by the judge to the jury. If the pleadings really alleged "fact," the jury could decide on their truth without any instructions concerning law. Did a wagon X. was driving collide with Y.'s person? What instruction would be necessary to enable the jury to decide that? But if we ask, did the defendant "promise" to buy the plaintiff's dwelling, then the jury must have aid from the court. The word "promise," when used in a pleading, means an undertaking bearing such a relation to the consideration alleged and made under such circumstances that, in the absence of some special objection, it will be enforceable. Obviously here are questions beyond the jury's province. So the commonest allegations in our present pleading are compounds of law and fact. If the allegation gets too indefinite, we call it an allegation of law and exclude it. Under notice pleading, if the allegation is so general as to give inadequate notice, it would be excluded or particulars required.



Consider next the ordinary common count for work and labor. This count is so extremely indefinite that under notice pleading it would not suffice. Its substitute might run: The plaintiff claims one hundred and fifty dollars for wages due for service as the defendant's chauffeur, during January, February, and March, 1916. This tells the defendant what he is sued for, which the common count does not do, and yet avoids the needless technicality of the usual special count.

An ordinary count for a negligent injury is a nice piece of mechanism. Allegations showing the defendant's duty to use care, the defendant's act stated with reasonable detail, his negligence, the legal causation of some specific injury to the plaintiff, perhaps the plaintiff's use of due care, his non-assumption of the risk, and other statements for slightly varying cases must be included, or one is subject to a general demurrer. Notice pleading, of course, would omit most of these averments, which give the defendant slight assistance in defending, and instead would tell him plainly and simply what the plaintiff demands. For example, the plaintiff claims damages for personal injuries sustained by being struck by the defendant's motorcycle, about August 1, 1916; such would seem to be an adequate notice pleading. The defendant will know, without any allegation, that the plaintiff claims that the defendant was negligent when he was legally obliged to be careful, that the plaintiff was free from fault, that the defendant's act caused injury to the plaintiff, and the other essential matters. The inclusion of these allegations of law in the complaint will not assist the defendant materially.

Turn now to that over-abundant growth, the complaint for libel. Compare its inducements, *colloquia*, innuendoes, "of the plaintiff," and so forth *ad nauseam*, with this simple statement: The plaintiff claims damages for a libel contained in the *Daily Argonaut* for October 16, 1916. If there could be reasonable doubt as to what statement is referred to, the complaint might state its general tenor sufficiently to identify it. It may be added that the pleader is not to be held to the exact date alleged; but the date must be accurate enough to direct the defendant to the defamation complained of. Thus, without requiring exact accuracy with the resulting danger of variance, the date becomes more important than under our present system. What a fine disregard of con-

sistency is shown by our common rule that, though the exact date be immaterial, it must be alleged for certainty, and yet need not be proved as laid!<sup>3</sup> To such a complaint for libel the defendant might answer as follows: The defendant says (1) that the statement made is true; (2) that it was fair comment upon an article published by the plaintiff in *Onward* for October 7, 1916; (3) that the plaintiff released the defendant from liability for the statement.

Notice pleading then requires that the cause of action or defense relied upon shall be stated as simply as possible, consistent with giving adequate information to the opponent. It is to be hoped that no law would develop determining what is sufficient notice of any cause of action or defense. It should be left a question of fact in each case to be determined by the trial judge, or other officer in charge of the pleadings. The question would arise upon an application by the opponent for particulars. If the opponent truly needs the particulars to enable him to apprehend the pleader's position, they should be given, otherwise refused. And if the opponent does understand the pleader's claim, whether that be the result of the pleading itself or partly due to the opponent's own knowledge, he is obviously not entitled to particulars. That the judge may sometimes, for his own use, need and require a more complete pleading than that which may have been filed, is noticed below.

## II

Does the present system work well? I think that all can see and appreciate the needless technicality and general inaptness of some of the rules of common-law pleading. The artificial forms of action, the broad general issues which do not give adequate notice, the common counts which are open to the same objection, and other defects well pointed out by Dean Ballantine in the

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<sup>3</sup> *Glenn v. Garrison*, 17 N. J. L. 1, 3 (1839); *Sage v. Hawley*, 16 Conn. 106 (1844). This absurd result is an incidental effect of essential-fact pleading. It seemed necessary that time and place be alleged to fairly apprise the opponent of the cause of action or defense relied upon, so the allegation is required. But in substantially all actions the time of the happening of any fact is *prima facie* quite immaterial; only such a defense as the statute of limitations would make it material, so it need not be proved at all, or at least not as laid in the pleading. Likewise, place is really material in local actions only, with the result that in other actions it need not be proved as laid. Some modern courts have refused to follow this eccentric rule. *Backus v. Clark*, 1 Kan. 303 (1863).



"Illinois Law Bulletin,"<sup>4</sup> need not be criticized again in this article. Code pleading was proposed and adopted to remedy those glaring faults. More than a dozen years before its adoption in New York the English judges, by their so-called "Hilary Rules,"<sup>5</sup> had attempted to correct some of these evils. But my indictment against the present system of pleading goes deeper. Code pleading and Hilary Rules pleading require the facts essential to constitute a cause of action, the facts which must be proved at the trial, to be alleged in the pleadings. It is this fundamental principle of our present system that seems to me erroneous. But what are the objections to it? It is a fruitful source of the delay in litigation which is so commonly condemned; it causes a great waste of time on the part of appellate courts; it no doubt wastes much time in the trial courts, though proof of this is harder to obtain; and occasionally it leads to an improper conclusion of a particular litigation. Of these objections more will be said in another paragraph.

With a view to determining how our present system of pleading is actually working, I have examined, case by case, a few volumes of reports from widely separated jurisdictions in this country and from England. In every instance I noted or attempted to note all cases which were reversed on the pleadings. Usually I noted also the cases in which pleading points were discussed, though the lower court was affirmed. In general the volumes chosen were the latest volumes published from the jurisdiction in question at the time the examination was made, some six years ago.<sup>6</sup> But in the case of England volumes were chosen from the classical period of common-law pleading, say 1830, again from the developed Hilary Rules pleading, about 1846, as well as from recent reports under the pleading established by the Judicature Acts.<sup>7</sup> The Illinois reports were given disproportionate attention, because

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<sup>4</sup> "The Need of Pleading Reform in Illinois," 1 ILLINOIS LAW BULLETIN, 3.

<sup>5</sup> These rules were adopted by the judges under parliamentary authority; they are found conveniently in 1 CHITTY, PLEADING, 16 Am. ed. 749.

<sup>6</sup> An earlier presentation of the results has been impossible.

<sup>7</sup> The Judicature Acts pleading is discussed clearly and yet concisely in HEPBURN, THE DEVELOPMENT OF CODE PLEADING, chap. 6. The inside history of the reform of pleading in England, culminating in the Judicature Acts pleading, is ably and interestingly told by Samuel Rosenbaum in "Studies in English Civil Procedure," published originally in 63 U. OF PA. L. REV. 151, 273, 380, 505.

the writer lived in that state at the time of the examination, and because Illinois has been singularly backward in instituting pleading reform. Exact accuracy could not be claimed for the tabulated results of this examination without undue rashness, but an honest effort has been made to have the results correct. Fractions have been avoided in computing results. With these remarks, intended to answer certain natural questions about the tabulation, it is printed in full.

We may notice first the remarkable figures from England. Under the common-law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot. No wonder that the English bench and bar were ready for reform. And what a successful reform the Judicature Acts were! In only one case in seventy-six can a pleading point be found. Reversals on questions of pleading drop from one in forty-four under the common law, and one in thirty-three under the Hilary Rules, to one in six hundred and five: one reversal in all the cases under the Judicature Acts which were examined. If anyone urges the adoption in any American jurisdiction of a pleading system analogous to that of the Judicature Acts, I for one am ready to second his efforts. The English system has been successful.

If we turn now to the figures from American jurisdictions, we ought to be confounded by them. In almost every instance the showing is worse than under any one of the three English systems. In a number of reversals on the pleadings we unhappily outdistance England entirely, the average for all the jurisdictions examined being one reversal in every twenty cases. If we leave out Michigan, which has long had partial notice pleading and has recently adopted it fully, the average is one reversal on pleadings for every seventeen cases. In affirmances on pleading points, the average is one in seven cases, or the same as under the English common law. If again we exclude Michigan, the average is one in every six cases. In this respect we are a trifle better than were the courts under the Hilary Rules. But our average of reversals is so much higher than theirs that on the whole they have the best of the argument.

Nor does it seem to make the least difference whether a state is a common-law or a code state. In the matter of reversals the



## THE PROPORTION OF DECISIONS ON PLEADINGS IN APPELLATE COURTS

JURISDICTION		Volumes examined	Date	Total cases examined	Reversals	Affirmances	Total pleading discussions
English common-law pleading	H. L.	1 Dow & Clark 1 & 2 Cr. & J.	1827-30	32	0	1 in 11	1 in 11
	Ex. Ch.	(Ex. Ch. cases, only)	1830-32	13	1 in 6	1 in 4	1 in 3
	Ex. Ch. & Exch.	1 C. & M.	1833	171	1 in 34	1 in 6	1 in 5
	K. B.	1 Nev. & M.	1832-33	139	1 in 139	1 in 8	1 in 7
	Total			355	1 in 44	1 in 7	1 in 6
English Hilary Rules pleading	Ex. Ch. & Exch.	16 M. & W.	1846-47	134	1 in 33	1 in 3	1 in 3
English Judicature Acts pleading	H. L.	A. C. 1906-09 (1907) 2 Ch. (part)	1906-09	280	0	0	0
	Divisional courts & Court of Appeal	(1908) 1 & 2 Ch. (1909) 1 & 2 Ch. (1907) 2 K. B. (part)	1907-09	325	1 in 162	1 in 46	1 in 36
		(1908) 1 & 2 K. B. (1909) 1 & 2 K. B.					
United States Sup. Ct.		221-24	1910-11	234	1 in 13	1 in 5	1 in 4
California		152-55	1907-09	435	1 in 15		
Connecticut		81	1908-09	208	1 in 21	1 in 5	1 in 4
		90	1915-16				
Illinois	Sup. Ct.	240-43	1909-10	283	1 in 15	1 in 5	1 in 4
	Sup. Ct.	249-52	1910-11	275	1 in 14	1 in 6	1 in 4
	App. Ct.	145-48	1908-09	484	1 in 19	1 in 8	1 in 5
	Appeals from the Municipal Court of Chicago	145-48	1908-09	135	1 in 135	1 in 23	1 in 19
		161	1911				
Iowa		139-42	1908-09	425	1 in 15		
Kansas		77-80	1908-09	585	1 in 13		
Massachusetts		204	1910	550	1 in 92	1 in 11	1 in 10
		206-09	1910-11				
Michigan		160	1910	110	1 in 37	1 in 14	1 in 10
		189	1916	101	0	1 in 20	1 in 20
Missouri		233-36	1910-11	132	1 in 44	1 in 4	1 in 4
New York		197	1909-10	267	1 in 13	1 in 13	1 in 7
		199-202	1910-11				
Ohio		77-80	1907-09	122	1 in 9		
Pennsylvania		256	1917	124	1 in 21	1 in 8	1 in 6
Tennessee		121	1908	26	1 in 26	1 in 5	1 in 4
Virginia		111-12	1910-11	232	1 in 20	1 in 7	1 in 5
Wisconsin		100-01	1898-99	185	1 in 15	1 in 6	1 in 4
		145-46	1911	173	1 in 43	1 in 7	1 in 6

common-law states average one in twenty-one, while the code states average one in twenty. In affirmances the common-law states average one in six, the code states one in seven. Code pleading has not reduced the number of cases which are decided on pleadings. It has not increased their number as did the Hilary Rules, but it has not effected any material reform as did the Judicature Acts. By this test it has largely failed in reducing delay in legal proceeding, or waste of time by the courts. One, therefore, who proposes that a common-law state adopt code pleading has really nothing in the above figures to commend his enterprise. Code pleading, in my judgment, is not the solution.

Before going further, one must congratulate the courts of Massachusetts. With only one reversal on pleadings in ninety-two cases and only one affirmance on pleadings in eleven cases, it occupies, compared with other American jurisdictions, a proud position. I have been told by one who should know that the Massachusetts Supreme Court is determined to avoid decisions on points of practice and pleading whenever possible, and to discourage the raising of such technical points on appeal. If true, the effect is excellent. Massachusetts uses a greatly modified common-law pleading.

The two late volumes of Wisconsin reports examined show a decided improvement over the earlier volumes. The Wisconsin court is pretty clearly taking much the same stand as the Massachusetts court. Wisconsin is of course a code state. Thus under any system much may be done to alleviate the situation by the determined efforts of the judges.

But the two courts that have the best records on the returns are the Michigan Supreme Court, and the Appellate Court of Illinois when sitting on appeals from the Municipal Court of Chicago. Is it not significant that these two courts are hearing appeals in cases which were tried under a system of notice pleading? In the last volume of Michigan reports available, containing cases decided since notice pleading was fully adopted, there is not a single reversal on a pleading question. Affirmances on pleadings had fallen to one in twenty. In the appeals from the Municipal Court of Chicago there was but one reversal on pleadings in one hundred and thirty-five cases, and but one affirmance on pleadings in every twenty-three cases. An inferior court of a great city with elected judges, sometimes able and sometimes not so able, has done business



without sending a great grist of pleading questions to be passed on by the appellate court! No doubt credit is due to the judges of the court and to its able and excellent Chief Justice, Harry Olsen; but is not the result due in part, possibly in large part, to the fact that the court, under powers granted to it by the legislature of Illinois, adopted a non-technical system of pleading, based on the general principle that any pleading is good that adequately notifies the opponent of the cause of action or defense he may expect to meet at the trial? That the same result has been achieved by the Michigan courts upon adopting a very similar system seems to argue that this reform is one to which American lawyers may well give serious consideration.

### III

There is one fact concerning this examination of reports that many will, at first sight, consider a serious flaw in the whole investigation. In counting the reversals and affirmances on pleadings, opinions on the question whether a pleading contained sufficient facts to constitute a cause of action or defense, have been included. The commonest example arises when the defendant demurs to the declaration or complaint for insufficient facts, and, after decision below, the defeated party appeals. It is natural to assume, first, that these are useful cases settling points of substantive law; and, secondly, that they constitute a class of cases to be encouraged, because they are instances of the settlement of litigation on the pleadings without the expense of a trial.

But to the first assumption it may be answered that very often they really decide not a question of substantive law at all, that is, whether a fact is essential to the party's case or not, but merely some technical pleading question. Illustrations of this may easily be recalled: (1) When the court is called on to determine whether a complaint for negligence is sufficient without an allegation of due care on the plaintiff's part, the real question in dispute is not whether contributory negligence will bar the plaintiff, but whether the plaintiff must allege due care, or the defendant allege contributory negligence. And so in many cases the question decided is not whether the fact is material under the substantive law, but only whether, according to the law of pleading, it rests with the plaintiff or with the defendant to plead the fact. (2) Very often

the question, instead of being one of substantive law, is merely a question whether a certain fact, which the pleader intended to allege, was properly alleged. For example, it may be whether evidence rather than ultimate facts, or whether allegations of law rather than ultimate facts, have been alleged. Or it may be whether a fact has been alleged so hypothetically as to be bad in substance.

(3) Many highly technical pleading points are thus raised upon demurrer, such as, whether a contract alleged, which is within the Statute of Frauds and which everyone knows is in writing, has to be alleged in the declaration to be in writing. Again, (4) there are often questions that arise through an attorney's failure to state some minor element of his case which could easily be established at the trial. In such a case the authorities may be dubious concerning the need for its allegation. The defendant, after the lower court has overruled his demurrer, may deem it wise to stand on his demurrer. Thus a highly unimportant question occupies the time of the appellate court. The plaintiff may concede that he has to prove the fact, but insist that his declaration need not allege it specifically. For example, in an action against a master for an injury caused by improper working conditions, must the plaintiff allege non-assumption of the risk? I fear that, if the truth could be discovered and told, we would find that far too many cases which are lost on demurrer are lost through oversight or lack of accurate pleading information on the part of the defeated counsel. Some such minor allegation is omitted through ignorance, and yet often without serious fault on the part of the attorney. The exact point on which the final court of appeal holds the complaint bad is not mentioned in the argument below, or the complaint would or should have been amended. It could have been alleged with a reasonable hope of proving it. But the case is finally lost on appeal, without the opportunity at that stage of amending, on a technical and unimportant question raised by inadvertence of counsel. (5) Another illustration of demurrers for insufficient facts which really raise no substantive law question is furnished by the declaration for defamation. It is ill suited to its purpose; it states some quite unnecessary things; its statement of essentials is highly artificial, not to say absurd. Yet its jargon of inducement, *colloquium*, and innuendo must be followed, or a general demurrer will prove efficacious. Would anyone claim that de-



cisions about these intellectual playthings settle points of substantive law or that they should be indulged in by adult courts!

We may conclude, then, that in many, perhaps most cases, decisions on demurrer, determining the sufficiency of the facts stated, settle no real questions concerning the substantial rights of the parties, but are in reality determinations in the law of procedure. It may truthfully be added that they are usually very unimportant determinations. And if this be so, the second assumption, that much is gained by having these questions settled without the expense of a trial, also fails; for one who wastes one hundred dollars a month should hardly be praised because he did not throw away a thousand. The point is that most of these matters need not be decided at all and would never arise under notice pleading. Judicial labor should not be spent upon them. To have serious litigation, involving substantial monetary interests, determined upon such frivolous questions is nothing short of absurd.

Of course there is a residuum of cases, no doubt a larger class in some courts than in others, where a demurrer is really used to determine whether the law will give redress on all the actual facts of the case. A proper system of pleading should retain this latter function of a demurrer, while eliminating all the futile uses just mentioned. However, it was found impracticable, in making the preceding tabulation, to separate these classes of cases without unreasonable labor. On that account both have been included as pleading questions. It is conceded that a portion of them are useful decisions and would have to be provided for in any sensible system. A means of accomplishing this is suggested later.

#### IV

Considering it now as reasonably established that our present systems of pleading bring far too many questions in that branch of procedural law before our appellate courts, with a consequent waste of their valuable time, a clogging of calendars, and an occasional miscarriage of justice, is there rational hope of improving the situation? I believe there is. What the English courts have done we should be able to accomplish. And that leads to the question, Why not adopt modern English pleading?

That system cannot be detailed in this article. Roughly speaking it may be said (a) to eliminate the technicalities that had developed in the common-law system; (b) to provide a considerable set of forms applicable to the commonest sorts of litigation, which must be used when pertinent and are to serve as analogies when not directly usable; (c) to permit in all, and to require in some cases pleadings which must state the essential facts of the cause of action or defense; but (d) to permit, in large classes of litigation, the omission of all formal pleadings stating the essential facts, and to substitute mere notices of the cause of action or defense, and, indeed, in many cases, to permit a rough statement of the nature of the cause of action, indorsed upon the summons, without any pleadings by the defendant at all.<sup>8</sup> In other words, the English system is a compromise which retains essential-fact pleading in part, adopts notice pleading in part, and for the rest makes all pleading unnecessary. Even so radical a position as the total abolition of pleading was urged by many members of the English bench and bar during the discussions which preceded the adoption of the modern English system.<sup>9</sup>

This English plan has proved so useful that the burden is plainly upon one who urges the acceptance of any other. Certainly it is more than probable that its general adoption in this country would be a long step in advance and be followed by real and large benefits. Still much may be said for attempting notice pleading pure and simple. (a) It has worked successfully in the Municipal Court of Chicago and in the state courts of Michigan. Indeed, Michigan has long been using it so far as the pleading of defenses is concerned. (b) It is much simpler than the English system, which is really quite complicated with its "Special Indorsement," "Indorsement for an Account," and "Indorsement for Trial without Plead-

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<sup>8</sup> Another and a very important and useful provision places the pleadings and all the pre-trial proceedings under the supervision of a master for settlement and directions to counsel. This plan for saving judicial time and providing an informal method of settling procedural matters cannot be too highly recommended.

<sup>9</sup> Mr. Rosenbaum's article (see note 7, above) contains interesting references, on pages 292, 296, 300, 382, and 398 of the U. OF PA. L. REV., to the English discussions concerning pleadings. One wishes that he had set forth the difficulties encountered in framing a system of notice pleading (see page 300) with more particularity, or had referred to the sources of his information, if in print, so that the particulars would be readily obtainable. The difficulties suggested are discussed later in this article.



ings." The use of forms with modifications when necessary is after all merely a rule-of-thumb system. Perhaps it would not prove so satisfactory were it not for the English provision for the reference of pleading questions, along with other matters of practice, to a master who keeps the machinery oiled. Of course we can adopt it *in toto*. But notice pleading would entail less of change and so be more easily put into operation by our bench and bar. (c) The greater simplicity of notice pleading should reduce to a minimum the growth of those technicalities which seem inherent in procedural law. (d) Again the success of the English system may be due in considerable measure to the high standards required for admission to the English bar, and to the fact that the English bench attracts, by its difficulty of attainment, by the respect attached to it, and by the adequate remuneration received by the judges, the very best of the English bar. So long as a prominent state admits practitioners to its bar on the basis merely of good moral character, we may well bestir ourselves to adopt a simple system.

## V

So far as the writer is informed, no one has formulated and published any comprehensive statement of the objections, valid or invalid, to notice pleading. But arguments have been advanced against it in the English journals when the Judicature Acts were in process of making or amendment, in sporadic references elsewhere, and in private conversations. These arguments may be summarized as follows: (1) The pleadings are likely to be ragged, scrappy, or disconnected. (2) They might be more expensive. (3) The advantage of having alleged facts admitted by non-denial would be lost. (4) Settlement of cases on demurrer without the expense of a trial would be impossible. (5) A party might often be taken by surprise at the trial, through evidence being presented that he did not anticipate. (6) The advantage that the present pleadings have in aiding the jury through a defining of the issues would be lost. (7) Likewise, the aid that the court receives from definite issues, both in passing on the relevancy of evidence and in framing instructions, would disappear. (8) It would be more difficult to apply the doctrine of *res judicata* accurately. (9) Careless, inaccurate pleading might lead to careless analysis of the

case on the part of both counsel and court, and result in inaccurate and unwise substantive law. These criticisms of notice pleading may now be considered in order.

1. The objection to ragged pleadings hardly needs a reply. The courts are not created or maintained to turn out literature, but to settle justly real controversies. The most effective means to that end is the one to be adopted.

2. There seems to be no real possibility that notice pleading would be more expensive. The pleadings would be shorter; pleading points would be seldom raised in appellate courts; when raised in the trial court they should and would be raised in a direct, expeditious, and economical way. To the argument that the lack of more formal pleadings will cause loss by creating trouble and delay in other stages of the procedure, a reply will be found in the answers to other objections, notably the fifth, sixth, and seventh.

3. The first answer to the objection, that admissions by non-denials would cease, is that such admissions are comparatively rare. The old idea that the pleadings are to reduce the case to a single issue must be considered obsolete. It is seldom that a prudent lawyer feels able to determine, in advance of the trial, the very point on which he may obtain a verdict. The result is that he puts in issue every fact which he thinks he has any chance of disproving, and pleads affirmatively every fact which he has any hope of proving. The admissions remaining are likely to be few. Secondly, admissions of the character just explained could almost invariably be obtained by stipulations between counsel. If that were impossible they could be obtained by the device of interrogatories and answers, introduced chiefly for another purpose (and therefore described in the answer to the next argument) but available also to meet the present need. Indeed, no doubt, more admissions could be secured in this way than are commonly made in pleadings at present.

4. It is urged under this head that under notice pleading the advantage of settling the case on demurrer is lost. In a previous part of this article I attempted to call attention to the fact that a large number of decisions on demurrer are not decisions on the merits, on the substantive law, but merely settle technical points of pleading. The loss of these gives the writer no concern; they involve a waste of judicial time and often a miscarriage of justice.



The residuum of determinations on demurrer should be preserved in some form. In a tentative Act Concerning Pleadings,<sup>10</sup> which I once had the temerity to formulate, I included the following device<sup>11</sup> to take care of these cases: If either party thinks the opponent has really no cause of action or defense, he may serve interrogatories on him which must be answered, possibly under oath, certainly subject to adequate penalty for a false answer. Having obtained the answers to these interrogatories, he may move the court to give judgment for himself on the ground that the answers of the opponent admit facts which show that such opponent has no cause of action or defense. The reader will perceive that this differs from a demurrer in vital respects. A demurrant wins if the demurree has omitted any essential allegation; the party who moves for judgment on his opponent's answers to interrogatories can win, only if the opponent has affirmatively admitted facts which are fatal to the latter's case. The dangers lurking in inadvertence and inaccurate allegation, which cause trouble under our present system, are wholly absent. Again, while a demurrer tests the sufficiency of the pleading to state a *prima facie* cause of action or defense, one may by interrogatories attempt to elicit any fact which is fatal to his opponent's case, whether necessary to the latter's *prima facie* case or not. Of course the interrogatories must be subject to the usual limitations; for example, immaterial or privileged answers could not be solicited. In the hands of a reasonably competent judge, such a proceeding ought to serve all the useful purposes of a demurrer and even catch some cases without foundation in fact, which under our present system go to trial. This device of interrogatories and answers could also be employed to obtain the admission of material facts, and thus to save the expense of proving them at the trial, even where there was no hope of obtaining sufficient admissions to settle the case entirely.

5. We consider next the suggestion that it is necessary, or at least reasonable, in order to protect the opponent and prevent surprise at the trial, to compel an allegation of all the essential facts of a cause of action or defense, and that therefore notice pleading is inadequate. The cardinal principle of notice pleading is that enough shall be stated adequately to apprise the opponent

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<sup>10</sup> See "A Bill for an Act Concerning Pleadings," 5 ILL. L. REV. 364. .

<sup>11</sup> See section 17 of the proposed act.

of the cause of action or defense. If that principle be carried into execution, how can the defendant be taken by surprise? Suppose he is notified that the plaintiff claims damages for injuries received by being run over by the defendant's automobile on the ninth of June, 1917, near the intersection of Madison and State streets in Chicago. Will the defendant's counsel be surprised at the trial if evidence is offered tending to prove (a) that the defendant or his servant was operating the car, or (b) that the driver could have reasonably foreseen injury to the plaintiff, or (c) that the act of the driver caused injury to the plaintiff, or (d) that the plaintiff was using due care? Surely any attorney fit to conduct a case in court might fairly be taken to expect these facts to be proved. Why then insist on their allegation? The allegation does no good. And its requirement brings down upon us an avalanche of decisions as to what are the essential facts — a matter already commented upon. Now, if the defendant had the misfortune to run over two persons on the ninth of June, 1917, he might need light as to the time of day that the plaintiff was injured. If he convinces the judge, or master in charge of settling the pleadings, that he does need light, then the plaintiff may be ordered to give the requisite information. Or perchance the defendant did not run over anybody at any time. He is in the dark as to why he is sued. Likely, however, he can defend on the principle of an alibi without further particulars. If particulars will really assist him they should be given to him. But will it assist him to tell him that he was negligent, that the plaintiff was not negligent, and that the defendant's act caused the injury? If, however, the opponent should get to the trial without a knowledge of what the other party was claiming, as might occur in very occasional instances, a simple remedy, not unknown to the law, would consist in postponing the trial until there was reasonable opportunity to prepare to meet the new aspect of the case. Such postponement would be rare, and, being dilatory and burdensome, should be granted only upon condition that the party to blame, if the blame can be located, pay all added costs.

6. It is next insisted that a perusal of the pleadings will aid the jury. That seems to me so highly improbable that it needs little, if any, reply. Notice pleadings would give the jury a general notion of the claims of each party. Formal pleadings do not materially clarify such notions. The opening statement of counsel



and, finally, the instructions of the court must be relied on to state the issues to the jury.

7. Does the allegation of the essential facts actually assist the judge (1) in eliminating irrelevant evidence? (2) in formulating his instructions? With regard to the elimination of irrelevant evidence, may I again refer to the Pleadings Act which I drafted.<sup>12</sup> In section 16 of that proposed act it is provided that the judge may in any case order pleadings filed which shall be sufficient to inform *the court* of the "general nature of the cause of action or defense relied upon." In other words, if a party should file a pleading, insufficient to indicate *to the court* the claim of the party, the court could require him to substitute a pleading adequate for that purpose. This the court may compel even when the opponent-party is sufficiently informed to satisfy himself, and accordingly makes no objection to the pleading. No doubt, generally, the pleadings would be sufficient to inform the court, and so this power would seldom be exercised. But it is there to meet any emergency. Now, if the court knows the nature of the cause of action, for example, that it is a claim on a promissory note for five hundred dollars and three years' interest, would it be so ignorant of what facts are essential to prove such a cause of action, as to be materially aided by the ordinary complaint on a note? I think it must be admitted that in simple cases the aid of essential-fact pleadings is not required for this purpose. In unusual, complex cases, the court might be helped by thoroughly good pleadings. The difficulty is that in such cases the assistance is seldom forthcoming. The bungling character of many complaints under the codes must often add to their work rather than enlighten them. The point is not well taken. And by way of an affirmative answer to it, I wish to urge that the present system occasionally requires the judge to permit a verdict for a party who has not proved the facts essential to his cause of action or defense. This occurs when the party's pleading is defective in omitting one or more essential allegations, and yet his opponent has not objected to it in the proper manner, or has objected in vain. Under such circumstances, proof of the facts actually alleged is sufficient to warrant a verdict.<sup>13</sup> Indeed if those facts are overwhelmingly established a verdict would have to

<sup>12</sup> See page 21, note 10.

<sup>13</sup> For an illustration of this, see *Adams v. Way*, 32 Conn. 160 (1864).

be ordered. This is a farcical proceeding which could not occur under notice pleading without error on the part of the trial court. Of course the senseless verdict may be set aside on a suitable motion, but the court should never have allowed such a verdict to be rendered. Essential-fact pleading thus may either mislead the judge or, more likely, compel him to act contrary to his own judicial knowledge of what are the essential facts.

Concerning the help that the pleadings may render the court in drafting instructions, I may only repeat that the court will know the essential facts without their aid. This will be especially true at the end of the trial, after the discussion and consideration naturally arising during its progress. Furthermore, counsel will be astute to present instructions covering every phase of the case. The present pleadings cannot be of great assistance. Indeed, several excellent trial judges have told me that sometimes they forget to look at the pleadings when preparing instructions.

8. The next objection to notice pleading is, that the presence of essential-fact pleadings in the record is valuable in view of the subsequent use of the case as *res judicata*. As every lawyer knows, evidence extrinsic to the record is admissible to determine what was actually *res judicata* in the case.<sup>14</sup> When we consider how loosely modern pleadings are constructed, and the occasional instances where new issues are made at the trial without amendment of the pleadings,<sup>15</sup> it is obvious that extrinsic evidence must be admitted, for the record would be a very unsatisfactory test. Probably notice pleadings would be about as useful as our present pleadings for the purpose in hand. But a much more useful expedient, and one accompanied by no such collateral ill effects as essential-fact pleadings, may be suggested. It would consist in having the court at the end of the trial make a statement on the record of the issues actually passed upon. It would be somewhat similar to the findings of the court in cases tried without a jury, though of course much simpler. This statement might be made after each counsel had presented a list of the facts he considered settled. A motion to amend it, addressed to the lower court, would be proper. I would not make the statement conclusive but merely *prima facie* evidence

<sup>14</sup> 24 AM. & ENG. ENCYC. OF LAW, 195, gathers many cases.

<sup>15</sup> See illustrations in *Jackson v. Sackett*, 146 Ill. 646, 35 N. E. 234 (1893), and *Blum v. Whitworth*, 66 Tex. 350 (1886).



on the question. Being inconclusive it would not be necessary to allow an appeal from the trial court's decision. This statement, made at the end of the trial, could and would define the actual issues much more accurately than any pleadings, loosely drawn, before the trial had developed the case clearly, could hope to do. It would be simple in operation and, so far as I can see, would lead to no collateral inconveniences or delays.

9. The last argument is that untechnical pleading would cause a certain carelessness or looseness of analysis of the case on the part of both counsel and court, and thus lead to inaccurate substantive law. In the first place, a little reflection will convince one that the present pleadings, whether common-law or code, do not, in the vast majority of cases, cause any subtle analysis of the litigation in hand. They are likely to be either a rather slavish copying of forms or an ill-organized mixture of evidence, facts, and allegations of law. Often they are drawn on the theory that the more one includes in the pleading, the more likely it is to contain the essentials. Probably substantive law is but very slightly assisted by any analysis compelled by the pleadings. Secondly, all would probably agree that the really intricate questions of substantive law that arise in litigation are not often developed by the pleadings. They arise at the trial, possibly on a motion for a nonsuit or verdict and, of course, when instructions to the jury are under consideration. That such questions do not arise on the pleadings is perhaps but a corollary of the fact that the pleadings are usually not very accurately worked out. The limitation of the pleadings to complaint and answer, or other similar restriction, naturally leads to the same result. Finally, to this argument of potentially bad substantive law, one may reply with the question: Has there been any serious complaint of the deterioration of substantive law where the pleadings have been minimized in importance? True, notice pleading has not had much time to prove itself clear of this charge; but no serious complaints have arisen. The same may be said of the situation in England where a longer period has elapsed since simplified pleading went into use. In the absence of any growing criticism of decisions we must assume that the old standards are at least maintained.

## VI

There is one further matter that should be mentioned. It has been urged that, assuming the adoption of a system of pleading based on notice, the test of adequate notice should be, what would sufficiently inform an opponent totally ignorant of all the circumstances of the case. In other words, it is said that you should not consider the knowledge of the opponent, in determining whether the pleading sufficiently informs him of the pleader's position. To put this contention still another way, the opponent should be notified of facts already perfectly within his knowledge. That seems rather useless. If the opponent by affidavit or *viva voce* testimony convinces the judge that the pleader's statement of his case, read in the light of all knowledge he (the opponent) has, leaves him in doubt as to what he is called upon to answer, then he is entitled to further particulars.<sup>16</sup> But if the pleader's statement, coupled with the opponent's knowledge, gives to the latter all the light he needs, why waste time in increasing the illumination. It is just a practical question. I fear that the suggestion of "objective notice," if that term may be employed, is made with a possibly unconscious hope that thereby we shall still have pleadings containing pretty full statements of fact. It must be admitted that occasionally the trial judge may have doubts concerning just how much information the opponent really needs. Such doubts he will rightly resolve in favor of requiring further particulars. An opponent would seldom have the temerity, we may hope, to attempt the deception of the trial judge. A street-car company, for example, that had reports from its conductors of every accident or near-accident on its lines, with the names of all bystanders and passengers, would hardly be in a position to deceive the court into granting unnecessary particulars. In this connection it should be recalled that the court may, in its discretion, compel pleadings which will adequately notify it of the causes of action or defenses. With that safeguard it seems quite unnecessary to permit the opponent to insist on being notified of things he already knows.

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<sup>16</sup> The obtaining of such particulars is provided for in section 9 of the draft act already referred to. See note 10, *supra*.



The law's delays! Alas! they are many, and concerning them there is much complaint. Is n't this an opportunity to eradicate one fruitful source of them?

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## THE DOCTRINE OF THE RENVOI IN ANGLO-AMERICAN LAW

A DISCUSSION of the merits of the renvoi must proceed independently of the English and American cases in which that doctrine has been involved. Indeed there is practically no analysis of the principles underlying the renvoi to be found in Anglo-American case law. The word "renvoi" itself does not appear in either an English or American judicial opinion prior to 1903.<sup>1</sup> This is the more remarkable when one takes into account the fact that the English courts were called upon before the courts on the Continent to decide a case in which the renvoi was squarely presented. Certainly as early as 1841 such a case came before the English courts.<sup>2</sup> The earliest continental case, on the other hand, seems not to have arisen until fifteen years later.<sup>3</sup> Discussion of the renvoi received its initial impetus on the Continent when the French Court of Cassation adopted it in the Forgo Case, finally decided in 1882.<sup>4</sup> From that time on until 1900, when it was rejected by the Institute of International Law at Neuchâtel, and contemporaneously incorporated in part in the German Code (*Einführungsgesetz*, Article 27), there grew up on the Continent a large body of case law and juristic writing relating to that doctrine. Notwithstanding the earlier start in England, the English cases in which the renvoi has been involved are far from numerous, and the volume of English juristic writing thereon is quite negligible when compared with the *quantum* of continental output.

In the present paper the writer proposes to consider: *first*, the

<sup>1</sup> *In re Johnson* [1903], 1 Ch. 821, 831.

<sup>2</sup> *Collier v. Rivaz*, 2 CURT. ECC. 855 (1841).

<sup>3</sup> Court of Guelderland (Holland), 5 REVUE DE DROIT INTERNATIONAL, xiii, 410. There a gift was made in Prussia in the Prussian form of an immovable in Holland. The Prussian conflict-of-laws rule required an application of the *lex situs*; the Dutch rule, an application of the *lex actus*. The Dutch court declined the renvoi back to Dutch law, thus sustaining the gift, because sufficient as to form under Prussian law, the *lex actus*.

<sup>4</sup> Cass., June 24, 1878, D. 1879, 1, 56; Cass., February 22, 1882, S. 1882, 1, 393. For an account of this case in English, see SEWELL, FRENCH LAW AFFECTING BRITISH SUBJECTS, 46-77.



theory of the renvoi in relation to Anglo-American principles of the conflict of laws, and *secondly*, the extent to which, if at all, that doctrine has found its way into the English and American cases.

### I. THE THEORY OF THE RENVOI IN RELATION TO ANGLO-AMERICAN PRINCIPLES OF THE CONFLICT OF LAWS

In order to make a concrete meaning of the renvoi, and also to furnish a basis for the theoretical discussion of that doctrine, the following example will be used:

X., a citizen of Massachusetts, dies intestate, domiciled in France, leaving movable property in Massachusetts, England, and France. The question arises as to how this property is to be distributed among X.'s next of kin.

Assume (1) that this question arises in a Massachusetts court. There the rule of the conflict of laws as to intestate succession to movables calls for an application of the law of the deceased's last domicile. Since by hypothesis X.'s last domicile was France, the natural thing for the Massachusetts court to do would be to turn to the French statute of distributions, or whatever corresponds thereto in French law, and decree a distribution accordingly. An examination of French law, however, would show that if a French court were called upon to determine how this property should be distributed, it would refer the distribution to the national law of the deceased, thus applying the Massachusetts statute of distributions. So on the surface of things the Massachusetts court has open to it alternative courses of action: (a) either to apply the French law as to intestate succession, or (b) to resolve itself into a French court and apply the Massachusetts statute of distributions, on the assumption that this is what a French court would do. If it accepts the so-called renvoi doctrine, it will follow the latter course, thus applying its own law.

This is one type of renvoi. A jural matter is presented which the conflict-of-laws rule of the forum refers to a foreign law, the conflict-of-laws rule of which, in turn, refers the matter back again to the law of the forum. This is renvoi in the narrower sense. The German term for this juridical process is "*Rückverweisung*."

Now let us assume (2) that the question of the distribution of the English movables arises in an English court. There, as in Massachusetts, the conflict-of-laws rule as to intestate succession

would call for a reference to the French law, as X.'s domiciliary law. But here again there are on the surface two alternative courses of action open to the English court, the one like that available to the Massachusetts court in (1), the other different: either (a) to apply the French law as to intestate succession, or (b) to take its cue from the French conflict-of-laws rule, and thus refer the question on to the Massachusetts statute of distributions, on the assumption that this is what a French court would do if called upon to pass upon the case. The adoption of the latter alternative means an acceptance of the renvoi.

In this latter case (2) the conflict-of-laws rule of the forum refers the jural matter to a system of law, the conflict-of-laws rule of which, in turn, refers the matter on for decision by the law of still a third legal unit. This is a less frequent type of renvoi, and indeed can be called an instance of renvoi, which means "a sending back," only in a wide sense of the term. The German term for this juridical process is "*Weiterverweisung*."<sup>5</sup>

There are then two types of renvoi cases, using the term "renvoi" in its widest sense: (1) where there is a "remission," a *Rückverweisung*, or reference *back* to the law of the forum by the conflict-of-laws rule of the foreign law, selected by the law of the forum to govern the jural matter; and (2) where there is a "transmission," a *Weiterverweisung*, or reference *on* to the law of some third legal unit by the conflict-of-laws rule of the foreign law, to which the law of the forum immediately refers the matter.

The issue raised by the renvoi doctrine may thus be stated in interrogatory form as follows: *When the conflict-of-laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system; i. e., to the totality of the foreign law, minus its conflict-of-laws rules?*<sup>6</sup>

If the doctrine of the renvoi be accepted, there is potentially

<sup>5</sup> Professor Lorenzen has suggested the term "transmission" for this type of renvoi: 10 COL. L. REV. 190, 197. Assuming that the word adequately describes the process of reference, it is hardly a companion term for the word "renvoi." A better suggestion still is that the word "remission" be used for "*Rückverweisung*" and "transmission" for "*Weiterverweisung*," 14 L. QUART. REV. 232.

<sup>6</sup> In a strictly scientific sense the internal rules of law of a legal unit must, of course, include the body of conflict-of-laws rules, as well as the rules governing directly the creation and enforcement of rights. Throughout this article the phrase "internal rules



no limit to the classes of cases in which it would be applicable. In all cases where the conflict-of-laws rule of the forum differed from that of the foreign law to which it referred, the *renvoi* would have to be invoked. As between England and the continental nations this would mean that as to all those questions which English law refers to the law of the domicile, as, for example, succession, testate or intestate, capacity, marriage, divorce, etc., with respect to all of which the continental nations, for the most part, would apply the national law, the *renvoi* would be called into play. As a matter of fact the great bulk of cases in England and on the Continent in which the *renvoi* has been involved have related to post-mortuary succession to property.

In this country there would be a large field for the application of the *renvoi* doctrine, if adopted by the courts, in cases involving the determination of the validity and obligation of contracts. Perhaps in no branch of the conflict of laws is there greater divergence among the courts of this country than exists, respecting the choice of the law that shall govern contractual validity and obligation.<sup>7</sup> To show concretely how on the basis of the actual decisions, an acceptance or rejection of the *renvoi* might make a difference

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of law," or "internal law," is used in the special sense indicated in order to set out clearly the exact problem involved in the *renvoi*.

Not infrequently the issue raised by the *renvoi* is stated to be: whether the reference to the foreign law by the law of the forum is to that law "in its totality," or to the specific provision of the foreign law directly applicable to the jural matter in question. See BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 53, 65, and Professor Lorenzen's articles on "The Renvoi Theory and the Application of Foreign Law," 10 COL. L. REV. 190, 194, 197, 198, 200, 339, 344.

Sometimes, also, the problem is stated, in somewhat different language, to be whether the reference is "to the whole law" of the foreign legal unit, or merely to its internal rules of law. DICEY (2 ed.), 714-15, 719; WESTLAKE (5 ed.), 31, 42, 113; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 164, 168, 181, 183, 184; Jethro Brown, "*In re Johnson*," 25 L. QUART. REV. 145, 148; Sanderson, "The Law Applicable to the Succession to Land in Egypt owned by a British Subject," 20 JUR. REV. 46, 52. The objection to both forms of statement is that from the standpoint of the forum, a reference to the foreign law, "in its totality," or "to the whole law" of the foreign legal unit, might call for the simultaneous application of two different rules of that law: (a) what the writer has described as the purely internal rule, directly creating rights, and (b) the conflict-of-laws rule of the foreign law; only in the event that (b) referred to (a) would the distinction become unimportant. The error of this form of statement is clearly set forth by Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 135-36.

<sup>7</sup> See the series of articles on this topic by Professor Beale in 23 HARV. L. REV. 1, 79, 194, 260.

in these cases, we may suppose that a contract made in Pennsylvania is sued on in a Massachusetts court, and the court is called upon to determine the validity thereof. The Massachusetts rule as to the choice of law governing the validity of a contract requires an application of the law of place of making.<sup>8</sup> The validity of this contract, therefore, would have to be tested by reference to Pennsylvania law. But the Pennsylvania conflict-of-laws rule, relative to the selection of the law that shall govern such a question, would require an application of the law of the place of performance of the contract.<sup>9</sup> If we assume (a) that the contract in litigation was to be performed in Massachusetts, or (b) that it was to be performed in Virginia, we should, on the supposition that the renvoi is part of Massachusetts law, have an instance of "remission" or *Rückverweisung*, in the one case (a), and "transmission" or *Weiterverweisung*, in the other (b). It is a little remarkable, in view of the vast number of cases involving the choice of the law governing the validity of a contract, that neither court nor counsel has suggested very clearly the possibilities of an application of the renvoi. Perhaps this shows that the whole doctrine is foreign to our methods of legal thought. The English courts have been drawn into it, because of the nearness of England to the Continent, and the conflict between the law of the domicile and the law of nationality, in the English and continental systems of private international law.

Reverting to the hypothetical case stated at the outset (1), which involved the renvoi in the narrower sense of "remission" or *Rückverweisung*, it is now proposed to follow out the possibilities presented by this case, for the purpose of ascertaining, which of all the conceivable solutions accords with Anglo-American principles of the conflict of laws. This plan necessarily embraces in it a discussion of the merits and demerits of the renvoi. Though the case taken for this purpose does not on its facts involve a "transmission" or *Weiterverweisung*, yet the arguments, applicable to the renvoi in the narrower sense, are for most part applicable as well to that doctrine which is presented by the second hypothetical case (2). Wherever by reason of the difference between the renvoi in the two senses of the term, special considerations seem controlling as to "transmission" or *Weiterverweisung*, account will be taken thereof.

<sup>8</sup> 23 HARV. L. REV. 98-100, where the cases are collected.

<sup>9</sup> *Ibid.*, 201-02, for the Pennsylvania cases.



It was stated that in decreeing the distribution of the movables in Massachusetts, the Massachusetts court had alternative courses of action open to it: either (a) to apply the internal French law of succession, or (b) to refer to the French conflict-of-laws rule, thus remitting the question to be decided according to the Massachusetts statute of distributions. Closer analysis shows, however, that there are really four, and not two, alternative courses of action:

A. The Massachusetts court may refer to the French conflict-of-laws rule, on the theory that it should decide the case as a French court would. Logically this would mean that in referring the matter back again to Massachusetts law, the reference must be taken to be to the Massachusetts conflict-of-laws rule, calling for an application of the domiciliary law of the deceased. This, in turn, would cause a remission of the question a second time to the French conflict-of-laws rule, thus producing a *circulus inextricabilis*, or endless cycle of reference back and forth between the Massachusetts and French conflict-of-laws rules, without ever reaching a decision of the real issue. This has been appropriately described as an instance of international lawn tennis.<sup>10</sup> A mere statement of this alternative carries with it its own refutation, since it obviously does not solve the problem in the case, but merely gives rise to another problem, *viz.*, how and when shall this interminable cycle of reference be broken. Yet logically this is the very thing to which an acceptance of the *renvoi* must always lead in cases of "remission" or *Rückverweisung*, since if the Massachusetts conflict-of-laws rule is regarded as referring to the French conflict-of-laws rule, the latter by the same token must be held to refer back again to the former. If the cycle of reference back and forth be broken on the first reference back to the Massachusetts law, and thereby internal Massachusetts law be applied to the case, the necessary conclusion must be, that while the *renvoi* is good enough for Massachusetts law, it is not good enough for French law. In other words after the first reference to the foreign conflict-of-laws rule, the deadlock cannot be broken on any logical principle. This shows the logical unsoundness of the *renvoi* in the narrower sense.

Similar considerations are applicable to cases of *renvoi* in the

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<sup>10</sup> BUZZATI, 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 146.

sense of "transmission" or *Weiterverweisung*, since it, too, can logically lead to no solution of the case presented. If an infinite variety of conflict-of-laws rules as to the given jural matter be assumed to exist, there might be an infinite number of references *on* to successive foreign laws without any decision of the merits of the case. This would be the result in the case supposed (2), if the Massachusetts conflict-of-laws rule required an application of the law of the last domicile of the deceased's father, which might have been, for example, New Hampshire, and the conflict-of-laws rule of New Hampshire, in turn, referred the question of succession *on* to still a fourth law, and so on *ad infinitum*. The English court would in such a case be referred first to French law, as the domiciliary law of deceased, then to Massachusetts law as his national law, then to New Hampshire law as the domiciliary law of his father, etc. Practically, of course, this infinite variety of conflict-of-laws rules does not exist. Thus in the case supposed, the English court would be referred to the French law, which would refer the question *on* to Massachusetts law, which would remit the question to French law; at this point would begin the endless shuttle between French and Massachusetts law. Thus we still have an instance of international lawn tennis, with only the difference that there is an additional player.

B. The Massachusetts court may apply its own statute of distributions, not because it is referred thereto by the French conflict-of-laws rule, that the deceased's national law shall govern, but on the theory that there is no law applicable to the jural matter, and thus to reach some result the court must fall back on its own law. In cases of "remission" or *Rückverweisung* this would produce a renvoi result, but not by the renvoi method. It would make impossible a reference *on* to the law of a third legal unit, *i. e.*, "transmission" or *Weiterverweisung*. Westlake<sup>11</sup> and Von Bar<sup>12</sup> have worked out an ingenious but fallacious theory to justify such a procedure. Adapting their theory to the facts of the hypothetical case under discussion, they would argue thus: The French internal rules as to post-mortuary succession must be read in

<sup>11</sup> 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 35-40, and 164-68. See also PRIVATE INTERNATIONAL LAW (5 ed.), 25-42.

<sup>12</sup> 1 THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS, 278-81; 18 ANNUAIRE, DE L'INSTITUT DE DROIT INTERNATIONAL, 41, 153-57, 174-75.



conjunction with the French rule as to the choice of law governing such succession, *viz.*, that the deceased's national law shall govern; thus interpreted the two rules simmer down to this: that the French internal law as to succession controls, provided the deceased was a French subject at death, but not otherwise; since by hypothesis X. was not a citizen of France, there is no rule of French law applicable to the determination of succession to his property. This is the so-called *désistement* theory, — the French law refuses to accept the reference offered by Massachusetts law; it desists, because it has no rules governing succession to property belonging to aliens. Consequently there is no alternative left but to apply Massachusetts law as the law of the forum; here also it happens to be the law of the *situs* of the property. This theory necessarily involves a holding that there is not only no applicable rule of French law, but also no applicable rule of Massachusetts law, except as Massachusetts happens to be here both the forum and *situs*. If the only function of the French conflict-of-laws rules be to limit the scope of the operation of the internal rules of French law, then by the same line of reasoning the Massachusetts conflict-of-laws rule must be intended to perform the same function. In other words the Massachusetts conflict-of-laws rule, that the law of domicile shall govern, must be read as limiting the internal rules of Massachusetts law respecting intestate succession, and the upshot of reading these two rules together is, that Massachusetts internal rules of distribution apply only in case the deceased was domiciled in that state on death. Since X. was not a French subject, French law is inapplicable; since he was not domiciled in Massachusetts on death, Massachusetts law is likewise inapplicable. There is here, therefore, a legal vacuum or gap, which must be bridged over, and which is bridged over by applying the law of the forum *as such*: otherwise no decision could be reached in the case. This has the appearance of being a scientific way of reaching a *renvoi* result without the objectionable *renvoi* process.

What then are the objections to this *désistement* theory? The theoretical objections are two: (a) It assumes that the purpose of the conflict-of-laws rules of any system of law is to define the limits of the spatial operation of the purely internal rules of that system. This is not so. The only occasion for a body of conflict-of-laws rules is the fact that the internal rules of the various systems

of law do not agree as to the consequences that shall flow from given acts or events. Under the Roman Empire this diversity of legal rules did not exist, since in theory, at least, there was only one world legal unit, and hence there could be no question as to what law should be applied to a given jural matter. Consequently there was no body of conflict-of-laws rules in the Roman law. But now that the world is divided up into a number of distinct and separate legal units, each supreme at least within its own territorial limits, and each possessing its own peculiar rules of internal law, it is imperative that there should exist a body of selective rules, whose function it is to choose that law, among several competing laws, that might possibly apply to a given jural matter which has the best claim to application. To say that this body of rules has no other function than to define the limits in space of the operation of the purely internal rules of law of each legal unit, is to rob it of the very purpose that called it into existence. As Dr. Bate puts it:<sup>13</sup> "It makes the dissonances which have created the need for international law the reason for denying its existence." The function of the rules of the conflict of laws is not *definitive*, but *selective*.

(b) The second theoretical objection to the *désistement* theory is its assumption that when in the case put (1) the Massachusetts court seeks to ascertain the provisions of French law as to distribution, following out its own conflict-of-laws rule that the law of deceased's last domicile shall govern, its purpose is to enforce French law as such. The truth is that the Massachusetts court is enforcing its own law throughout, and is not in any sense enforcing French law. It was not created for that purpose. It is the function of the Massachusetts law to say as to cases arising in its courts, what constitutes an adequate tie or bond between persons, things, conduct, or events and French territory to justify the application of internal French law to the jural matter, or any phase of it. It is not for French law to pass upon the adequacy of this tie for the purpose named. If the law of Massachusetts determines that the fact of domicile of a deceased in France at the time of his death is a sufficient tie to justify the application of French internal law to the matter of the succession to his movables, then that is an end of the matter, so far as concerns any movables located in Massachusetts; and this, entirely independent of the fact that French

<sup>13</sup> BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 74.



law would select the applicable law by reference to the deceased's national law.<sup>14</sup>

The following are the practical objections to the *désistement* theory: (a) It makes rights depend upon the law of the chance forum, which in the case of succession to movables would also be the law of the *situs*. In the second case supposed (2), where the English court is called upon to decree the distribution of X.'s English movables, the result of this theory would be that English internal law would have to be applied, thus eliminating all possibility of "transmission" or *Weiterverweisung*; the English conflict-of-laws rule would point to French law as applicable because X. was domiciled in France at death, but French law would wash its hands of the question on the theory that its rules of distribution could apply only to French subjects. Thus the movable estate of a deceased would pass piecemeal instead of as a unit, an end the securing of which is the analytical justification for the rule that gives effect to the law of deceased's last domicile in the distribution of his movables wherever located. As pointed out by Dr. Bate,<sup>15</sup> this would be productive of results not only undesirable, but in some cases also "positively anti-social," as, for example, in a case where an English court is called upon to pass upon the validity of a marriage between two Danish subjects domiciled in France, valid by both French and Danish internal law; such a marriage might be invalidated by English law, notwithstanding its compliance with the internal law of the domicile of the parties, France, and the internal law of the parties' national sovereign, Denmark, solely because England happened to be the forum, and in spite of the fact that no element of the transaction occurred where English law is applicable as the territorial law.

(b) A second practical objection to the *désistement* theory is that it throws upon the local judge the burden of deciding whether or not the foreign law desists, and throws upon the attorney, called upon to advise his client as to what law will govern his conduct, the same burden. The difficulty of determining such a question may be seen by an examination of the English cases, later to be considered, in which the court thought it pertinent to ascertain whether French law recognizes a *de facto* domicile as the basis of the enjoy-

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<sup>14</sup> BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 78, 90-94.

<sup>15</sup> *Ibid.*, 75.

ment of civil rights, or requires, under Article 13 of the French Civil Code, governmental authorization for that purpose.<sup>16</sup>

C. A third possible course of action open to the Massachusetts court is to proceed on the renvoi theory. This would mean that the Massachusetts conflict-of-laws rule, that X.'s movable property should be distributed according to the law of his last domicile, would be construed to refer to the French conflict-of-laws rule, selecting X.'s national law for this purpose, which in turn would be construed to refer to the internal law of Massachusetts applicable to intestate succession, *i. e.*, the Massachusetts statute of distributions. As already indicated in the second hypothetical case taken as the basis of this discussion, a like reference would be made to internal Massachusetts law, in a case of "transmission" or *Weiterverweisung*. This is the renvoi pure and simple. There are at least four objections to the adoption of this course of action:

(a) It is illogical. No logical reason can be given why if in the one case (1) Massachusetts law be taken to refer to the French conflict-of-laws rule, the latter should not in turn be held to refer back again to the Massachusetts conflict-of-laws rule, and so on *ad infinitum*; or why if in the other case (2) the English conflict-of-laws rule be regarded as referring to the French conflict-of-laws rule, the latter should not likewise refer to the Massachusetts conflict-of-laws rule, producing in the end a shuttle between the Massachusetts and French law, as already explained.

(b) A second objection to the renvoi is that it results in the abrogation or amendment of the conflict-of-laws rule of the forum by the corresponding rule in the foreign law to which the law of the forum refers. Thus in the first case (1) the practical result is that the French conflict-of-laws rule, giving effect to X.'s national law, is allowed to be substituted in a Massachusetts court for the Massachusetts conflict-of-laws rule pointing to the law of X.'s domicile; the Massachusetts conflict-of-laws rule thus becomes in fact to select X.'s national law as applicable, and not his domiciliary law. A similar abrogation of the English conflict-of-laws rule in favor of the French rule selecting the national law takes place in the second case, instancing renvoi in the wider sense (2).<sup>17</sup>

<sup>16</sup> See BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 75-76, on this point.

<sup>17</sup> See on this the dissenting opinion of Mr. Justice Taschereau in *Ross v. Ross*, 25 Can. S. C. 307, 353-54 (1894).



(c) A third objection to the *renvoi* is that it is based upon the erroneous assumption that the Massachusetts and English courts in the cases supposed should constitute themselves French courts, charged with the administration and enforcement of French law, and should decide the questions presented exactly as a French court would. But the Massachusetts court in the one case, and the English court in the other, are not functioning as French courts in decreeing the distribution of movables formerly belonging to a deceased domiciled at death in France. They exist and were created for the administration and enforcement of Massachusetts and English law respectively.<sup>18</sup> Furthermore, even conceding that the Massachusetts and English courts should resolve themselves into French courts and decide the cases just as a French court would, it must be obvious that this cannot be done without an inquiry into the question of whether or not the *renvoi* is a part of the French law. If it is, then on the assumption made, no solution of either case could be reached, since in the one case we should have an indefinite cycle of reference back and forth between Massachusetts and French law, and in the other case, either an indefinite and interminable reference *on* or the same cycle of reference as in the previous case; if the *renvoi* is not part of French law then Massachusetts internal law would be applicable in both cases. However, if the *renvoi* is good enough to be a part of Massachusetts and English law, it would seem also to be good enough for French law, and the result would be that the perpetual deadlock of reference previously pointed out would sooner or later arise.

(d) A final objection to the *renvoi*, and one closely akin to (b) and (c), is, that it is premised upon the assumption that in the Massachusetts and English courts it is the function of French law, and not Massachusetts and English law respectively, to determine what tie or bond between persons, things, conduct, or events and French territory is sufficient to justify an application of French internal law. The error of this assumption has been shown.

The chief practical argument urged in favor of the adoption of the *renvoi* is that it would result in uniformity of decision of the same question by the courts of the various legal units concerned.<sup>19</sup> Thus in the two cases taken as the basis of this discussion, the

<sup>18</sup> BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 105-07.

<sup>19</sup> BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 181-83.

argument would be made, that if the Massachusetts court accepts the reference back to its internal law offered by the French conflict-of-laws rule, and if in addition the English court accepts the reference *on* to internal Massachusetts law offered in like manner, the courts of all three legal units concerned in the distribution of X.'s movable estate will reach the same result, and the entire estate, no matter where located, will pass as a unit and not piecemeal. If this identity of result could be thus secured, a practical justification for the acceptance of the renvoi in both its forms, at least in cases of succession, might well be held to exist. But the assumption that such an identity of result can be secured by an adoption of the renvoi fails to take into account an important factor, *viz.*, that the renvoi must be assumed to be part of French as well as Massachusetts and English law, for if it is properly a part of one system of law, it would seem to be also properly a part of all the systems of law concerned. On this further assumption, the French courts in distributing the movable estate located in France would apply the rule of nationality, which would occasion a reference to Massachusetts law, and the latter would in turn refer the question back to French internal law. Hence as to the French movables French internal law would ultimately govern, thus upsetting the identity of result so much desired. The truth is that such identity of result can be secured in all cases only by the international adoption of a uniform body of conflict-of-laws rules. In that event there would be no occasion for the renvoi, since it is only the differences in the conflict-of-laws rules of various legal units that gives rise to the question as to whether the conflict-of-laws rule of the forum refers directly to the provision of the internal foreign law, or to the conflict-of-laws rule of the foreign system, — the question which, as previously shown, lies at the very bottom of the renvoi.

It has, indeed, been vigorously urged<sup>20</sup> that the argument to show identity of result in the matter of movable succession cannot be attained by an acceptance of the renvoi, because the French courts, as well as the English and Massachusetts courts, in the cases supposed, must be taken to have adopted that doctrine, ". . . is a figment of theory and not based on a solid practical difficulty," since, "in any particular case, the English court, or the French court, or the Massachusetts court would know whether

<sup>20</sup> BENTWICH, *THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION*, 182-83.



the other had already dealt with the succession," and hence "would adopt the principle already applied to the succession, and apply either its own rules of private international law, or the doctrine of the renvoi, so as to subject the whole movable succession to one law." The suggestion is a startling one. It makes the acceptance or rejection of the renvoi by the court of a given legal unit depend upon whether the renvoi has been rejected or accepted by the particular foreign law to which the conflict-of-laws rule of the forum refers. This would necessarily mean that there could be no general acceptance or rejection of the renvoi by a given legal unit, since all would depend upon the exigencies of each particular case.

There is, however, at least, a limited class of cases in which an acceptance of the renvoi would produce identity of decision by the courts of the various legal units interested in such cases, *viz.*, those cases where both the national law of the parties and their domiciliary law agree that one or the other, *i. e.*, either the internal law of the nation or the internal law of the domicile, is the competent law applicable to the case, and where, in addition, the only existing conflict-of-laws rules known to any legal unit are either that the national law or that the domiciliary law shall be selected. Such a case would arise if two Italian subjects acquired a French domicile and thereafter married. The validity of the marriage under both French and Italian law would have to be tested by Italian internal law, as the national law of the parties, whereas according to English conflict-of-laws rules it would have to be tested by French internal law, as the domiciliary law of the parties; hence in a given case the English courts might find the marriage valid, when both the French and Italian courts would reach an opposite result, or *vice versa*. However, if the English court should accept the reference on to Italian law offered by the French conflict-of-laws rule, the courts of all three legal units would reach the same result. Whether or not French and Italian law, or either of them, had accepted the renvoi could not affect this result. In an actual case involving an analogous situation of fact,<sup>21</sup> the English courts, as we shall see, invoked the renvoi. It is only in this limited class of cases that a practical reason can be urged for an acceptance of the renvoi. Obviously, however, this is no argument for its general acceptance.

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<sup>21</sup> *In re Trufort*, 36 Ch. 600 (1887).

D. The final course open to the Massachusetts and English courts in the cases supposed is to regard the reference to the foreign law by the conflict-of-laws rule of the forum as one directly to the appropriate rule of the internal foreign law. This seems the natural course to follow, and is the one best supported by authority, both judicial and juristic. The arguments in its favor have been indicated in a negative way in the elimination of the other alternatives. They are principally these:

(a) By such direct reference to the applicable rule of the internal foreign law, all possibility of a tossing back and forth of the legal question in a case can be avoided. This is a practical and logical advantage.

(b) It is consistent with the general common-law theories of the conflict of laws, *viz.*, that courts exist for the enforcement of the law of the legal unit creating them, and none other, and that when the law of the forum points to a foreign law for the decision of a question, it determines for itself, wholly without reference to that foreign law, what tie between persons, things, conduct, or events and the legal unit within which the foreign law is supreme, is sufficient to warrant invoking that law.

## II. TO WHAT EXTENT, IF AT ALL, HAS THE RENVOI FOUND ITS WAY INTO THE ENGLISH AND AMERICAN CASES?

### A. *The English Cases*

The earliest English case cited in support of the proposition that the renvoi has been adopted by the English courts is *De Bonneval v. De Bonneval*,<sup>22</sup> decided in 1838. There a testator whose last domicile was France made two wills, one in the English form in England, disposing of his property there, and the other in the French form in France, disposing of his French property. A petition was filed in the Prerogative Court of Canterbury (before Sir Herbert Jenner), for the probate of the English will, which did not conform to French internal law as to form. The court held that since the testator was domiciled at death in France, the validity of his will was to be tested by French law. However, feeling that the French courts were better qualified to determine the validity of this will under the French law than an English court could be,

<sup>22</sup> 1 CURT. ECC. 856.



the court further said (pages 869-70), that those courts were "the competent authority" to decide that question, and accordingly suspended proceedings on the will until its validity or invalidity had been pronounced by the French courts.

Taking only the language of the court within the four corners of its opinion, it is difficult to find any support for the *renvoi* in this decision. The court did say, and correctly, that the validity of the will depended upon its compliance with French law; but it failed to state whether it meant thereby internal French law as to form, or the rules as to form prescribed by the law to which the French conflict of laws would refer, which might be, and in the event was, a very different body of law. Only on the assumption that the court meant to say the latter can the case be made to support the *renvoi*.

In point of fact, when the will came before the French Court of Cassation, that court did apply the French conflict-of-laws rule (Article 999 of the French Civil Code) to sustain it. Under that code provision a will executed by a Frenchman in a foreign country was valid, if it complied with the law of place of execution as to form, even though it did not comply with French internal rules of law in this respect. In this fashion the will in question was sustained, because it conformed with the internal English rules as to form.<sup>23</sup> If the opinion of the Court of Cassation be read into that of the English court, and the latter be regarded as going through the processes which the French court did to sustain the will, the English decision can be made to speak the *renvoi*. The propriety of doing this depends upon whether or not the English court should have foreseen that the Court of Cassation might invoke a French conflict-of-laws rule, if, taking into consideration the totality of the French law from the viewpoint of a French court, such invocation was proper. To impute such foresight to the English court seems not unreasonable. If courts habitually defer in the administration of the estates of persons domiciled abroad to the courts of the domicile, the result must necessarily be a tacit acceptance of the *renvoi*, wherever the decision of the domiciliary courts is reached by an application of the conflict-of-laws rule there in force.<sup>24</sup>

<sup>23</sup> Cass., February 6, 1843, S. V. 1843, 1, 209.

<sup>24</sup> The only case referred to in the opinion in the *De Bonneval* Case, and apparently

There is nothing in the English reports showing the subsequent career of the De Bonneval Case in the English courts. However, the judgment of the Court of Cassation<sup>25</sup> states that the parties before that court conceded that the will had been admitted to probate by the Prerogative Court of Canterbury, after the judgment of the Cour Royale de Rouen sustaining the will which the Court of Cassation later affirmed. The result of the case, therefore, may well be said to involve a tacit acceptance of the renvoi.

The next case, *Collier v. Rivaz*,<sup>26</sup> was decided three years after the De Bonneval Case (1841). The opinion is by the same judge who decided that case, and hence, if it can be said to countenance the renvoi, it may be regarded as throwing light on the question of whether or not the De Bonneval Case impliedly accepted that doctrine. In the Collier Case a British subject died domiciled in Belgium. In the language of the report (page 855), "he left a will and six codicils, four of those codicils were not executed according to the forms required by the law of Belgium." A possible inference from this statement is that the will and two codicils, as to which there was no contest, did comply with the Belgian requirements as to form, and were admitted to probate on that ground. At the time of the testator's death (1829), the Code Napoléon was in

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the only prior case in which an English probate court suspended proceedings pending the determination of the validity of a will by the courts of the testator's last domicile, is *Hare v. Nasmyth*, 2 ADD. 25 (1823). The question in that case was whether the will of the testator, domiciled at death in Scotland, had been revoked, a question which the English court refused to pass upon, referring for a decision thereof to the Scotch courts. As shown by the opinions of the judges in the House of Lords, to which the Scotch case was ultimately appealed, the case was decided by those courts on ordinary principles applicable to the revocation of wills, without reference to the Scotch conflict-of-laws rules. See 1 SH. SCOTCH APP. CAS. 65; 3 HAGG. ECC. 192, note; and 1 SH. 112.

In the following cases the English courts have stated that the courts of a deceased's last domicile have jurisdiction to determine succession to movables formerly belonging to the deceased, no matter where the same may be located: *Enohin v. Wylie*, 10 H. L. C. 1 (1862); *Dogliani v. Crispin*, 1 H. L. 301 (1866); *In re Trufort*, 36 Ch. 600 (1887). Similar statements are made by English text-writers: DICEY (2 ed.), 391-92; WESTLAKE (5 ed.), 114-15. If these cases be regarded as going to the extent of holding that a judgment of the deceased's domiciliary courts will be enforced in England, even though such judgment be reached by an application of the conflict-of-laws rules of the domicile, then, as pointed out by Westlake, they amount to a tacit acceptance of the renvoi. However, the only case which may be said to have gone to the extent of announcing any such doctrine is *In re Trufort*, which will be discussed later on.

<sup>25</sup> Cass., February 6, 1843, S. V. 1843, 1, 209, 218.

<sup>26</sup> 2 CURT. ECC. 855.



force in Belgium. Article 13 provided in effect that a person establishing a domicile in Belgium with governmental authorization should enjoy all civil rights. The Belgian conflict-of-laws rule as to choice of law governing testamentary form pointed to the national law of the testator. The court concluded from the testimony of experts in Belgian law that the provisions of that law as to testamentary form did not apply to foreigners domiciled in Belgium without governmental authorization, and that the Belgian courts would sustain the codicils if executed in conformity with the requirements of the testator's national law; and on these two grounds held the codicils valid.

The following are the significant parts of the court's opinion:

(Pages 858-59.) "The question however remains to be determined, whether these codicils which are opposed are executed in such a form *as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium*, in the circumstances under which they have been executed. Because it does not follow, that Mr. Ryan (the testator), being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and subjects of another country; *and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.*"

(Page 861.) "Then if this is the law of Belgium; if the succession with regard to such persons who came to reside in Belgium as Mr. Ryan did is governed by the laws of their own country; then the law of his own country being followed by Mr. Ryan, these codicils are entitled to probate."

(Pages 862-63.) "... they [the experts in Belgian law] do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural born, subject of Belgium; but the succession of persons who, however long they might have been resident, not having obtained the royal authority to reside there, being

considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. The Court sitting here decides from the evidence of persons skilled in that law, and *decides as it would if sitting in Belgium.*"

These extracts from the court's opinion show that the court proceeded on a combination of the *désistement* and the straight renvoi theories to sustain the codicils, without being conscious of the difference. Especially noticeable is the assumption of the court that the same decision should be reached by an English court that a Belgian court sitting in the case would have reached, and the further assumption that Belgian and not English law is to determine what tie between persons and Belgian territory is sufficient to call for an invocation of Belgian law in the English courts; both of these assumptions, which lie at the root of the *désistement* and renvoi theories, have been shown to be false. The case is open to all the objections noted as applicable to those theories, to the objection that apparently the will and the two codicils, as to which there was no dispute, were sustained because in compliance with internal Belgian law as to form, whereas the contested codicils were sustained because in compliance with internal English law as to form — an odd result — and to the further objection that there could be no guaranty that the English court was reaching the Belgian result without evidence as to whether the renvoi was part of Belgian law, as to which there was not an iota of evidence.<sup>27</sup>

The case of *Maltass v. Maltass*,<sup>28</sup> by way of what may be considered a *dictum*, referred to *Collier v. Rivaz*, though it is not clear from the opinion just how far the court meant to approve of that decision.

The next case in which the renvoi was directly involved was *Frere v. Frere*.<sup>29</sup> There a testator, domiciled in Malta, made a will in the English form while temporarily in England. His domicile at death was still Malta. His will was attested by three witnesses,

<sup>27</sup> It is interesting to note that about forty years after the Collier Case the Belgian courts judicially accepted the renvoi, in Tribunal Civil de Nivelles, February 19, 1879 [BELGIQUE JUDICIAIRE, 982 (1880)], and in *Bigwood v. Bigwood*, App. Brussels, May 14, 1881 [BELGIQUE JUDICIAIRE, 758 (1881)]. This decision has since been consistently followed: see Professor Lorenzen's article, 10 COL. L. REV. 192, notes 8 and 9.

<sup>28</sup> 1 ROB. ECC. 67, 72 (1841).

<sup>29</sup> 5 NOTES OF CASES, 593 (1847).



whereas Maltese law required no less than five. A Maltese advocate testified that the will of a Maltese subject by birth or domicile would be valid both as to movables and immovables in Malta if made according to the law of the place of its execution. Notwithstanding the fact that the executors named in the will renounced probate of it, and all parties in interest except certain minors consented to an intestacy, the court denied a motion for a declaration of the invalidity of the will on the ground that a Maltese court would have sustained the will, and it was incumbent on the English court to reach the same result as if it were sitting as a Maltese court. That part of the opinion which shows an application of the *renvoi* is interesting as an example of the matter-of-course style of argument habitually adopted by the courts in these cases. The court said (pages 595-96):

"But the question here is, whether a will made in this country, according to the law of this country, by a person domiciled in Malta, is a good and valid will in Malta; . . . His [the Maltese advocate's] opinion, however, is, that a will made by a domiciled subject of Malta, but not in that island, according to the law of the country where it was executed, cannot be pronounced by the Courts of Justice at Malta invalid and of no effect. Then can I say that this will is invalid according to the law of Malta? Certainly not."

As this extract from the opinion shows, there is no argument of the *renvoi*, either on principle or on authority. A *renvoi* result is simply assumed as natural and indisputable.

The leading English case on the *renvoi*, and the only case which has gone to an appellate court, is *Bremer v. Freeman* (1857).<sup>30</sup> There is a sharp difference of opinion as to whether the case accepts or rejects the *renvoi*.<sup>31</sup> The case was heard on appeal by Lord Wensleydale, Dr. Lushington, Sir John Patteson, and Sir Wm. H. Maule, and the opinion was written by the first-named judge. The issue was as to the formal validity of a will executed by a

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<sup>30</sup> 10 MOORE P. C. 306.

<sup>31</sup> That the case accepts the *renvoi*, see DICEY (2 ed.), 716 and note 4; WESTLAKE (5 ed.), 127 (§ 89); BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 166-67 (it is not entirely clear that the author meant to put this interpretation on *Bremer v. Freeman*, though this seems a fair construction of his language); BROWN, "In re Johnson," 25 L. QUART. REV. 145, 150; that the case rejects the *renvoi*, see ABBOTT, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 143-44.

British subject, domiciled *de facto* in France at death. The testatrix had made a will in France in the English, but not in the French, form, dealing with movables which were principally in England. She had at no time obtained from the French government authorization to establish in France such a domicile as would carry with it, under Article 13 of the French Civil Code, the full enjoyment of all civil rights.<sup>32</sup>

The Prerogative Court of Canterbury (Sir John Dodson) allowed eight French advocates to testify as to the effect of a lack of governmental authorization on the power of testation under French law, and concluded therefrom,<sup>33</sup> "that it is necessary in order to establish such a domicile in France as to affect the succession of the testator and the mode of making wills, that that domicile should be by authorization." The court expressly referred to *Collier v. Rivaz*, and purported to follow that case in sustaining this will because of its compliance with English form (page 255).

This decree upholding the will was reversed by the Privy Council. Lord Wensleydale stated that there were two issues in the case: (a) as to where the testatrix was domiciled at death and (b) whether "by the municipal law of the domicile at the time of death, the will propounded was valid." There is nothing in the opinion directly showing whether Lord Wensleydale meant the phrase, "the municipal law of the domicile," to include both the internal and the conflict-of-laws rules of that law.<sup>34</sup> The first issue was resolved in favor of a French domicile. The second, and for our purposes more important, issue, was resolved against the validity of the will by an application of French internal law as to testamentary form. After reviewing the testimony of the experts, three of whom had stated that governmental authorization was not necessary to the establishment of such a domicile as to confer the power of testation under French law, and five of whom had stated that such authorization was necessary, and after examining French cases and treatises in point, Lord Wensleydale concluded

<sup>32</sup> The language of Article 13 of the French Civil Code is as follows: "The foreigner who shall have been admitted by the government to establish his domicile in France shall enjoy there all civil rights as long as he continues to reside there."

<sup>33</sup> DEANE'S ECC. 192, 255.

<sup>34</sup> Professor Lorenzen has argued that the phrase necessarily was meant to include the conflict-of-laws rules of the domicile, since only such a rule "could sanction a will executed in France in the *English* form": 10 COL. L. REV. 339-40.



(page 373) that it was not "established, that for the purpose of having a domicile which would regulate the succession, any authorization . . . was necessary." Commenting on *Collier v. Rivaz*, he said (page 374):

"The case was not regularly contested, which makes it of less authority. It was a mere question on the parole evidence of the Belgian law, which was very short and unsatisfactory. Their Lordships have referred to the depositions, and doubt whether the learned Judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion."

The only reference in Lord Wensleydale's opinion to French conflict-of-laws rules is the following (pages 362-63):

"It is to be remarked, speaking with all respect to those gentlemen (*i. e.* the expert witnesses as to French law), that the rule of international law which all English lawyers consider as now firmly established, namely, that the form and solemnities of the testament must be governed by the law of the domicile of the deceased, does not appear to be recognized, or at least borne in mind, by any of them. Nay, in *Quartin's Case*, both the *Cour Royale* and the *Cour de Cassation*, expressly decided that the will must be in the form and with the solemnities of the place where it is made, on the principle of '*locus regit actum*'; an error which is ably exposed in the opinion of *M. Target* in the *Duchess of Kingston's Case* (COLL. JUR. 323). The three witnesses called for appellant, Messrs. *Frignet*, *Senard*, and *Paillet*, all maintain the same doctrine.

"If this position were really true, the case of the appellant would prevail, but the other witnesses do not maintain the same doctrine. Of the five experts examined for the respondent, three, Messrs. *Blanchet*, *Herbert*, *De Vatismesnil*, all think that the will, either in the form required by the law of the domicile of origin, or the place where the party dwells, is valid; a position which, by English lawyers, is certainly now considered to be exploded since the case of *Stanley v. Bernes*."

The inference to be drawn from this extract is that Lord Wensleydale and his colleagues considered the rules of private international law to be of international validity, and consequently of international uniformity. Hence their adherence to the rule respecting the choice of law as to testamentary form as announced by the English courts, irrespective of whatever might be the corresponding rule as stated by the French courts. The possibility of a difference

between the English and French rules for the choice of the law governing testamentary form, as a legal matter, seems to have been regarded as not open to argument. If this be the correct exposition of the part of the opinion quoted, it would seem to follow that the case cannot be said to be an authority in favor of the proposition that the renvoi has been accepted by the English courts; since only in the event that the conflict-of-laws rule of French law as to form should differ from the corresponding rule of English law, and only in the further event of an application of the law chosen by the former law, can there be said to have been a renvoi in the sense of the word as used in this article.<sup>35</sup>

Conceding, then, that the case cannot be aligned very satisfactorily, either as accepting or rejecting the renvoi, as that word is here used, the question remains as to whether the case sanctions or disapproves of the *désistement* theory. There can be no doubt from a reading of the opinion of the Privy Council that the purpose of the inquiry into French law was to ascertain the specific provision of that law applicable to the form of will required of an English subject dying domiciled in France. But the significant fact is that the court, rightly or wrongly, concluded that the same form was required for such a will as would be required for the will of a French subject, and in this fashion found the will in issue to be invalid. There was therefore no desisting on the part of the French law. Hence the question propounded calls for a speculation as to what the court would have done had it concluded that there was no rule of French law applicable to the will in issue. Respecting this question Dr. Bate has said: <sup>36</sup>

"It will be seen that this case stops just where it begins to be interesting. Had the court come to the conclusion that French law had no rules of succession (testate or intestate) for a foreigner who was domi-

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<sup>35</sup> It should also be stated that at the time of the case of *Bremer v. Freeman*, the French conflict-of-laws rule for the determination of the validity of a will in matters of substance was, that the national law of the testator should be applied; but as to the formal validity of a will the law of the place of execution alone was the applicable law. SEWELL, AN OUTLINE OF FRENCH LAW AS AFFECTING BRITISH SUBJECTS, chap. 5. In view of this state of the French law it would have made no difference in the result whether the Privy Council accepted or rejected the renvoi, since in any event the reference would have been to the French internal law as to form. This shows further the danger of relying too strongly on this case, either as for or as against the renvoi.

<sup>36</sup> BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 13.



ciled in France without authorization, the court would have had to say how it would deal with the lacuna. That it would not have applied French rules *malgré* French law seems a logical conclusion, for, otherwise, the long discussion as to the effect in France of the absence of authorization would have been unnecessary."

While the question, as indicated, is speculative, yet "the long discussion as to the effect in France of the absence of authorization" might very well be indulged in even if meant to reject the *désistement* theory, since the effect of authorization or no authorization might have been to require the application of a different rule of internal French law; for example, French law conceivably might have required two witnesses for wills of testators with an authorized domicile, but no less than three, for such as had not the necessary authorization. Furthermore the purpose of this excursion into French law seems to be shown in that part of the opinion which proceeds on the hypothetical assumption that an authorized domicile was necessary for the enjoyment of the legal power of testation (pages 365-66). Accepting that assumption, the lack of such authorization must produce, said Lord Wensleydale, one of two alternative results: (a) either deprive the foreigner of the power of testation altogether; or (b) deprive him of such power as to movables in France. Under the former alternative the will in issue would have been bad, and the estate would be distributed as in case of intestacy. According to what law would such distribution take place? The opinion does not leave this matter in doubt, for Lord Wensleydale said (page 365):

"If he [the testator] should be domiciled in a country where, on death, by law all his effects go to the sovereign by a '*droit d'aubaine*,' more extensive than that of old France, which applied only to personal effects within the kingdom, that law must prevail, and his will would be of no validity, and his relatives by his domicile of origin, would lose all their rights."

If, on the other hand, the lack of an authorized domicile went only to deprive a person of the power of testation as to French movables, still his will to be effective as to non-French movables would have to comply with French internal rules as to form. Throughout the opinion, therefore, the Privy Council showed that it was seeking the particular rule of internal French law applicable to the case,

and was not attempting to ascertain whether or not the French law would wash its hands of the case. That the French law might possibly desist seems not to have occurred to the judges. Hence the case is not a strong authority *for or against* either the renvoi, or the *désistement* doctrines.<sup>37</sup>

The next important case in the order of time is *Hamilton v. Dallas*.<sup>38</sup> There an Englishman died domiciled *de facto* in France

<sup>37</sup> 4 PHILLIMORE, INTERNATIONAL LAW, 211, 227-28, states that after the decision of the Privy Council in *Bremer v. Freeman*, an attempt was made to introduce evidence showing that the Council was mistaken in its interpretation of French law. To this end the defeated party requested the President of the Civil Tribunal of the Seine to name the French advocates most competent to form an opinion as to whether or not Lord Wensleydale's exposition of French law was correct. Ten advocates were named, and the admitted facts laid before them. They were unanimously of the opinion that the will was valid and not invalid according to French law. Their opinion, as set out in the French by Phillimore, after reciting the facts, concludes: "They (*i. e.*, the undersigned advocates) are positively of the opinion that according to French law the deceased never acquired in France such a domicile as to cause her will or the form of her will to be governed by the law of that country, and that consequently if the will was executed in conformity with the English law, the deceased would not be adjudged to have died intestate." The Privy Council refused to admit this evidence tendered after it had pronounced sentence. As Phillimore says, "it is open to the observation that the other side might possibly have produced an equal amount of testimony in support of the sentence."

The severity of the decision in *Bremer v. Freeman* led to the passage of Lord Kingsdown's Act, 24 & 25 VICT. C. 114, permitting British subjects to make wills of movables either in the form prescribed by the law of place of making, or according to the law of the domicile, or the domicile of origin, if within the British dominions.

<sup>38</sup> L. R. 1 Ch. 257 (1875).

Between *Bremer v. Freeman* and *Hamilton v. Dallas*, the following cases involving the renvoi incidentally should be noted: *Crookenden v. Fuller*, 1 Sw. & Tr. 441 (1859). A testatrix, whose domicile of origin was England, there made a will in the English form. She died a resident of France, but without having lost her domicile of origin; it was held that her will was valid since it conformed to the English law. By way of *dictum* the court added that even assuming the testatrix to have been domiciled in France at death, her will was none the less valid under the French rule that a will in the form of the law of place of execution was in compliance with the French law. This *dictum* involves an acceptance of the renvoi. *Laneville v. Anderson*, 2 Sw. & Tr. 24; 38-39 (1860); testator domiciled at death in France executed in England a will in the English form: this will was held valid, since the French law would have referred the matter of its validity to the law of the place of execution. This ruling was only a *dictum*, since the court found that the will in question had been revoked by a later one. *Onslow and Allardice v. Cannon*, 2 Sw. & Tr. 136 (1861); testator domiciled in Scotland executed a will in the East Indies conformably to the local law there, but not in the Scotch form; it was opposed by the next of kin as invalid because not in the Scotch form. Pending the proceedings in opposition the Scotch courts held that a will of movables executed by a domiciled Scotchman abroad was valid if in the form of the law of place of execution; thereupon the next of kin withdrew their objections.



but without having secured the authorization necessary under Article 13 for the acquisition of such a domicile as would confer full civil rights. He left a will as to the validity of which there was no contest. By the death of one of the legatees in the testator's lifetime there was a partial intestacy. The issue was as to whether the next of kin should be determined by English or French law. The property involved was movable property located in England. It was held that since the testator was domiciled in France at death, the succession to his property should be governed by internal French law. The court pointed out that the deceased had asserted no civil right under French law as to the property in issue, since he had died intestate with respect thereto. The court said (page 270):

"He [the deceased] has asserted no right that I know of, except that of residing, and that he has a right to reside by the law of nations, by the law of France, and by every law of reason and good sense, is not to be disputed; but a right to succeed to the property of which he has died intestate is not comprehended in or covered by the 13th article."

Here then the court construes the English conflict-of-laws rule effectuating the law of the domicile to refer to the internal law of the domicile. There is not so much as a suggestion to be found in the opinion that the reference should be regarded to be to the conflict-of-laws rules of the domicile. Had that interpretation been put upon the English rule selecting the law of the domicile, the movables would have had to be distributed according to the English statute of distributions, since the applicable conflict-of-laws rule of French law would have referred to the law of the deceased's nation. This would have accorded with *Collier v. Rivaz*, to which, however, no reference was made in the opinion. The principal case is very like *Bremer v. Freeman*, with the difference that there the formal validity of a will was in issue, whereas here rights of intestate succession were in issue; in both cases the deceased's last domicile was France, and in both internal French law was applied. The principal case was a little clearer one for the application of French law, since it did not involve the exercise of any civil right within Article 13 of the French Civil Code. The weight of *Hamilton v. Dallas* as at least a tacit rejec-

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In the *Goods of Luigi Bianchi*, 3 Sw. & Tr. 16, 17 (1862), contains a very faint suggestion of renvoi by way of *dictum*.

tion of the renvoi is the greater, because of the fact that had English law been found applicable, the Crown would have been entitled to a succession duty, of which the decision deprived it.

*In the Goods of Lacroix*<sup>39</sup> was a case in which the testator, a naturalized British subject residing in Paris, there executed in the English form a will disposing of his movables in England. Later while still resident in Paris he executed a will in the French form disposing of his property in France. There seems to have been some doubt as to what the testator's domicile was, but the court "inferred" that it was France (page 96). French law was not selected, however, as the law of the last domicile, but under the provision of Lord Kingsdown's Act (24 & 25 VICT. c. 114), validating a will made according to the form required by the law of the place of making. Evidence was adduced to show that by the French law the will of a British subject was valid if made in France in the form required by English law to give validity to wills executed by Englishmen in England, whatever the domicile of the testator at the time of making the will, or at death. On this evidence the court (Sir James Hannan) admitted the English will to probate. Furthermore the court conceded that the French wills, complying with internal rules of French law as to form, were likewise valid (pages 96-97). Thus as to the English will the reference made by the English conflict-of-laws rule embodied in Lord Kingsdown's Act, *viz.*, *locus regit actum*, was held to point to a rule of the French conflict of laws; whereas as to the French will the reference was regarded as designating the internal rules of French law. And this inconsistent holding was made without any consciousness on the part of the court of the differences in the legal processes involved.

In explanation of this case it should be said that the application for the probate of the will was *ex parte* and uncontested. The whole question of the renvoi was assumed by both court and counsel without the slightest reference to prior English cases in which that doctrine was involved. The decision has been well characterized by Dr. Bate,<sup>40</sup> as merely showing "how accommodating a judge will sometimes be rather than declare a will to be void in point of form."<sup>41</sup>

<sup>39</sup> 2 P. D. 94 (1877).

<sup>40</sup> BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 108.

<sup>41</sup> As a case construing Lord Kingsdown's Act the result may well be questioned.



In *In re Trufort* (*Trafford v. Blanc*)<sup>42</sup> an action was brought to enforce the judgment of the Court of Appeal of the canton of Zurich, Switzerland, as a judgment *in rem* binding on the English movables of the testator. The testator, a born British subject, who later became a naturalized Swiss subject, died domiciled in France, leaving a will by which he gave all his property to his godson, X. P., claiming to be the legitimate son of the testator, sued X. in the Swiss courts, getting a judgment which declared that he was the legitimate son of the testator, and as such, entitled to nine-tenths of the estate as his compulsory portion according to the Swiss law of succession. The testator's personal estate was located in England, Switzerland, Italy, and elsewhere. According to French law the national law of the deceased would govern succession to his property. Furthermore by a treaty of 1869 between France and Switzerland, rights of parties claiming to share in the estate of a Swiss subject dying domiciled in France were to be determined according to the law and by the tribunals of Switzerland. The court held that since by the law of the testator's domicile at death, as well as under the treaty between France and Switzerland, succession to his property was to be governed by his national law, and since he was then a citizen of Switzerland, the Swiss courts had jurisdiction to determine finally such question of succession, and their judgment would be recognized and enforced in England, even though based upon a mistake of law or fact, or both.

The immediate question raised by this case relates to the effect of the Swiss judgment in England. This judgment, however, would be conclusive only as to property located in Switzerland at most, unless predicated upon proper jurisdiction in the Swiss courts. So the real question was as to the jurisdiction of the Swiss courts to render a judgment binding on the movable estate of the testator,

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since the probable purpose of that act in enacting in its permissive form the rule *locus regit actum* was to insure the validity of wills executed by Englishmen in foreign countries, in accordance with the internal law of the place of making, as to which the testator would be able to get expert advice, whereas he could only with the greatest difficulty get such advice abroad, in regard to English internal rules of law as to wills. The result of the decision is hence to extend the remedial purpose of the act by making a will executed abroad valid, if (a) complying with the internal law of the place of making, or (b) complying with the law designated by the conflict-of-laws rule of the place of making.

<sup>42</sup> 36 Ch. 600 (1887).

wherever located. Under the English conflict-of-laws rule such jurisdiction exists in the courts of the deceased's last domicile.<sup>43</sup> Since the testator was domiciled at death in France, the French courts would have jurisdiction to render a judgment binding on the entire movable estate. But under the French conflict-of-laws rule the courts of the testator's nation would possess such jurisdiction. Hence if the English law took its cue as to jurisdiction from the French conflict-of-laws rule, the finding followed that the Swiss courts had jurisdiction, and their judgment was entitled to recognition and enforcement in England. That is the precise holding of the English court. Thus that court said (page 612):

"The testator's nationality then being Swiss at the time of his death it follows that the Zurich tribunals are those which according to the law of the testator's domicile have jurisdiction to decide on the right of succession to his estate, and in fact they have at the instance of the defendant been recognized as such by the Court of St. Julien.

"That being so, I have here an advantage similar to that which the Court had in *Dogliani v. Crispin*, that the claim of the party litigating in this Court has been actually raised and decided in the Courts which according to the law of the testator's domicile were the proper and competent tribunals to decide on their rights. Those tribunals have decided that the plaintiff is entitled to nine-tenths of the testator's personal estate, of which the funds which form the subject-matter of the present action are part, and in accordance with the principle laid down in *Dogliani v. Crispin*, I consider that I am bound by their decision."

There is therefore a renvoi in the sense of *Weiterverweisung* of the jurisdictional question in the case, since the English law referred to the French law, and then accepted the reference on to the Swiss law offered by the French conflict of laws as to jurisdiction. The authority of the case in this matter is weakened, however, by the existence of a treaty between France and Switzerland, subjecting the succession to the property of a Swiss subject dying domiciled in France to the operation of Swiss law, and to the jurisdiction of the Swiss courts. If the effect of this treaty was to extraterritorialize Swiss law and the Swiss courts so far as the questions of succession therein provided for, then it might well be contended

<sup>43</sup> *Enohin v. Wylie*, 10 H. L. C. 1 (1862); *Ewing v. Orr Ewing*, 10 A. C. 453 (1885); *Dogliani v. Crispin*, 1 H. L. 301 (1866); DICEY (2 ed.), 391-92, 720; WESTLAKE (5 ed.), 114-15; FOOTE (4 ed.), 252-53.



that the Swiss courts and law were to that extent French courts and law, and hence in legal effect the judgment sought to be enforced in England was the judgment of the courts of the testator's last domicile. It should be stated, however, that the main emphasis in the opinion is laid not upon the Franco-Swiss treaty, but upon the French conflict-of-laws rule referring the English court on to the law of the testator's nation. No contention was made that the French courts alone had jurisdiction to render a judgment in the matter of succession everywhere binding.

It has been contended that there was no question of *renvoi* involved in *In re Trufort*.<sup>44</sup> Thus Mr. Abbott has said:

"The facts, at most, show an interesting case of *renvoi* as between France and Switzerland, but that proves nothing as to English law. Nor is it material that indirectly this *renvoi* is effectuated by giving effect to the Swiss judgment. Since the time of Lord Ellenborough, England has enforced, without reference to the merits of the case, the judgment of a competent tribunal which had jurisdiction. The present case, therefore, is an example not of the *renvoi* but of *res judicata*."

This contention may be admitted without weakening the authority of the case as sustaining the *renvoi*. Only "the judgment of a competent tribunal which had jurisdiction" will be recognized and enforced in an English court. Whether the tribunal had jurisdiction will be determined by an application of English conflict-of-laws rules on that question. As to questions of succession the English rule acknowledges jurisdiction in the courts of the deceased's last domicile. In the instant case that would have meant that the French courts would have been possessed of such jurisdiction. But obviously this would not sustain a judgment entered by the Swiss courts. Such a judgment could be declared entitled to recognition and enforcement in an English court, only if the English conflict-of-laws rule effectuating the existence of jurisdiction in the courts of the domicile, France, allowed a reference on to the Swiss courts by virtue either of the treaty between France and Switzerland, or of the French conflict-of-laws rule conceding jurisdiction to the courts of a deceased's nation. The case, therefore, is more than an example of *res judicata*.

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<sup>44</sup> Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 142; Professor Lorenzen, "The Renvoi Theory and the Application of Foreign Law," 10 COL. L. REV. 327, 334.

Professor Lorenzen has summarized the case as follows:

"This case has been cited in support of the doctrine of *Weiterverweisung*. In reality, it stands only for the limited proposition submitted to the Institute of International Law, and regarded by its members as distinct from renvoi, — to the effect that where the law of the State in which a party has a domicile and the law of the country of which he is a subject agree that the law of one of them is to govern, the rights created by such law should be enforced or recognized in all jurisdictions in which either the *lex domicilii* or the *lex patriae* is regarded as the proper rule."

The gist of this contention seems to be rather that cases such as *In re Trufort*, though strictly involving the renvoi, may well be treated as an exception to the rule which calls for the rejection of that doctrine. On the analysis made it would seem incorrect to maintain that there is no question of the renvoi in such a case. The justification for an exception allowing the renvoi, if there is any justification at all, is the practical desirability of the result thereby produced. Taking the facts of *In re Trufort*, the result of an acceptance of the renvoi is that the English, French, Swiss, and Italian courts will all reach the same result in the distribution of the deceased's movable estate, thus making the entire estate pass as a unit. Certainly the weight of opinion among English text-writers regards *In re Trufort* as a renvoi case.<sup>45</sup>

Perhaps the strongest contention against an interpretation of *In re Trufort* as sanctioning the renvoi is one made inferentially by Dr. Baty,<sup>46</sup> in discussing the English conflict-of-laws rule which recognizes "the domicile as the one and only forum" in the matter of divorce. He says:

"That is a rule to which there is at any rate one exception, namely, when the law of that forum (that is, the domicile) regards another forum as competent. It is easy to see that this must be so in one case. If the Court of the domicile entirely refuses to deal with the matter, and elects to send the parties to another tribunal, there can be no harm in concurring with it. This is not a case of what is called renvoi — because we can apply Italian law, whether Italy likes it or not, but we cannot invoke the Italian Courts unless they are agreeable to the reference. If

<sup>45</sup> DICEY (2 ed.), 718-19; WESTLAKE (5 ed.), 39-40, 113-14; BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 112-14; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 168.

<sup>46</sup> BATY, POLARIZED LAW, 65.



they decline to adjudicate, it is as reasonable to send the parties to the Court indicated by Italy, as to deal with the matter ourselves."

The suggestion is a cogent one as applied to *In re Trufort*, if it be assumed, as seems there to have been the case, that the French courts would have declined entirely to take jurisdiction and have referred the parties on to the Swiss courts.

The next important English case involving the *renvoi*, *In re Johnson (Roberts v. Attorney-General)*,<sup>47</sup> has been described as "the first case in which the question of the *renvoi* was clearly and definitely before an English court."<sup>48</sup> There a British subject with a Maltese domicile of origin acquired a domicile of choice in Baden, Germany, and died so domiciled. She left a will which was found to be executed in accordance with the law of Baden, but which did not dispose of all her movables. A question arose as to whether these undisposed-of movables should be distributed according to Baden law, or the law of the testatrix's domicile of origin. It was found that according to Baden law the property would be distributed conformably to deceased's national law. The court (Mr. Justice Farwell) held the distribution should be made according to testatrix's national law, here the law of Malta, her domicile of origin.

Two alternative lines of argument were used in arriving at this conclusion. *First*, the court contended that the deceased did

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<sup>47</sup> [1903] 1 Ch. 821.

In the interim between *In re Trufort* and *In re Johnson*, there were two English cases bearing on the *renvoi*, the one directly, the other only incidentally by way of *dictum*: *In the Goods of Brown-Sequard*, 70 L. T. (N. S.) 811, and *In re Martin (Loustalan v. Loustalan)*, [1900] P. 211. In the former case the will of an Englishwoman, domiciled at death in France, was admitted to probate on uncontested *ex parte* motion, although executed in the English and not the French form; the admission to probate was based upon the ground that the evidence (the undisputed affidavit of a single French advocate) showed that the French courts would give effect to the will so as to pass thereunder any property in France belonging to the deceased, because of its compliance with the form prescribed by her national law; the opinion, which is only eight lines long, assumes the whole question of the *renvoi* without any consciousness on the part of the court of the principle involved, and with no reference to prior English cases; it is therefore entitled to little, if any, weight as a precedent. In the latter case (*In re Martin*), the President (Sir F. H. Jeune) of the Probate Division expressed with a doubt a *dictum* involving a *renvoi* solution of the case (pages 216-18); the Court of Appeal, however, did not pass upon the soundness of this *dictum*, reversing the decision of the Probate Division on other grounds.

<sup>48</sup> BENTWICH, *THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION*, 169.

not establish in Baden such a domicile as would regulate succession to her property, because the law there disregarded domicile as the basis for post-mortuary succession to property; wherefore the court argued there had been no *de facto* change of domicile. The language of the court on this point is worth quoting (page 828):

"When, therefore, the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicile *de facto*; and the case is accordingly remitted to this Court as a case where the propositus has intended but has failed to obtain an effectual domicile of choice. No change is effectual unless the factum is proved, and *the factum cannot exist in a country where the law refuses to recognize it*. The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden Courts would in effect have disavowed him and disclaimed jurisdiction."

The suggestion that a *de facto* situation cannot exist unless recognized by some law does violence to language as currently used. The announcement that the testatrix could not in fact reside in Baden with the intention of making her permanent home there, unless some law of Baden took account of this *de facto* condition, is both startling and absurd. What the court probably meant to say was, that there was no law of Baden applicable to the succession to this property, since that law did not recognize domicile as a sufficient tie between the owner of property and Baden territory to invoke the jurisdiction of Baden law. In other words the Baden law desisted and refused to be applied. Thus interpreting Baden law the court was thrown back on the next preceding applicable law, that is, the law of testatrix's domicile preceding her sojourn in Baden. In this fashion the court was led to decree a distribution according to the law of Malta, where testatrix was domiciled at birth and also immediately before going to Baden.<sup>49</sup>

<sup>49</sup> The court's assumption that the Baden courts would have declined jurisdiction was erroneous. See 9 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT- UND STRAFRECHT, 134; 10 COL. L. REV. 336; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 170, note (a); 19 L. QUART. REV. 245 (4). Furthermore there was no evidence before the court that the Baden courts would have declined jurisdiction; the evidence showed merely that according to the Baden rule the courts there would have



The second line of argument adopted by Mr. Justice Farwell in reaching the conclusion that Maltese law should control the distribution of the English movables was predicated upon the assumption that the testatrix acquired a domicile in Baden, and that the Baden courts would not have renounced jurisdiction over the distribution of her movables. Proceeding in this manner the court attempted to extraterritorialize itself as a Baden court and reach the same result that such a court would arrive at by an application of its own law. The Baden courts, argued Mr. Justice Farwell (pages 832-35), would apply the national law of deceased, which in the instant case could not mean English law as a law ubiquitous throughout the Empire, but "to that law as applicable to the particular *propositus*, and not to Englishmen generally without regard to their domicile of origin" (page 835). Since, then, the testatrix's nationality was Maltese, viewing the matter from a viewpoint within the British Empire, Maltese law would be applied by the Baden courts, and should therefore on the assumed premise be applied also by the English court.

The opinion in this case is replete with loose reasoning. Thus the court makes the shocking statement (page 835) that "the law of England distributes such movables in accordance with domicile of origin," though it is elementary that the law of the owner's last domicile and not his domicile of origin is controlling in that regard. If the testatrix had acquired a domicile of choice, either within or without the British Empire before going to Baden, the result reached by an application of the law of Malta as that of the domicile of origin would not necessarily have coincided with the result which would have been reached by the Baden courts. Furthermore the latter result could not be reached without some inquiry into the question as to whether or not the *renvoi* had become a part of the law of Baden, an inquiry as to which no evidence at all was adduced and no curiosity was expressed by the court.<sup>50</sup> Finally if the testatrix had been a French subject with a Maltese

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decreed distribution conformably to the national law of testatrix. See Brown, "*In re Johnson*," 25 L. QUART. REV. 145, 152.

<sup>50</sup> See on this Professor Lorenzen's comment in 10 COL. L. REV. 337-38, and note 38, from which it appears that at the time of the decision of *In re Johnson* the *renvoi* had been rejected by the law of Baden, though if the testatrix had died after January 1, 1900, the Baden courts would have applied the German Code provisions relative to intestate succession conformably to Article 27 of the *Einführungsgesetz* of that code.

domicile of origin, under the first line of reasoning adopted by the court, the law of Malta would in the end have been applied, whereas under the second line of reasoning French law as the national law of the testatrix would have been applicable. This demonstrates the unsatisfactoriness of the court's reasoning, and the impossibility of knowing just what the case was intended to represent.<sup>51</sup> It is worth noting also that the master's certificate found that the will of the testatrix was valid according to Baden law, but that the legal succession to her undisposed-of property would be governed, according to Baden law, by the law of the country of which she was a subject at the time of her death (page 822). In other words, apparently, though it cannot be said with absolute certainty, the will was tested by internal Baden law and found valid, whereas the undisposed-of property was distributed according to Maltese law, notwithstanding the fact that the English law selected the law of the last domicile as the gauge of both testamentary and intestate succession.

The only English case bearing on the renvoi and cited in the opinion was *In the Goods of Brown-Sequard*. *Collier v. Rivaz*, *Bremer v. Freeman*, *Hamilton v. Dallas*, and the other cases thus far discussed were neither referred to in argument by counsel nor cited by the court. Mr. Justice Farwell did make a passing reference to the Forgo Case and to a scattering of continental juristic writings on the renvoi (pages 831-32), but the opinion shows a signal lack of appreciation of the legal principles underlying an acceptance of the renvoi. No one seemed to be interested to urge upon the court the propriety of applying internal Baden law in the distribution of this property. However, in spite of the fact that the

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<sup>51</sup> This objection is discussed by W. Jethro Brown, "*In re Johnson*," 25 L. QUART. REV. 145, 151-52. BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 170-71, has argued that the inconsistency disappears, if the line of argument be rejected which concludes that the testatrix did not get a Baden domicile, because Baden law refused to recognize domicile as of any consequence in the distribution of movables; this rejection, it is contended, should be made in view of Lord Lindley's pronouncement in *In re Martin*, [1900] P. 211, 227, that the domicile of the testatrix must be determined exclusively by reference to English law. Lord Lindley was undoubtedly right in making this statement, notwithstanding the fact that it was made in a dissenting opinion. See, on the matter of the ascertainment of domicile in the English courts by applying English rules as to domicile alone, 20 HARV. L. REV. 226, note. This error on the part of Mr. Justice Farwell, however, even though it may be rejected, must certainly shake the authority of the case as a renvoi precedent.



case is quite unsatisfactory from any point of view it was followed blindly and without comment in *In re Bowes*,<sup>52</sup> where the will of a testator of British nationality, who had acquired a *de facto* domicile in France without, however, the authorization necessary under French law, was held to be governed as to validity, construction, and administration by English law.

One of the most unique cases commonly cited to sustain the proposition that the *renvoi* has been definitely accepted by the English courts is *In re Baines*.<sup>53</sup> There a British subject, probably domiciled in England, owned Egyptian land, which he disposed of by a will valid as to form both by English and Egyptian law. Under the will the executors sold the land. They then deposited the proceeds of the sale in a bank in England. An issue arose as to the disposition to be made of these proceeds. The provisions of the will in respect thereto were valid by English law, but were invalid according to the local Egyptian law. Concededly the right to the proceeds depended on the right to the succession to the land, a matter which under English law would be referred to the law of the *situs*. However, under articles 77 and 78 of the Egyptian Civil Code, succession to land in Egypt was to be governed by the national law of the deceased owner. The testimony of experts in Egyptian law was adduced to show that the Egyptian courts would construe these code provisions in their application to the case in hand as requiring a reference to the ordinary territorial law of England. The dispositions made by the will were accordingly held valid because in conformity with English law. On the surface of things this case seems to be an instance of *renvoi* in reference to succession to immovables, and such is the view of the case commonly entertained.<sup>54</sup>

This decision, however, would seem to be sustainable on other grounds. Since the property was located in Egypt on the testator's death, rights therein must have been crystallized at once at that time in accordance with the provisions of Egyptian law as such. The rights so acquired should obviously not be altered or divested by the mere fortuitous change of the *situs* of the property there-

<sup>52</sup> 22 T. L. R. 711 (1906).

<sup>53</sup> Unreported; decided March 19, 1903, by Mr. Justice Farwell. A digest of the case is to be found in DICEY (2 ed.), 723.

<sup>54</sup> DICEY (2 ed.), 723; Lorenzen, 10 COL. L. REV. 338; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 175.

after. It would seem, therefore, to have been incumbent upon the English court in ascertaining the rights in the proceeds which still represented the *res* to determine the question exactly as if it were sitting as an Egyptian court administering Egyptian law. If, however, the property had been physically located in England on the testator's death, the English court in determining rights therein would have been called on to enforce only English law as law, and any foreign law to which it might have been referred by its conflict-of-laws rules would have been operative only as a fact and not as law. In spite of all of this it may very well be, in view of the fact that the case was decided by the same judge who decided *In re Trufort*, that the argument of the opinion proceeds on a renvoi premise, though the only report of the case is so meager as to make certainty of statement in this respect impossible.<sup>55</sup>

The most recent English case involving the renvoi is *Armitage v. Attorney General*.<sup>56</sup> The case arose on petition under the Legitimacy Declaration Act, 1858 (21 & 22 VICT. c. 93), praying for the declaration of the validity of petitioner's marriage. Petitioner, an Englishwoman, had previously married one Gillig, an American citizen domiciled at all times in New York. Some years later she went to South Dakota and established there such a domicile as to confer on the South Dakota courts jurisdiction over her marital status under the local law. Thereupon she filed suit for divorce, to which Gillig filed an answer and cross-claim. Petitioner was granted a decree of divorce on the ground of desertion, and possibly also cruelty, though this was not entirely clear from the recitals

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<sup>55</sup> The Supreme (British) Consular Court in Egypt reached a result opposite to that which Mr. Justice Farwell anticipated would be reached by the Egyptian courts, in the case of *In the Goods of William Torrey Grant*, deceased (reported in 34 LAW MAG. AND REV. 5th series, 296-98). There the consular court, applying first of all the Egyptian conflict-of-laws rule, embodied in Article 77 of the Mixed Civil Code effectuating the national law of the deceased respecting the inheritance of his Egyptian land, construed this reference to be to the conflict-of-laws rule of the deceased's national law, here the rule that the *lex situs* should govern, in this manner ultimately applying the Mussulman law of inheritance as enforced in Egypt. The decision has been attacked as an improper construction of Article 77, but not because of its renvoi feature. See Sanderson, "The Law Applicable to the Succession to Land in Egypt owned by a British Subject," 20 JUR. REV. 47. It has also been contended that the case has since been overruled by a later decision of the same court, though again apparently not with respect to the renvoi argument. BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 174-75.

<sup>56</sup> [1906] P. 135.



of the decree. Neither ground was recognized by New York law as a proper one for divorce. Petitioner thereafter remarried "an English gentleman, always domiciled in England" (page 140), and there were four children as the issue of this marriage. It was for the declaration of the validity of this second marriage that the present suit was brought. Gillig had also remarried, and had filed a petition for a declaration of the nullity of his second marriage on the ground that petitioner was still his lawful wife because of the nullity of the South Dakota decree of divorce. The issue in both cases turned upon the recognition that would be accorded to this decree by the English courts. Evidence was introduced to show that the New York law would allow a married woman to get a domicile separate and apart from her husband for the purpose of suing for divorce, and that the Dakota decree would therefore be recognized and enforced by the New York courts. Under the English rule, however, petitioner would not have had capacity to establish a domicile of her own, in advance of her securing a divorce at the last domicile she had in common with her husband; in other words, only the courts of New York would have jurisdiction to decree a divorce in her favor.

The English court (Sir Gorell Barnes) held that it would put itself in the position of a New York court, thus reaching the result which the evidence showed such a court would have reached if confronted with the case. The fact that both parties to the first marriage had remarried was a persuasive fact, moving the court to sustain petitioner's second marriage if that could possibly be done. The language of the court which shows that it assumed a *renvoi* attitude to accomplish this result is as follows (page 141):

"The evidence, in the present case, shows that in the State of New York the decision of the Court of South Dakota would be recognized as valid. The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the State of New York — the State of the domicile — as having affected and determined it."

Characteristically of opinions in cases involving the *renvoi*, no English or foreign case or authority touching on the matter of

the renvoi was cited or referred to in the instant opinion. In fact the word "renvoi" does not appear therein. The whole question is assumed as if the answer propounded by the court were the only possible one under the circumstances, and were entirely obvious.

This completes the roster of English cases on the renvoi.<sup>57</sup> It should be stated, however, that in view of the fact that the digests contain no renvoi heading, and the cases must be searched out more or less at random, it is not unlikely that there are cases other than those heretofore discussed relating to that doctrine. The actual extent to which it has played a part in the case law, either of England or of this country, cannot be stated with any assurance of accuracy.

Along with the English renvoi cases should be put the Canadian case of *Ross v. Ross*.<sup>58</sup> A merchant whose domicile was at all times Quebec, while temporarily in New York City, made a holographic will in the form allowed by the law of Lower Canada, but not by internal New York law. The Quebec conflict-of-laws rule as to testamentary form effectuated the law of the place of execution of the will, *locus regit actum*, but there was some doubt

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<sup>57</sup> In *In re Simpson*, [1916] 1 Ch. 502, 508, there occurs language which smacks of the renvoi. There a British subject died domiciled in France, leaving a will in the French but not in the English form. An issue arose as to whether the language of the will evidenced an intention to exercise a power of appointment. Evidence as to French law was to the effect that the will was amply sufficient to pass all property which the testatrix could in any way dispose of at her death; that the French law did not recognize the difference between power and property as understood in English law; and that the French courts if asked whether the power had been exercised by this will would receive evidence as to the difference between power and property in English law, and then consider whether the will on its face evidenced an intention to exercise the power. In other words, there seems to have been here a genuine *désistement* on the part of French law with respect to the jural matter in issue. The court (Mr. Justice Neville) said (page 508): "The will is a valid will in England, but the testatrix being domiciled in France the construction would be *prima facie* in accordance with French law. The evidence shows that the words used would be sufficient according to French law to pass all her personal property. A power of disposition by will over property not belonging to the testator is, however, unknown to French law, and in ascertaining whether the will disposed of such property a French court would be compelled to inquire what such a power was, and how it could be executed by an English will. The answer would be that the bequest if contained in an English will would be sufficient to pass the property subject to the power. And so in an English court the construction which would be applied to an English will must be applied to the construction of a French will valid in England so far as regards the power."

<sup>58</sup> 25 Can. S. C. 307 (1894).



as to whether this rule was imperative, or only permissive, and intended to supplement the primary rule effectuating the domiciliary law of the testator. A majority of the court were of the opinion that the rule was permissive or facultative, and that, therefore, the will was valid because executed in the Quebec form. The majority further held that even if the rule *locus regit actum* were imperative in its application to testamentary form, the will was none the less valid, since by the law of New York, the *locus*, the formal validity of a will was to be tested by the testator's domiciliary law, here the law of Quebec. This latter point, which though a *dictum*, is a clear application of the renvoi in the matter of testamentary form, was assumed by the majority to be self-evident, and no authority was cited to sustain it; neither was there any discussion of it on principle.

Two judges (Mr. Justice Fournier and Mr. Justice Taschereau) held that the Quebec conflict-of-laws rule, *locus regit actum*, was imperative, and were therefore called upon either to accept or to reject the renvoi. Mr. Justice Fournier accepted the renvoi ordered by New York law, thus basing his decision on the *dictum* of the majority, and thereby sustaining the will.

Mr. Justice Taschereau, proceeding from the position that the rule of *locus regit actum* was imperative, held the will to be invalid because not in the form required by internal New York law, thus rejecting the renvoi offered by the New York conflict of laws. The dissenting opinion in which this result was reached is in most respects the best judicial exposition of the renvoi to be found in Anglo-American case law. The only English renvoi cases referred to and made the basis of an anti-renvoi argument were *Bremer v. Freeman* and *De Bonneval v. De Bonneval*. The renvoi issue, as adapted to the facts of the case in hand, was thus stated (page 356):

"I utterly fail to understand the import of the rule *locus regit actum*, if it does not mean, adapting it to this case, that a Quebecer who desires when in New York to make a will has to make it according to the form required by the law of New York for its own subjects; or to put it in other words, if a will in the holograph form made by a New Yorker in New York is void under the New York law in New York, a Quebecer's will in that form made in New York is also void in Quebec, which is Ross's *lex domicilii*."

The arguments of Mr. Justice Taschereau rejecting the renvoi as to testamentary form, and holding the will to be invalid for failure to comply with internal New York law as to form, were principally these:

1. That section 2611 of the New York Code of Civil Procedure (enacting that "a will of personal estate, executed by a person not a resident of the state according to the laws of the testator's residence, may be admitted to probate"), which was the New York conflict-of-laws rule regarded by the majority as referring to internal Quebec law for the ascertainment of the validity of the will as to form, was intended to apply only to the personal estate of the testator in New York;

2. That to invoke the *lex domicilii* rule of New York law was in effect allowing the New York legislature to change the Quebec conflict-of-laws rule as to testamentary form, by making it optional for a Quebecer executing a will in New York to follow either internal New York law or internal Quebec law as to form. This argument was cogently stated as follows (pages 353-54):

"And the New York legislature had not the power to alter that law (*i. e.* the rule of *locus regit actum*) for the province of Quebec, and to decree that a Quebecer could in New York make his will either according to his *lex domicilii* or to the *lex loci actus*, or to neither one nor the other, but according to a mixture of both, at least so as to affect movables in Quebec.

"It cannot be that the legislature of New York had the right to pass a statute in the following terms: 'Whereas by the law of the province of Quebec a holograph will made in New York by a citizen of the province is invalid in Quebec; whereas it is expedient to provide otherwise; it is hereby decreed that hereafter such a will shall be valid.' Could such an enactment affect property in Quebec? I would say not, and the legislature never intended to do so. To give to their statute the meaning that the respondent contends for would be to extend it in a manner not justified by any principle of law that I know of.

"The respondent, in other words, would argue, at least his argument leads to it, that though the legislature in Quebec has refused to adopt the change in the law made in this respect as to holograph wills by Article 999 of the Code Napoléon or by Article 1588 of the Louisiana Code, yet the New York legislature has done it for them."

3. That the will in issue would be held invalid even by the New York courts. If those courts were passing upon the validity of



this will, argued the learned justice, they would in the first instance apply the rule that the law of the testator's last domicile is controlling as to testamentary form; this would occasion a reference to Quebec law, which in turn would refer back again to New York law, according to which a holographic will was not a testamentary act. The same result would be reached, as shown at a later point in the argument, if the will had been made in England, where holographic wills, as in New York, were unknown to the law; if in such a case the New York courts were petitioned for the probate of the will of this Quebecer, domiciled in Quebec at death, they would again refer to the law of the testator's domicile, that is Quebec, which in turn would refer the matter on to the law of England as the place of the execution of the will; under English law no testamentary act would have been enacted, and hence the probate of the assumed will would be denied.

Curiously this last argument of the learned justice was itself predicated upon an acceptance of the *renvoi* by New York law, both in the sense of "remission" or *Rückverweisung* and "transmission" or *Weiterverweisung*. In substance it amounts to a declaration that while the *renvoi* may do well enough for the foreign law to which the conflict of laws of the forum refers in a given case, it has no place in the law of the forum itself. This argument is the one blemish on the otherwise excellent and sound dissenting opinion.

It is now submitted that the following propositions may fairly be deduced from the foregoing discussion of the *renvoi* in the light of legal principle and English case precedents:

1. That the doctrine of the *renvoi* in any form is out of harmony with Anglo-American principles of the conflict of laws;
2. That the extent to which, if at all, it has become imbedded in English case law is a matter of some doubt, in view of the fact that there has been no decision of the matter by either the House of Lords or any court of appeal:<sup>59</sup>

<sup>59</sup> There is a conflict among writers as to whether the *renvoi* has been accepted as a principle of the English conflict of laws: that it has been so accepted, see DICEY (2 ed.), 715-23, WESTLAKE (5 ed.), 25-42, BENTWICH, *THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION*, chap. 8; that it has been rejected, see Abbott, "Is the *Renvoi* a Part of the Common Law?" 24 L. QUART. REV. 133; that the English law is in doubt, see Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law,"

3. That in cases where an application of the renvoi occasions a reference back again to English law, *i. e.*, in cases of "remission" of *Rückverweisung*, it has been accepted by English probate courts when the testamentary formalities of English law are declared adequate by the foreign law to which the English rules of the conflict of laws refer. *Bremer v. Freeman*, the only case which has gone to an appellate court, is of doubtful authority either for or against this proposition:

4. That in cases where an acceptance of the renvoi occasions a reference on to the law of some third legal unit, *i. e.* cases of "transmission" or *Weiterverweisung*, the English cases have been more favorable to the renvoi, and have accepted it (a) where a foreign judgment as to post-mortuary succession to movables was involved (*In re Trufort*), and (b) where the validity of a decree of divorce was in question (*Armitage v. Attorney General*).

#### B. Renvoi Cases in this Country

There is only a scattering of cases in this country in which the renvoi has been involved, and in none of them is there any discussion of that doctrine either on principle or on authority. The earliest case here in which there is even a suggestion of renvoi is *Dupuy v. Wurtz*.<sup>60</sup> The issue in the case turned on the validity of a will executed in France by a testatrix whose domicile of origin was New York. The will was in compliance with New York form, but was contested on the ground of non-compliance with the law of France where it was alleged testatrix was domiciled at death. The court found that the testatrix had never abandoned her domicile of origin, and accordingly affirmed the decree admitting the will to probate. By way of *dictum* the court also held that even if testatrix's last domicile was France, nevertheless the will was valid, because French law was not according to the decisions of the French courts construing Article 13 of the French Civil Code, applicable to the testamentary acts of foreigners resident in France, who had not established there an authorized domicile. The contrary ruling of the Privy Council in *Bremer v. Freeman* was shown to have been overruled by later French cases. The court

<sup>10</sup> Col. L. REV. 190, 326; BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 9, 77, 108-120; BATY, POLARIZED LAW, 115-20.

<sup>60</sup> 53 N. Y. 556 (1873).



also found that the will in issue would be sustained by the French courts if executed in the form required by New York law. This *dictum*, and such it was, since the court expressly said that the decision of the case might safely be rested "upon the ground that, irrespective of the consideration arising upon Article 13, no domicile in France was established" (page 574), proceeds upon both the *désistement* and the straight *renvoi* theories. The court did not discuss the principles underlying either theory. Indeed it is rather apparent that the court was not conscious of the juristic difference between them, or of the possibility of a doubt as to the propriety of accepting either or both.

*Harral v. Harral*<sup>61</sup> was a suit by a wife claiming a half interest in her husband's movable estate by virtue of a marriage celebrated in France under the community-of-goods system. The husband was a domiciled New Yorker. He went abroad to pursue his medical studies, and after acquiring a domicile *de facto* in France, married the petitioner. His domicile thereafter and until his death was France. The executors, next of kin, and legatees of the husband, who had made a will before leaving New York in which he disposed of all his property, contended that petitioner had no claim to a share in the estate, because the testator had not established in France an authorized domicile in accordance with Article 13 of the French Civil Code. Under the common-law conflict-of-laws rule the rights of the wife in her husband's movable property would depend upon the law of the husband's domicile at the time of marriage, here France. The contention of the wife might have been sustained on this simple ground, without reference to French law. And this seems to have been the view taken by the chancellor. He said:

"Although Dr. Harral had not been admitted to the civil rights of a Frenchman, or, in other words, had not, to use our form of speech on the subject, become naturalized in France, that fact did not prevent him from obtaining a domicile, in fact, there. And the rights of the complainant are to be determined, not by the decision of the question whether her husband assumed allegiance to the government of France, but by the decision of the question whether, when the marriage took place, he was domiciled, in fact, in that country. See "*Dicey on Domicil*," 362. Several cases are cited in which the French courts have held that, in the absence of any express nuptial contract, the husband's mere

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<sup>61</sup> 10 Stew. Eq. (N. J.) 458 (1883); 39 N. J. Eq. 279 (1884).

domicile, in fact, determined the widow's rights in his personal estate. It is urged that there are decisions of those courts to the contrary also.

*"But it is a question not depending for its determination merely on the decision of the French courts. It is a question of international law, upon which the adjudications of those courts are indeed of very high importance, but it is to be decided in this case here according to what may seem to be just views and principles."*<sup>62</sup>

The Court of Errors and Appeals, however, made an extensive inquiry into the French law, and came to the conclusion that a matrimonial domicile might be acquired in France, so as to subject all the movable property belonging to either party at the time of marriage to the operation of French law, by six months' residence in France, without the authorization described in Article 13 of the French Code. The result of this finding of French law was that it made no difference whether the court considered itself sitting as a New Jersey court, or as a French court, so far as the disposition of the case in hand was concerned. On either theory the contention of the wife would properly prevail. If, however, the court regarded itself as functioning as a French court charged with the administration and enforcement of French law as law, it thereby in substance accepted the renvoi doctrine. But the authority of the case is greatly weakened in this respect by the fact that the result reached by an acceptance of the renvoi was no different from the result to be reached by a rejection of that doctrine.

In *Lando v. Lando*<sup>63</sup> two persons, both citizens of Minnesota, married while temporarily in Hamburg, Germany. On the death of the supposed husband, the wife objected to the granting of letters of administration to the former's father on the ground that she was deceased's lawful wife, and as such entitled to precedence in the matter of administration. Thus the validity of the German marriage was drawn directly in question. The deceased's father contended that the marriage was invalid because not celebrated before a person authorized by German law to perform a marriage ceremony. Article 13 of the *Einführungsgesetz* of the German Code was stipulated in evidence as the applicable German law. One section of this article provides that the validity of a

<sup>62</sup> 10 Stew. Eq. 468-69.

<sup>63</sup> 112 Minn. 257, 127 N. W. 1125 (1910).



marriage depends upon the national law of the contracting parties; another section, that the form of a marriage concluded within the Empire is determinable "exclusively by German Law." The wife contended that the former section was the proper one to apply, and that, therefore, the marriage was valid because in conformity with Minnesota law. The court after noting that "the proper interpretation of the provision (Article 13 of the German Code) abounds in doubt and uncertainty" (page 263), sustained the wife's contention principally on the ground that every presumption was to be indulged in favor of the validity of a marriage.

The case is devoid of all argument of the *renvoi* either on principle or on authority, and the whole point is assumed without question as dependent solely upon the proper interpretation of the German Code provisions. The real principles at stake were not discussed either by court or counsel. Furthermore the decision proceeds upon a rather obvious mistake as to the meaning of the German Code provision stipulated in evidence. The purpose of that provision was to subject the validity of a marriage celebrated in Germany to the national law or laws of the parties in all matters of substance, and to internal German law as regards questions of form.<sup>64</sup>

*Guernsey v. Imperial Bank of Canada*<sup>65</sup> was an action by the holder of a promissory note against the indorser. The note was executed, delivered, and indorsed in Illinois. It was payable in Canada. Demand, protest, and notice of dishonor all complied with the requirements of Canadian law. It was agreed, however, that these steps to charge the indorser were not in accordance with the requirements of the law of Illinois, if the note had been payable there. The indorser contended that the sufficiency of the notice was to be gauged by Illinois law because his contract as indorser was made in that state. To this contention the court made this brief answer (page 301):

"To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that State was, when the indorsement was made, and it still is, that when commer-

<sup>64</sup> SCHUSTER, PRINCIPLES OF GERMAN LAW, 480, 490; 6 PLANCK, BGB. 48-54; STAUDINGER, KOMMENTAR ZUM BGB. (7/8 *auf.*), EG. 64-72; NIEDNER, KOMMENTAR ZUM BGB. (2te *auf.*), EG. 37-41.

<sup>65</sup> 188 Fed. 300 (1911).

cial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley v. Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor."

The above was really only a *dictum*, since the case was finally disposed of on the ground that the manner of giving notice of dishonor and the sufficiency of that notice were governed by the law of the place of payment of the primary obligation on the instrument, and not by the law of the place where the indorser's contract was made. In substance this *dictum* involves an acceptance of the renvoi in the sense of "transmission" or *Weiterverweisung*. In any event the holding in this respect both because it is a *dictum*, and for the further reason, that it is a mere hasty assumption of the court made without any consciousness of the real principles involved, is entitled to little, if any, weight. The case suggests, however, a fertile field for the application of the renvoi should it ever gain a foothold in our law, that is, in the field of the choice of law governing contractual validity and obligation.

In *Bell v. Riggs*<sup>66</sup> a somewhat analogous question was presented. There suit was brought for the cancellation of a note and the mortgage securing it. The note was executed and delivered in Oklahoma but payable in Kansas; the land on which the mortgage was given was in Oklahoma. The mortgage deed contained a provision that both the note and mortgage should be construed according to Oklahoma law. The note was negotiable by the law of Kansas, but non-negotiable according to Oklahoma law. It was contended that the law of Oklahoma should govern, since the parties had expressly so agreed, but that since Oklahoma law would refer the question of the negotiability of this note to the law of the place of payment, the result was that the law of Kansas, according

<sup>66</sup> 34 Okla. 834, 127 Pac. 427 (1912).



to which the note was non-negotiable, would ultimately govern. The only answer of the court was that "this argument, if plausible, is certainly not more than plausible" (page 844). In this case then the court used a line of argument which when used by counsel in the previous case was condemned by the court. It should be said, however, that inasmuch as the parties expressly agreed that Oklahoma law should govern their contract, the case might have been decided without reference to any question of the *renvoi*, on the plain ground that the parties meant by the law of Oklahoma that law as applicable to a note made and payable in Oklahoma; that is, the case could be disposed of by a construction of the meaning of the language of the parties. In this view the case presents no *renvoi* question at all, and it is not clear that the court did not mean to treat the case as one raising only a question of construction. The case has, however, been approved on the ground that it rejects the *renvoi*.<sup>67</sup>

The cases in this country thus show even less fair appreciation of the principles underlying the *renvoi* than do the English cases. Indeed the word "*renvoi*" seems not to have been spoken in an American court by either court or counsel, though a *renvoi* process has occasionally been sanctioned or rejected by the courts. In view of the insidious nature of the *renvoi*, the impossibility of ascertaining definitely the extent to which it has functioned in Anglo-American case law, the discordance of that doctrine with common-law conceptions of the conflict of laws, it is time that

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<sup>67</sup> 11 MICH. L. REV. 236.

White v. Holly, 80 Conn. 438, 68 Atl. 997 (1908), presents an issue very similar to that of the principal case. There a settlor under a deed of trust reserved for herself a power to appoint the trust *res* "by any writing in the nature of a last will and testament executed according to the forms required by the statutes of Connecticut then in force at the time of such execution by her for a will of real estate." The settlor left a will executed in New York and attested by two witnesses, which purported to exercise the power. The will was valid under New York law, but was not attested by a sufficient number of witnesses to comply with Connecticut law. A statute of Connecticut, however, provided that a will executed according to the law of the place of execution should be admissible to probate in Connecticut and pass any property there located. It was held that the power was properly exercised, since the will conformed to the requirements of this statute. In other words the provision in the deed of trust specifying the manner of exercise of the power was taken to refer to the *locus regit actum* principle of the Connecticut conflict of laws enacted by the statute in question. The real issue, however, was one of construing the language of the instrument creating the power, and not of *renvoi*.

both court and counsel addressed themselves consciously to the problems which it involves. An examination into its merits and demerits will, it is believed, require its rejection in all but the most exceptional cases.

•*Ernst Otto Schreiber, Jr.*<sup>68</sup>

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<sup>68</sup> ERNST OTTO SCHREIBER, Jr., was born at Lansing, Michigan, December 4, 1888. The son of a German immigrant, he secured for himself a good education, graduating from the George Washington University with the degrees of A.B. in 1910, and LL.B. (with honor) in 1912. He was invited to teach in the Law School, and proved himself a teacher of unusual force and ability. He obtained a leave of absence for the year 1916-17, and entered the Harvard Law School as a graduate student; receiving the degree J.S.D. at Commencement, 1917, when he was selected to represent the Law School on the Commencement platform. Shortly before Commencement he contracted a severe case of typhoid fever, and was actually affected with delirium when he delivered his oration. A few days later he died.

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## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> II

### II. REGULATIONS OF INTERSTATE COMMERCE

THE doctrine that a state cannot tax interstate commerce is derived from an interpretation of the clause in the Constitution granting to Congress the power to regulate such commerce. The steps in this interpretation are the declarations that taxation of commerce is a regulation thereof,<sup>2</sup> that the state cannot regulate those subjects of interstate commerce which are national in character,<sup>3</sup> and that exchange and transportation of commodities between the states are national in character.<sup>4</sup> State taxation which falls directly on exchange and transportation between the states has uniformly been held beyond the power of the state.<sup>5</sup> On the other hand, property within the state,<sup>6</sup> privileges granted by the state,<sup>7</sup> and intra-state commerce done within the state<sup>8</sup> are uniformly held proper subjects of state taxation. If the power to

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<sup>1</sup> For the general introduction to this discussion and for the first section dealing with "Interferences with Federal Instrumentalities," see 31 HARV. L. REV. 321-72 (January, 1918).

<sup>2</sup> The Passenger Cases, 7 How. 283 (1849).

<sup>3</sup> *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299 (1851).

<sup>4</sup> *Welton v. Missouri*, 91 U. S. 275, 280 (1876).

<sup>5</sup> *Case of the State Freight Tax*, 15 Wall. (82 U. S.) 232 (1873); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. Rep. 826 (1885); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. Rep. 881 (1890); *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891).

<sup>6</sup> *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

<sup>7</sup> Cases cited in notes 21, 23, 33, 35, 38, *infra*.

<sup>8</sup> *Home Machine Company v. Gage*, 100 U. S. 676 (1880); *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888); *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. Rep. 250 (1892); *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. Rep. 367 (1895); *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. Rep. 128 (1900); *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. Rep. 403 (1905).

tax necessarily involved the power to destroy,<sup>9</sup> if the question were entirely one of power and not at all one of economics,<sup>10</sup> it would follow that no tax on these subjects could be held invalid as a regulation of interstate commerce.

Though the maxims quoted would preclude inquiry into the effect on interstate commerce of a tax imposed on a subject within the authority of the state, the inquiry is logically permissible. We may grant that a tax on a subject of interstate commerce is a regulation of such commerce. We may concede that some taxes levied on other subject matters are not regulations of interstate commerce. But we may still inquire whether other taxes on subjects not themselves interstate commerce may not properly be regarded as regulations of interstate commerce. And the Supreme Court holds that taxes on subjects not themselves interstate commerce are nevertheless regulations of such commerce, where in effect they discriminate against interstate commerce in favor of intra-state commerce.

### 1. *Taxes Discriminating against Interstate Commerce*

In *Welton v. Missouri*<sup>11</sup> the court held invalid a state statute imposing a tax nominally on peddlers, but defining a peddler as one who peddles goods which are not the growth, produce, or manufacture of the state. Mr. Justice Field declared that any tax which was levied on the sale of goods for the reason that they originated in other states was invalid as a regulation of interstate commerce. In answer to the contention of the state that the goods in question were no longer in the original packages, he said that the commercial power of Congress over commodities which have been brought into a state from other states "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."<sup>12</sup> A similar doctrine was laid down in *Darnell v. Memphis*,<sup>13</sup> which held that a state could not,

<sup>9</sup> Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431 (1819). See 31 HARV. L. REV. 321.

<sup>10</sup> Mr. Justice Moody in *Home Savings Bank v. Des Moines*, 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907). See 31 HARV. L. REV. 343.

<sup>11</sup> 91 U. S. 275 (1876).

<sup>12</sup> 91 U. S. 275, 282 (1876).

<sup>13</sup> 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908). For other cases affirming the doctrine that a state cannot by taxation discriminate against interstate commerce, see



by exempting from its general property-tax, articles which were manufactured from the produce of the state, impose such a tax solely on goods manufactured from the produce of other states.

In these decisions the state tax was declared invalid as a regulation of interstate commerce, though the subjects of taxation were sales of goods within the state and personal property located within the state. In both cases the articles had lost their interstate character before they or their sales had become subject to the statute of the state. They were within the taxing power of the state in the same manner and to the same extent as articles of domestic origin were within the power of the state.<sup>14</sup> But the economic result of imposing heavier taxes on goods and the sales of goods of extra-state origin than on those of intra-state origin was to burden the future introduction of merchandise from other states, and thus to give an economic advantage to domestic producers. In deciding these cases, therefore, the Supreme Court applies an economic test to determine whether taxes, levied on subjects not in themselves interstate commerce, are nevertheless regulations of interstate commerce. In substance it declares a tax invalid solely because of objection to the measure by which the amount of the tax is determined. If the rate imposed had not been higher than that applied to goods of domestic origin, the tax would have been sustained. The taxes held unconstitutional would be made entirely valid by the imposition of similar taxes on goods of domestic origin.

## 2. *Taxes not Discriminating against Interstate Commerce*

If a state tax falls directly on a subject of interstate commerce, it is invalid notwithstanding the fact that the identical tax is

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*Pierce v. The State*, 13 N. H. 536, 582 (1843), *semble*; *State v. North & Scott*, 27 Mo. 464 (1858); *Guy v. Baltimore*, 100 U. S. 434 (1880); *Tiernan v. Rinker*, 102 U. S. 123 (1880); *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454 (1886); and *Ex parte Stoddard*, 35 Nev. 504, 131 Pac. 133 (1913). See also HALL, CASES ON CONSTITUTIONAL LAW, 1086, note 1. For cases sustaining seeming discriminations against interstate commerce, on the ground that the state had based its differences of treatment on a proper classification under the police power, see *McGuire v. State*, 42 Ohio St. 530 (1885); *Reyman Brewing Co. v. Brister*, 179 U. S. 445, 21 Sup. Ct. Rep. 201 (1900); *Cox v. Texas*, 202 U. S. 446, 26 Sup. Ct. Rep. 671 (1906); and *State v. Parker Distilling Co.*, 236 Mo. 219, 139 S. W. 453 (1911).

<sup>14</sup> A non-discriminatory tax on goods of extra-state origin was sustained in *Brown v. Houston*, note 6, *supra*. A tax on all peddlers was sustained in *Emert v. Missouri*, note 8, *supra*.

imposed on corresponding intra-state commerce. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."<sup>15</sup> The question is treated as one of power and not of economics. The Supreme Court fixes its attention, not upon the economic results of the tax, but upon the legal *res* which is declared by the statute to be the subject on which the tax is imposed. This is not to say that economic considerations have been entirely neglected in determining what subjects of taxation are to be regarded as in themselves interstate commerce. But what the court considers in this connection is not the burden imposed by the particular tax before it, but the burden which would result if the subject were taxed to the point of extinction.

Where, however, the subject on which the tax is imposed is not itself interstate commerce, it is manifest that only by recourse to its economic effect on interstate commerce could it be declared a regulation of such commerce. But, with the exception of the cases involving discriminations against interstate commerce, the early decisions of the Supreme Court did not regard as important the measure by which the amount of a tax was determined, provided the subject on which the tax was levied was within the authority of the state. The subjects of taxation with which these cases have been concerned are acts, occupations, property, and privileges. The questions under consideration could of course arise only when the property was employed in interstate commerce, when the act or occupation was conducted in some connection with interstate commerce, or when the privilege was enjoyed by those engaged in whole or in part in interstate commerce.

#### A. TAXES ON PRIVILEGES<sup>16</sup>

It has never been urged that taxes on inheritances were regulations of interstate commerce, even when the property passing

<sup>15</sup> Mr. Justice Bradley in *Robbins v. Shelby County*, note 5, *supra*.

<sup>16</sup> "Privilege" is here used in the sense of some permission obtained from the state which might have been entirely withheld. The two such privileges involved in the decisions to be considered are the privilege of being a domestic corporation and the privilege of a foreign corporation to exercise its corporate powers within the state for the conduct of business which is not interstate commerce. "Privilege" is often used in a broader sense in speaking of "privilege taxes." See Mr. Justice Harlan in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 43, 30 Sup. Ct. Rep. 190 (1910):



by the inheritance derived its value from some connection with interstate commerce. The privilege taxes which have been challenged as regulations of interstate commerce have been those levied on the privileges of being a corporation, or of exercising corporate powers within the state. The state may decline to create a corporation. It may decline to permit a foreign corporation to enter the state to carry on intra-state commerce. From the power of the state to forbid has been inferred the power to burden as it pleases.

(a) *The Doctrine of Unlimited Power*

In *State Tax on Railway Gross Receipts*,<sup>17</sup> decided in 1872, the court sustained a Pennsylvania statute imposing on every railroad company incorporated under the laws of Pennsylvania a tax of three-fourths of one *per centum* upon the gross receipts of said company. One of the grounds on which the decision was based is thus stated in the opinion of the court:

"It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same."<sup>18</sup>

It is to be noted that Mr. Justice Strong cites no authority for this doctrine that the state may measure a tax on corporate fran-

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"Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege," citing *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 43 S. W. 115 (1897). Privilege taxes of this more general character will be dealt with in a succeeding section under the head of "taxes on acts and occupations."

<sup>17</sup> 15 Wall. (82 U. S.) 284 (1873).

<sup>18</sup> 15 Wall. 284, 296 (1873). The other reason given for the decision was that the tax was laid "upon a fund which has become the property of the company" and "which has lost its distinctive character of freight earned, by having become incorporated into the general mass of the company's property." This ground of the decision was subsequently disavowed in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, note 5, *supra*.

chises granted by it in any way that it pleases. Mr. Justice Miller dissented. With him concurred Justices Field and Hunt. The dissenting opinion lays emphasis on the fact that the imposition of the tax is in reality on transportation, and that it must be paid out of the receipts thereof,<sup>19</sup> and must therefore increase the price of such transportation. No attention was paid specifically to the argument of the majority that the tax was justified, because of the power of the state to deny the privilege of incorporation. The reasoning, however, was sufficiently broad to cover the contention:

"I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce."<sup>20</sup>

In *Delaware Railroad Tax*,<sup>21</sup> decided the following year, the court, in unanimously sustaining a Delaware statute imposing a tax on a Delaware corporation, expressed the doctrine as follows:

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."<sup>22</sup>

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<sup>19</sup> Mr. Justice Miller asks whether the tax is "within the evil intended to be remedied by the commerce clause of the Constitution" and answers: "It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is 'to keep the word of promise to the ear and break it to the hope.'" 15 Wall. 284, 298 (1873).

<sup>20</sup> 15 Wall. 284, 299 (1873).

<sup>21</sup> 18 Wall. (85 U. S.) 206 (1874).

<sup>22</sup> 18 Wall. 206, 231 (1874).



In *Railroad Co. v. Maryland*<sup>23</sup> the court sustained a stipulation in the charter of a corporation created by the state of Maryland that the corporation should pay to the state in January and July, in each and every year, one-fifth of the whole amount which may be received for the transportation of passengers on said railroad by said company during six months last preceding. Since the corporation was engaged in transportation between Baltimore and Washington, the receipts which were made the measure of the annual payment were in large part receipts from interstate commerce. In the opinion of Mr. Justice Bradley, it was stated that it would have been possible for the state to construct a railroad between Baltimore and Washington, and exact such compensation for transportation on such road as it chose.

"As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives."<sup>24</sup>

The fact that this exaction by the state would affect interstate transportation was said to be not material, and it was pointed out that the same result follows from every burden or tax imposed on corporations engaged in interstate commerce.

"The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*; and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more

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<sup>23</sup> 21 Wall. (88 U. S.) 456 (1875).

<sup>24</sup> 21 Wall. 456, 472 (1875).

nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers.”<sup>25</sup>

No authorities were cited for the decision of the court. The brief dissenting opinion of Mr. Justice Miller was as follows:

“I am of opinion that the statute of Maryland requiring the railroad company to pay into the treasury of the State one-fifth of the amount received by it from passengers on the branch of the road between Baltimore and Washington, confined as it is exclusively to passengers on that branch of the road, was intended to raise a revenue for the State from all persons coming to Washington by rail, and had that effect for twenty-five years, and that the statute is, therefore, void within the principle laid down by this court in *Crandall v. Nevada*.”<sup>26</sup>

The foregoing cases involved taxation on domestic corporations. The absolute power of the state was founded on the fact that it might have declined to create the corporation. The franchise that could be denied could be taxed as the state pleases. In *Maine v. Grand Trunk Railway Co.*<sup>27</sup> the same doctrine was applied to a foreign corporation which had leased the rights and privileges of a domestic corporation. The statute under which the tax was levied imposed on every corporation, person, or association operating a railroad in the state “an annual excise tax for the privilege of exercising its franchises.” The majority held that the tax was levied on a privilege entirely within the discretion of the state to grant or withhold, and that the “character of the tax, or its validity, is not determined by the mode adopted in fixing its amount.”<sup>28</sup> The amount of the tax in question was determined by applying the statutory rate to a sum ascertained by multiplying the average receipts per mile over the whole system of the road by the number of miles in the state. This measure clearly included receipts from interstate, as well as from intra-state, commerce. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, maintained that the tax, though called one on a franchise, was, in fact, one on the receipts of the company derived from international transportation. The precedents on which they relied involved taxes

<sup>25</sup> 21 Wall. 456, 473 (1875).

<sup>26</sup> 21 Wall. 456, 475 (1875).

<sup>27</sup> 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).

<sup>28</sup> 142 U. S. 217, 228, 12 Sup. Ct. Rep. 121 (1891).



imposed, not on some privilege within the grant of the state, but on receipts from interstate commerce,<sup>29</sup> or on engaging in a specified business which was in part interstate commerce.<sup>30</sup> In these cases the subject on which the tax was levied was held to be beyond the power of the state. The majority, on the other hand, rested the decision on the authority of *Home Ins. Co. v. New York*,<sup>31</sup> sustaining a tax on the franchise of a domestic corporation. They must therefore have regarded the tax as imposed on the privilege of a foreign corporation either to succeed to the rights of a domestic corporation, or to be admitted to the state to carry on intra-state commerce, for these were the only privileges which the state might have withheld. The language of the statute is sufficiently broad to bring the case within the authority of the precedents relied on by the minority. But the difference of opinion on this point does not affect the authority of the case for the proposition that the validity of the tax depends on the subject on which it is levied, and not on the measure by which its amount is determined. "There is," said Mr. Justice Field for the majority, "no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred."<sup>32</sup>

In *Ashley v. Ryan*<sup>33</sup> the court sustained unanimously a statute of Ohio which required a fee for filing with the secretary of the state, articles of agreements of consolidation of different corporations. The amount of the fee was fixed by a small percentage of the total capital stock, and it was alleged that this requirement was a regulation of interstate commerce. In view of subsequent decisions, the opinion of Mr. Justice White is of more than usual importance. He presents the theory underlying the decision as follows:

<sup>29</sup> *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, note 5, *supra*.

<sup>30</sup> *Crutcher v. Kentucky*, note 5, *supra*; *Leloup v. Port of Mobile*, note 5, *supra*; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. Rep. 635 (1886); *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. Rep. 958 (1890).

<sup>31</sup> 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889). Though the tax was measured by the capital stock, part of which was invested in United States bonds, it was held not to be an unconstitutional interference with the federal borrowing power. See pages 334-35, *supra*.

<sup>32</sup> 142 U. S. 217, 229, 12 Sup. Ct. Rep. 121 (1891). For a re-interpretation of the Maine Case, see *Galveston, H. & S. A. R. Co. v. Texas*, note 41, *infra*.

<sup>33</sup> 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894).

"The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. . . .

"Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim of the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. . . .

"It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained."<sup>34</sup>

Ten years later, in two unanimous decisions, the Supreme Court sustained taxes on the local business of foreign corporations and dismissed as immaterial the contentions that, because the taxes

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<sup>34</sup> 153 U. S. 436, 440-43, 14 Sup. Ct. Rep. 865 (1894).



imposed economic burdens on interstate commerce, they were therefore invalid regulations of such commerce. *Pullman Co. v. Adams*<sup>35</sup> involved a tax on sleeping-car companies carrying passengers from one point to another within the state. The tax was \$100, plus twenty-five cents per mile for each mile of railroad track over which the company runs. The company offered to show that the receipts from intra-state passengers did not equal the expenses chargeable against such receipts. On the assumption that the company was legally free to abandon its intra-state business,<sup>36</sup> the court held that it was not important that there were no profits on that business, and that the tax would have to be paid from interstate receipts, saying: "The company cannot complain of being taxed for the privilege of doing local business which it is free to renounce. Both parties agree that the tax is a privilege tax."<sup>37</sup>

*Pullman Co. v. Adams* was quoted with approval in *Allen v. Pullman's Palace Car Co.*,<sup>38</sup> which sustained a tax of \$3,000 on sleeping-car companies for one or more passengers taken up at one point in the state and delivered at another point within the state. But, in rejecting the contention that, since the intra-state business was such a small part of the total business, the statute was but a thinly disguised attempt to tax the privilege of interstate traffic, Mr. Justice Day remarked:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection."<sup>39</sup>

This reference to the possible significance of the economic burden on interstate commerce must be taken as merely a qualification of the implication that the state cannot require payment of a tax on intra-state commerce as a condition of continuing to engage in interstate commerce; for the passage in the opinion immediately following that quoted above reads as follows:

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<sup>35</sup> 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903).

<sup>36</sup> This assumption was based on the interpretation of the state constitution given by the state court.

<sup>37</sup> 189 U. S. 420, 422, 23 Sup. Ct. Rep. 494 (1903).

<sup>38</sup> 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903).

<sup>39</sup> 191 U. S. 171, 181, 24 Sup. Ct. Rep. 39 (1903).

"Upon this proposition we are unable to distinguish this case from *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. Rep. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit."<sup>40</sup>

It is obvious from these two decisions that the court was still interested exclusively in the legal *res* which was the subject of the tax. The next case to be considered is *Galveston, H. & S. A. R. Co. v. Texas*,<sup>41</sup> decided five years later. The tax there in issue was imposed on railroad corporations and other persons owning or controlling any line of railroad wholly within the state. Neither the majority nor the minority treated the tax as on a privilege within the power of the state to withhold. The minority deemed it an occupation tax and valid, in spite of the fact that the measure of the tax included receipts from interstate commerce. The majority held that the tax was imposed directly on the receipts, and was therefore invalid. Both majority and minority were looking merely at the subject on which the tax was laid, although Mr. Justice Holmes for the majority declared that, "neither the state courts nor the legislatures, by giving a tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."<sup>42</sup> Fuller consideration of the case will be given in a later section dealing with taxes on occupations. Attention is called to it at this point for the bearing which the division of opinion among the judges has on the next case to be considered. In the *Galveston Case* the majority was composed of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day, and Moody. The dissenting judges were Mr. Justice Harlan, who wrote the opinion, and Chief Justice Fuller, and Justices White and McKenna.

<sup>40</sup> 191 U. S. 171, 181-82, 24 Sup. Ct. Rep. 39 (1903).

<sup>41</sup> 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

<sup>42</sup> 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).



(b) *The Modification of the Doctrine of Unlimited Power*

Thus far, as we have seen, the doctrine that a state may tax as it pleases any privilege that it may withhold has always had the assent of a majority of the Supreme Court. But in 1910 came two decisions which seem to mark a new departure. The majority seems to have become a minority. This conclusion, however, cannot be stated with certainty, since in both these cases, *Western Union Telegraph Co. v. Kansas*<sup>43</sup> and *Pullman Co. v. Kansas*,<sup>44</sup> the majority of the court did not fully agree in the reasons for their decision. Mr. Justice Harlan wrote the opinion of the court in both cases. With him concurred Justices Brewer and Day. Mr. Justice White filed separate concurring opinions. Both Mr. Justice Moody and Mr. Justice Peckham were absent from the bench on account of illness when the cases were decided. But it was announced that the former approved of Mr. Justice Harlan's opinion in the Western Union Case, and that the latter agreed with the minority. Mr. Justice Holmes wrote dissenting opinions in the two cases, in which opinions Chief Justice Fuller concurred. Mr. Justice McKenna concurred in the dissenting opinion in the Kansas Case, and his dissent in the Pullman Case was separately recorded.

The tax involved in the two cases was measured by applying scheduled rates to the total capital stock. So far as the wording of the statute indicates, it was imposed on all corporations, domestic and foreign, exercising their corporate powers within the state. But, as the case came before the court, both the majority and minority treated the question as one involving the propriety of the exaction on foreign corporations as a condition of doing local business within the state. Kansas had obtained decrees in her own supreme court, ousting and restraining the corporations from doing any business that was wholly internal to the state and not pursuant to some arrangement with the federal government. The basis for the decree was the non-payment of the tax. The question before the Supreme Court was whether ouster from all purely local business in default of such payment was a regulation of interstate commerce.

The precise issue which the court had to meet will be made clearer by quotations from the dissenting opinions of Mr. Justice

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<sup>43</sup> 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

<sup>44</sup> 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

Holmes. In the Western Union Case he says: "I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which the state has absolute arbitrary power."<sup>45</sup> He points out that Kansas has not attempted to impose an absolute liability, but has merely said that if the company wishes to do local business it must pay a certain sum.

"It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. . . . I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. . . . If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave."<sup>46</sup>

Mr. Justice Holmes recognizes that "the local and interstate business may be necessary each to the other to make the whole pay."<sup>47</sup> But this he dismisses as immaterial, on the ground that "to deny the right of Kansas to do as it chooses with the local business is to require the local business to help sustain that between the states."<sup>48</sup> This point he reinforces in the Pullman Case:<sup>49</sup>

"I am quite unable to believe that an otherwise lawful exclusion from doing business within a state becomes an unlawful or unconstitutional burden on commerce among states because, if it were let in, it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all; it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself, I see no right to demand an entrance for domestic business to help it out."

In concluding his opinion the learned justice goes back to the *dicta* of Chief Justice Marshall for support:

"That the local business of telegraph and railroad companies may be taxed by the states has been held over and over again, with full accept-

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<sup>45</sup> 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).

<sup>46</sup> 216 U. S. 1, 53, 30 Sup. Ct. Rep. 190 (1910).

<sup>47</sup> *Ibid.*

<sup>48</sup> 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).

<sup>49</sup> 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).



ance of the doctrine that *quoad hoc*, 'the power to tax involves the power to destroy' (*M'Culloch v. Maryland*, 4 Wheat. 316, 431, 4 Law Ed. 579, 697), — essentially the doctrine on which the power of the states to tax interstate commerce was denied. . . .

"I do not see how the reasoning that denies the power of the State to tax one kind of commerce (interstate) and asserts it with regard to the other (intra-state) can be reconciled with the denial of the power of the state to exclude the latter altogether, or to tax it for whatever sum it likes. The right to tax 'in its nature acknowledges no limits.'" <sup>50</sup>

There can be no doubt that Mr. Justice Holmes is correctly applying the reasoning of many of his predecessors. If such reasoning was essential to the decisions, he seems on firm ground when he says that he thinks "the tax in question . . . was lawful under all the decisions of this court until last week." <sup>51</sup> The majority can escape from the force of Mr. Justice Holmes's appeal to authority only by breaking entirely new paths, or by showing that the precise question before them differs from those involved in the earlier decisions. Both of these methods are adopted.

Mr. Justice White in his concurring opinion in the *Western Union Case* makes no reference to any of the precedents. He lays emphasis upon the fact that the Western Union Company has been doing both local and interstate business in Kansas for a long time; that it came in as the result of the implied invitation or tacit consent of the state; that it had expended large sums of money in the state, and that its investment was still there; that the continued beneficial existence of the investment depended upon the right to use the property for the purpose for which it was acquired, *i. e.*, for both interstate and local business. These facts he brings to bear upon the contention of the state that the tax is not a burden on interstate commerce, because the company may avoid the tax by abandoning its local business. The abandonment of the local business, he says, would result in rendering worthless and, in effect, confiscating the property established for the purpose of doing such local business. He held, therefore, that this was no case for the doctrine of election or voluntary assumption of an unconstitutional burden.

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<sup>50</sup> 216 U. S. 56, 76, 77, 30 Sup. Ct. Rep. 232 (1910).

<sup>51</sup> 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

"The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. . . . The view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in." <sup>52</sup>

This position of Mr. Justice White seems to be based on the due-process clause rather than on the commerce clause. Mr. Justice Holmes meets it as follows:

"Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already is in the state, or even has been there for some time. . . . Whatever the corporation may do or acquire there is infected with the original dependence upon the will of the state. . . . But furthermore, it is a short answer to this part of the argument that, in the present case, according to the decisions relied upon by the majority, the state could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other states." <sup>53</sup>

The debate between Mr. Justice White and Mr. Justice Holmes is continued in their opinions in the Pullman Case. The former concedes the general principle relied on by his colleague. Wherever

<sup>52</sup> 216 U. S. 1, 50-51, 30 Sup. Ct. Rep. 190 (1910).

<sup>53</sup> 216 U. S. 1, 55-56, 30 Sup. Ct. Rep. 190 (1910).



the state has the absolute power to exclude, he says, it may impose such conditions as it pleases on the right to come in. If "a foreign corporation avails of such a right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the conditions."<sup>54</sup> In such a case, "the absolute power of the state is the determining factor, and the validity of the condition is immaterial."<sup>55</sup> But this principle is said to have no application to a foreign corporation engaged in interstate commerce, for its right to come into the state to engage in such commerce is independent of the will of the state. "The power to exclude in such a case being only relative, affords no warrant for the exertion by the state of an absolute prohibition."<sup>56</sup> The learned justice goes so far as to say that "where the right to do an interstate business exists, without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on with its interstate business a local business would be a direct burden upon interstate commerce,"<sup>57</sup> and in conflict with the principle that "a state may not exert its conceded lawful powers in such a manner as to impose a direct burden on interstate commerce."<sup>58</sup>

As to this last point, Mr. Justice Holmes replies that it seems to him "a proposition not to be assumed, but to be proved."<sup>59</sup> And he rejects it. And with respect to his colleague's distinction between absolute and relative powers of exclusion, he observes:

"I do not see how or why the right of a state to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the state is only relative, and in the sense that it is confined to the local business, I agree. But, in the sense that it is not absolute over that local business, the statement seems to me merely to beg the question that is discussed. I do not see why the power is less absolute over that because it does not extend to something else."<sup>60</sup>

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<sup>54</sup> 216 U. S. 56, 66, 30 Sup. Ct. Rep. 232 (1910).

<sup>55</sup> *Ibid.*

<sup>56</sup> 216 U. S. 56, 68, 30 Sup. Ct. Rep. 232 (1910).

<sup>57</sup> *Ibid.*

<sup>58</sup> 216 U. S. 56, 65, 30 Sup. Ct. Rep. 232 (1910).

<sup>59</sup> 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).

<sup>60</sup> 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

Here, again, Mr. Justice Holmes follows faithfully the footsteps of his forerunners. Mr. Justice White is opening new paths. He says, in effect, that the right of the state to exclude a foreign corporation from doing local business in connection with interstate business ought not to be recognized, because the inability to carry on local business in connection with the interstate business imposes a direct burden on interstate commerce. The extent to which this is true will of course depend on the kind of business in question. It will appear that in the *Western Union Case* and in the decisions which have followed it, the determination of the question whether the tax is a regulation of interstate commerce is dependent on the nature of the business in question,<sup>61</sup> as well as on the measure by which the amount of the tax is determined.

Mr. Justice Harlan's opinion for the court in the *Western Union Case* took a somewhat broader ground than that chosen by Mr. Justice White. It stands for the more general proposition that, wherever the abandonment of local business would appreciably increase the cost of conducting the interstate business, the state cannot measure a tax on the local business by a method which results in imposing a substantial burden on the interstate business. In reply to the claim that the state had no intention to embarrass interstate commerce, but only to prevent the company from doing local business without complying with the statute, it was said:

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. . . ."<sup>62</sup>

"The right of the *Telegraph Company* to continue the transaction of local business in *Kansas* could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not

<sup>61</sup> This was in type before the author had received the advance sheets containing the opinion in *Looney v. Crane Co.*, note 114, *infra*. See pages 600-618, *infra*.

<sup>62</sup> 216 U. S. 1, 27, 30 Sup. Ct. Rep. 190 (1910).



bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution.”<sup>63</sup>

The opinion thus stands for the doctrine, that when the measure adopted for determining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. The power to burden interstate commerce does not exist merely because of the general power of the state to exclude a corporation from doing local business.

In every case, then, the question at issue is whether a tax imposed by the state really burdens interstate commerce. Whether it does so will depend not only upon the measure by which the amount of the tax is determined, but also upon the character of the business to which the tax is applied.<sup>64</sup> In *Pullman Co. v. Adams*<sup>65</sup> the decision was based on the assumption that the company was legally free to abandon its local business. The court stated that, if such were not the case, the tax would be invalid. No consideration was given to the fact that the abandonment of local business might result in such economic loss to the interstate business, that the legal freedom to abandon the local business would not be exercised, even though the tax on the local business exceeded the net income from that business. In *Western Union Telegraph Co. v. Kansas*,<sup>66</sup> however, the court looked at the contention that the corporation might escape the tax by abandoning its local business, not from the standpoint of the legal possibility of such abandonment, but from the standpoint of its economic effect. If the company could not abandon its local business without economic loss to its interstate business, the state cannot impose a tax on the local business which is in reality a burden on the interstate business. In the language of Mr. Justice Harlan:

“We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be

<sup>63</sup> 216 U. S. 1, 47-48, 30 Sup. Ct. Rep. 190 (1910).

<sup>64</sup> See note <sup>61</sup>, *supra*.

<sup>65</sup> Note 35, *supra*.

<sup>66</sup> Note 43, *supra*.

done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.<sup>67</sup>

"The state knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public — a right lawfully acquired from the United States when Kansas was a Territory, and exercised, consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union. . . ."<sup>68</sup>

"It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses, not only by exactions that directly burdened such commerce but by taxation upon property situated beyond its limits."<sup>69</sup>

Owing to the difference between the opinion of Mr. Justice Harlan and that of Mr. Justice White, it is difficult to state the proposition for which the Western Union Case and the Pullman Case stand. Mr. Justice White's opinion in the Pullman Case would seem to indicate that he would permit Kansas to impose such taxes as it pleases on domestic corporate franchises. Yet he said in the Western Union Case that he did "not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies."<sup>70</sup> Yet the fundamental principle of that opinion is directly opposed to the fundamental principle of Mr. Justice White's opinion in *Ashley v. Ryan*.<sup>71</sup> But the learned justice tells us that the doctrine of

<sup>67</sup> 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

<sup>68</sup> 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

<sup>69</sup> 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

<sup>70</sup> 216 U. S. 1, 52, 30 Sup. Ct. Rep. 190 (1910).

<sup>71</sup> Note 33, *supra*. In a *dictum* in his opinion in the Western Union Case Mr. Justice Harlan makes it evident that he would apply the doctrine of the decision to domestic corporations engaged in other kinds of interstate commerce than transportation. At 216 U. S. 1, 36-37, 30 Sup. Ct. Rep. 190 (1910), he says:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a State, should in addition solicit orders for goods



some of the earlier cases in which he concurred did not represent his individual convictions.

"When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much as an original question I would have held a contrary view. But because my convictions were thus yielded in such a case affords no reason why I now should assent to extending the doctrine of the previous cases to conditions to which, in my opinion, they do not apply."<sup>72</sup>

Mr. Justice Harlan does not recognize that his opinion is in any way inconsistent with previous decisions. He prefaces his analysis of the situation involved in the case at bar with an extended review of earlier decisions. But these were cases in which the court held that the tax was imposed on a subject itself interstate commerce.<sup>73</sup> He dismisses the contention that earlier cases had established that a state may impose on foreign corporations such terms as it pleases, by pointing out that "those were cases in which the particular foreign corporation before the court was engaged in ordinary business, and not directly or regularly in interstate or foreign commerce."<sup>74</sup> *Pullman Co. v. Adams*<sup>75</sup> he explains by saying that the tax there involved was not at all disproportioned to the

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manufactured in and to be brought from another State for delivery, could the former State make it a *condition* of the right to engage in local business within its limits that the corporation pay a given percentage of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution, no court could, by any form of decree, recognize or give effect to or enforce such a condition."

This *dictum* is directly contrary to *Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892). In that case, however, Mr. Justice Harlan dissented.

<sup>72</sup> 216 U. S. 56, 74, 30 Sup. Ct. Rep. 232 (1910).

<sup>73</sup> *McCall v. California*, note 5, *supra*; *Crutcher v. Kentucky*, note 5, *supra*; *Gloucester Ferry Co. v. Pennsylvania*, note 5, *supra*; *Leloup v. Port of Mobile*, note 5, *supra*; *Galveston, H. & S. A. R. Co. v. Texas*, note 41, *supra*; *Henderson v. New York*, 92 U. S. 950 (1875); *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. Rep. 213 (1891).

<sup>74</sup> 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

<sup>75</sup> Note 35, *supra*.

local business, and was, therefore, "not to be regarded as a mere device to reach or burden the interstate commerce of the company." *Allen v. Pullman's Palace Car Co.*<sup>76</sup> he dismisses by quoting from the opinion to the effect, that the statute sustained "applied 'strictly to business done (by sleeping-car companies) in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein.'"<sup>77</sup> But what the opinion in that case said of the statute was that "its terms apply strictly," etc.<sup>78</sup> Clearly both the Adams Case and the Allen Case were decided on the theory that any economic burden imposed by the taxes on interstate commerce was immaterial, so long as the company was free to abandon the local business. Very likely the taxes might have been sustained on the theory that the burden on interstate commerce was not sufficiently serious to be controlling. But this was not the theory adopted and applied. Though the Western Union Case and the Pullman Case may not require any overruling of earlier decisions, they plainly mark the abandonment of earlier doctrines. Notwithstanding the differences of opinion among the judges who constituted the majority of the court, the Western Union Case and the Pullman Case clearly decide that a tax on the right of a foreign corporation to do local business may by reason of its economic effect on interstate commerce be a regulation of that commerce. With the establishment of this doctrine, the court is compelled to consider the economic effect on interstate commerce of every tax complained of.<sup>79</sup> But neither in the Western Union Case nor in the Pullman Case was it inquired whether the specific amount of the tax in question was disproportionate to the value of the privilege of doing local business. No reference was made to the amount of local business. The theory of the majority seemed to be that it was unconstitutional to apply the measure of total authorized capital, even though the rate applied to that amount was infinitesimal. The rates specified in the Kansas statute started at one-tenth of one per cent on the first \$100,000 and diminished as the capital was larger. The Western Union Company was taxed \$20,100 on an authorized

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<sup>76</sup> Note 38, *supra*.

<sup>77</sup> 216 U. S. 1, 44, 30 Sup. Ct. Rep. 190 (1910).

<sup>78</sup> 191 U. S. 171, 180, 24 Sup. Ct. Rep. 39 (1903).

<sup>79</sup> See note 61, *supra*.



capital of \$100,000,000. Mr. Justice Holmes remarked in his dissenting opinion:

"If, after this decision, the state of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid \$20,100 I shall be curious to see upon what ground that legislation will be assailed."<sup>80</sup>

In the Pullman Case the company was taxed \$14,800 on an authorized capital of \$74,000,000. In *Ludwig v. Western Union Telegraph Co.*,<sup>81</sup> decided at the same term, the company escaped from the payment of \$25,050 on its authorized capital of \$100,000,000. This case arose under an Arkansas statute which adopted the measure of the authorized capital stock. It would seem that, unless certain measures are to be deemed invalid whatever their economic effect on interstate commerce,<sup>82</sup> the court should in each case consider the rate as well as the measure, should ascertain the value of the local business, and should judge whether the sum actually charged for the privilege of conducting that business is moderate or excessive.

Some of these elements were touched upon in *Atchison, T. & S. F. R. Co. v. O'Connor*,<sup>83</sup> which declared invalid a Colorado tax of two cents per \$1,000 on the capital stock of a foreign corporation. The decision was unanimous, indicating that all the court accepted the doctrine of the Western Union Case as definitely established. Mr. Justice Holmes, who wrote the opinion, referred to the fact that the greater part of the property and business of the Kansas corporation seeking to escape from the Colorado tax "is outside the state of Colorado, and of the business done within the state but a small proportion is local, the greater part being commerce among the states."<sup>84</sup>

In *Baltic Mining Co. v. Massachusetts*,<sup>85</sup> decided in 1913, the nature of the business and the amount of the tax receive more

<sup>80</sup> 216 U. S. 1, 54-55, 30 Sup. Ct. Rep. 190 (1910).

<sup>81</sup> 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).

<sup>82</sup> This appears to be the conclusion of the Supreme Court with reference to the measure of total capital stock, with no maximum limitation where applied to taxes on foreign corporation. See pages 600-618, *infra*.

<sup>83</sup> 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912).

<sup>84</sup> 223 U. S. 280, 285, 32 Sup. Ct. Rep. 216 (1912).

<sup>85</sup> 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).

specific consideration. In that case an excise tax measured by the total authorized capital, with a proviso that the annual imposition should not exceed \$2,000, was held not to be a burden on interstate commerce when applied to the two corporations whose rights were there in question. One of these corporations was the Baltic Mining Company, which had no property in the state except current bank deposits and a certificate for \$80,000 in the stock of another corporation. The other corporation, the S. S. White Dental Company, had in the state no real estate except a leasehold interest; it did no manufacturing in the state; its only property in the state consisted of about \$100,000 in stock, fixtures, and bank deposits. In the case of each of these corporations, the authorized capital by which the tax was measured was only one-fifth, or thereabouts, of their entire assets. Mr. Justice Day, who wrote the opinion, stated that the court had no disposition to limit the authority of the Western Union Case or the Pullman Case, but added that "every case involving the validity of a tax must be decided on its own facts,"<sup>86</sup> and that therefore "the facts upon which these cases were decided must not be lost sight of in deciding other and alleged similar cases."<sup>87</sup> He then proceeded to point out the differences between the Kansas and Massachusetts statutes<sup>88</sup> and between the business of the complainants and that of the objectors in the Kansas cases.<sup>89</sup> After considering these differences he said:

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<sup>86</sup> 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913).

<sup>87</sup> *Ibid.*

<sup>88</sup> In addition to the difference due to the fixing of a \$2,000 maximum in the Massachusetts statute, Mr. Justice Day refers to the fact that the authorized capital of the two corporations subjected to the Massachusetts tax is in each case about one-fifth of their total assets. 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

<sup>89</sup> "In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western U. Tel. Co. Case, the company had a large amount of property permanently located within the state, and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intra-state business from the interstate business by the limitations of state lines in its prosecution." 231 U. S. 68, 85-86, 34 Sup. Ct. Rep. 15 (1913).

"In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against



"The conclusion, therefore, that the authorized capital is only used as the measure of the tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is only used as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." <sup>90</sup>

Thus it appears that a state may still measure taxes on lawful subjects by receipts or capital stock which it cannot tax directly. But of course a significant feature of the Massachusetts statute was the provision that the tax should in no event exceed \$2,000. Chief Justice White, and Justices Van Devanter and Pitney, dissented from the decision, but without filing an opinion.

After the decisions in *Western Union Telegraph Co. v. Kansas* <sup>91</sup> and *Ludwig v. Western Union Telegraph Co.*, <sup>92</sup> Kansas and Arkansas changed their statutes. The Kansas statute with respect to foreign corporations, as interpreted by the state court, referred, for the measure of the tax, only to that proportion of the total paid-up capital stock which was represented by property in Kansas employed in purely local business. It also limited the annual imposition to \$2,500. In *Lusk v. Botkin*, <sup>93</sup> a tax of this amount on a foreign railway company doing business in Kansas was sustained. The Arkansas statute was similar, except that there was no maximum limit to the tax that might be charged. In *St. Louis S. W. Ry. Co. v. Arkansas* <sup>94</sup> this statute was sustained and a tax of

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laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913).

<sup>90</sup> 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

<sup>91</sup> Note 43, *supra*.

<sup>92</sup> Note 81, *supra*.

<sup>93</sup> 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916).

<sup>94</sup> 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914).

\$6798.26 imposed on a foreign corporation whose property owned and used in the state for intra-state business was valued at \$13,586,-520. These two cases would seem to indicate that the Massachusetts statute involved in the Baltic Case might also be applied to a foreign railroad company. The court might, however, draw a distinction between the cases and hold that, in spite of a provision for a maximum, a tax which refers for a measure to total capital stock cannot be applied to a corporation engaged in transportation, and using the same facilities for local and interstate business in such a manner that the abandonment of local business would not proportionately decrease operating costs. Whether, in such a case, the provision for a maximum would remove the difficulty inherent in selecting the total capital stock as a measure ought in common sense to depend on the maximum set. It would certainly be going far to say that a tax of \$2,000 on the right of a foreign railroad corporation to do local business was invalid, merely because the total capital was taken as a basis for determining the exact amount of any levy of less than \$2,000.<sup>95</sup>

On the same day that *Lusk v. Botkin*<sup>96</sup> was decided, the Supreme Court, in *Kansas City, F. S. & M. R. Co. v. Botkin*,<sup>97</sup> held applicable to a railroad corporation chartered in the state of Kansas a Kansas statute, imposing on the privilege of being a corporation a fee which was graduated according to the amount of paid-up capital stock, with a proviso that the maximum should be \$2,500. Thus it appeared that, so far at least as domestic corporations are concerned, the selection of total capital stock as a measure is cured by a provision for a reasonable maximum, even though the corporation is engaged in transportation. The opinion left the reader in doubt as to the importance of the provision for a maximum. It seemed to assume that the doctrine of *Western Union Telegraph Co. v. Kansas*<sup>98</sup> applies to taxes on the franchises of domestic corporations. Its silence on this point might be taken to obliterate the distinction between taxes on domestic corporations and those on foreign corporations, which was relied on by Mr. Justice White to exclude the issue in *Pullman Co. v. Kansas*,<sup>99</sup> from the prece-

<sup>95</sup> But see *Albert Pick & Co. v. Jordan*, 169 Cal. 1, 16-17, 20, 145 Pac. 506 (1915).

<sup>96</sup> Note 93, *supra*.

<sup>97</sup> 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).

<sup>98</sup> Note 43, *supra*.

<sup>99</sup> Note 44, *supra*.



dents in favor of the right of the state to tax domestic corporations as it pleases. The weakness of that distinction was convincingly demonstrated by Mr. Justice Holmes. But at the time it saved Mr. Justice White from direct repudiation of his opinion in *Ashley v. Ryan*.<sup>100</sup>

It was not necessary in *Kansas City, F. S. & M. R. Co. v. Botkin*<sup>101</sup> either to repudiate or affirm the broad doctrine, formerly prevailing, that the complete power of the state to refuse the privilege of incorporation necessarily sanctions any tax that the state might choose to levy on the enjoyment of the privileges granted, and the opinion of Mr. Justice Hughes is careful to do neither. It says only that a state tax on this privilege "is not necessarily invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power."<sup>102</sup> The learned justice, however, took pains to show that the reason for the decision was the special circumstances and characteristics of the special case:

"In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax — on the privilege granted by the state of being a corporation — and while it is graduated according to the amount of paid-up capital stock the maximum charge is \$2,500 in the case of all corporations having a paid-up capital of \$5,000,000 or more. This is the amount imposed in the present case where the corporation has a capital of \$31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce."<sup>103</sup>

Clearly, after this opinion, any state court would be in grave doubt as to the proper decision in a case involving a tax on the franchise of a domestic railroad corporation engaged in interstate commerce, if the tax was measured by total capital stock with no maximum limitation. The opinion of Mr. Justice Harlan in the *Western Union Case* proceeded on a theory which would be equally

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<sup>100</sup> See pages 580-81, 591-92 *supra*.

<sup>101</sup> Note 97, *supra*.

<sup>102</sup> 240 U. S. 227, 232, 30 Sup. Ct. Rep. 261 (1916).

<sup>103</sup> 240 U. S. 227, 235, 30 Sup. Ct. Rep. 261 (1916).

applicable to domestic corporations. A *dictum* declared plainly enough that a domestic corporation engaged in selling merchandise to purchasers in other states could not be subjected to a tax measured by its total receipts as a condition of doing local business.<sup>104</sup> But Mr. Justice White's opinion proceeded on grounds applicable only to foreign corporations, and without his concurrence, the majority would have been a minority. Yet Mr. Justice White also stated that he "did not dissent from the fundamental application which the court made of the commerce clause of the Constitution."<sup>105</sup> His statement of the special grounds on which he concurred might have been regarded as prompted mainly by a desire not to be guilty of inconsistency with his previous position in *Ashley v. Ryan*.<sup>106</sup> The difficulty of knowing the precise extent of the new law which the Supreme Court made in the Western Union Case will be apparent when we come to consider the confusion engendered in some of the state courts during the transition period.

So far, however, as the taxation of domestic corporations is concerned, the Supreme Court has largely cleared up the doubts raised by *Kansas City, F. S. & M. R. Co. v. Botkin*.<sup>107</sup> For in *Kansas City, M. & B. R. Co. v. Stiles*,<sup>108</sup> which is the latest<sup>109</sup> case on the subject, an annual excise measured by total capital stock was exacted from a domestic railroad corporation engaged in transportation between different states. This domestic corporation was created by a consolidation of other corporations under the very statute which imposed the annual excise. As Mr. Justice Day says in the opinion:

"The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."<sup>110</sup>

<sup>104</sup> Note 71, *supra*.

<sup>105</sup> 216 U. S. 56, 64, 30 Sup. Ct. Rep. 232 (1910). See also statement enoted on page 590, *supra*, cited in note 70, *supra*.

<sup>106</sup> Note 33, *supra*. See also page 580-581, *supra*.

<sup>107</sup> Note 97, *supra*.

<sup>108</sup> 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916).

<sup>109</sup> See note 61, *supra*.

<sup>110</sup> 242 U. S. 111, 117, 37 Sup. Ct. Rep. 56 (1916).



For authority for its position the opinion goes back to *Ashley v. Ryan*,<sup>111</sup> thus implying that that case was not shaken by the Western Union Case. It is also said that the objections of the complainant "were so recently discussed, and the previous cases in this court considered in *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S., 60 Law. Ed. 617, 36 Sup. Ct. Rep. 261, that it would be superfluous to undertake extended discussion of the subject now."<sup>112</sup>

"In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due-process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in part measured by the capital stock representing property owned in other states."<sup>113</sup>

It is true that the case cited said that each case must depend upon its own circumstances. But one of the circumstances in that case was that the annual imposition was limited to \$2,500, however large the capital of the corporation. That circumstance was absent in the Louisville Case. But there was present in the Louisville Case the circumstance that the statute complained of was on the books when incorporation was sought and obtained. So it still remains to be settled by explicit decision that excises on domestic corporations previously chartered may be measured by any method that the state chooses to adopt. The remaining question still left open by the decisions of the Supreme Court is whether taxes on foreign corporations engaged in combined interstate and intra-state commerce, other than some form of transportation using the same facilities for both kinds of commerce, may be measured by total capital stock with no limitation as to the amount to be paid.

Since the foregoing sentence was written and in the hands of the printer, the question thus left open by previous decisions has been answered. On December 10, 1917, the Supreme Court

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<sup>111</sup> Note 33, *supra*.

<sup>112</sup> 242 U. S. 111, 118, 37 Sup. Ct. Rep. 56 (1916).

<sup>113</sup> *Ibid*.

decided *Looney v. Crane Co.*,<sup>114</sup> and declared invalid a Texas statute, imposing a franchise tax on foreign corporations, which was measured by total capital stock plus surplus and undivided profits. The opinion was by Chief Justice White. It seems to take the position that no foreign corporation engaged in combined domestic and interstate commerce within a state may be subjected to any tax as the price of the privilege of engaging in domestic commerce that would not be proper independently of the enjoyment of such privilege. There is no discussion of the economic effect on interstate business of withdrawal from local business. The opinion relies on "general principles" previously laid down in the *Western Union Case*<sup>115</sup> and the *O'Connor Case*.<sup>116</sup> The economic integration of local and interstate transportation which was adverted to and seemingly relied on in those cases is absent in the *Looney Case*, for the complaining corporation was a foreign manufacturing concern. Its total assets in Texas, consisting of money, merchandise, and two warehouses, were assessed at \$301,179. Its total paid-up capital was \$17,000,000, and its surplus and undivided profits were \$8,129,000. Its gross receipts for the year 1913 were \$39,831,000, "of which only \$1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other states to purchasers in Texas who ordered them and from the shipment from Texas to other states for the purpose of filling orders sent from such states."<sup>117</sup>

The facts above given are stated in the opinion of the Chief Justice before the discussion of the constitutional question, but are not again mentioned. All questions of degree are explicitly dismissed from consideration. The *Baltic Case*<sup>118</sup> and others<sup>119</sup> relied on by the state are said to sustain in no way "the assumption

<sup>114</sup> Number 16, October Term, 1917; 38 Sup. Ct. Rep. 85 (1917). The decision was unanimous, but the fact that it was not reached without some difficulties may perhaps be inferred from the fact that the case was first argued on May 3, 1916, and restored to the docket for reargument May 2, 1917. It was reargued on November 6, 1917, and decided December 10, 1917.

<sup>115</sup> Note 43, *supra*.

<sup>116</sup> Note 83, *supra*.

<sup>117</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 86 (1917).

<sup>118</sup> Note 85, *supra*.

<sup>119</sup> Cases cited in notes 94, 97, and 108, *supra*.



that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution." <sup>120</sup> If the attorneys for the state made and relied on any such assumption, they were unwise. Of course, if a statute violates the Constitution, it violates it. The excuse that the violation is "such a little one" cannot be entertained. But there may well have been more merit in the claim on behalf of the state than the fashion in which it was dismissed would indicate. If the effect on interstate commerce of a state tax on the privilege of doing local business is but slight, this may well warrant a decision that the tax does not "regulate" interstate commerce, but merely "incidentally affects" it. This is a familiar distinction applied in passing judgment upon state exercises of the police power which bear in some measure on interstate commerce. As Mr. Justice Holmes said in dealing with a somewhat analogous problem involving a state tax measured by receipts:

"We are to look for a practical rather than a logical or philosophical distinction. . . . A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it may. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." <sup>121</sup>

The fact that Mr. Justice Holmes himself declined to adopt this kind of reasoning in the *Western Union Case* is occasion for surprise. The further fact that Chief Justice White, who did follow such lines of thought in the *Western Union Case*, now abandons them in *Looney v. Crane Co.*,<sup>122</sup> is also to be wondered at. The bridge which he built to escape from the force of earlier decisions seems to be wrecked after the crossing is safely made. Possibly this statement needs some qualification, for there is a reference in the opinion to "controlling decisions dealing with cases in substance

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<sup>120</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

<sup>121</sup> *Galveston, H. & S. A. R. Co. v. Texas*, note 41, *supra*, page 227.

<sup>122</sup> Note 114, *supra*.

identical in fact and principle with the case here presented."<sup>123</sup> By this the Chief Justice possibly means to imply that the difference between the business involved in the cases dealing with railroads, parlor-car companies, and telegraph companies, and that of the Crane Company in the principal case, is from a practical and economic standpoint immaterial. But the point is of enough importance to be more explicitly treated. If the Chief Justice intended to make it, he nevertheless used other language which, taken alone, would smother it.

In addition to the franchise tax imposed by Texas, there was involved in the Looney Case a "permit" tax, based on total capital stock exclusive of surplus and undivided profits. The permit tax in force in Texas prior to 1907 was also based on capital stock, but there was a provision that no more than \$200 should be charged for a ten-year permit, no matter how large the capital stock of the corporation seeking it. The Act of 1907 removed the limitation, so that the Crane Company would be compelled in 1915 to pay \$17,040 for the renewal of the ten-year permit, for which in 1905 it paid only \$200. Both the permit tax and the franchise tax were enjoined. They were resisted in reliance on the equal-protection clause, as well as on the due-process and commerce clauses, but the opinion of the court neglects the equal-protection clause, because it holds that both the commerce clause and the due-process clause render the complainant immune from the demands of the state. The central theme of the opinion is as follows:

"It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intra-state business of such corporation carried on as a result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted

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<sup>123</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).



a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established.”<sup>124</sup>

Needless to say, the proposition would not be so stated except by one who wished to demonstrate its want of foundation. It was not so stated by Mr. Justice Holmes in his dissent in the *Western Union and Pullman* cases. It was not so stated by Mr. Justice Day in *Kansas City, M. & B. R. Co. v. Stiles*,<sup>125</sup> which sustained a tax on a consolidation of domestic corporations engaged in local and interstate transportation, although the tax was measured by the total capital stock, with no provision for a maximum. Every word of Chief Justice White's opinion above quoted might be applied with equal logic to the taxes on domestic corporations, measured by total capital stock. Yet the Chief Justice agrees that such taxation is proper. If a different decision in the *Looney* Case would deny the existence of the federal system, so does the actual decision of the *Stiles* Case from which the Chief Justice does not dissent; for the tax in that case was “intrinsically and inherently” beyond the power of the state, if this means that, but for the fact that the subject taxed was a privilege granted by the state, the tax could not be imposed.

The issue in these cases is not to be solved by the logic of the Absolute. Mr. Justice Holmes tried it in his dissent in the *Western Union and Pullman* cases. Since the state may deny the privilege, he says, it may burden it as it pleases, even though it also burdens interstate commerce. And now the Chief Justice, in similar absolutistic vein, says that, if the tax is intrinsically on interstate commerce, it does not matter that it is also on something else

<sup>124</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

<sup>125</sup> Note 108, *supra*.

which is within the authority of the state. It looks like a dilemma, and it is, so far as any inexorable logic is concerned. The problem of a dilemma cannot be solved by competing asseveration. It is a question of more or less. We can find an illuminating guide to the way out of the difficulty, by appealing from Mr. Justice Holmes in the *Western Union Case* to Mr. Justice Holmes in *Hudson County Water Co. v. McCarter*.<sup>126</sup> In his opinion in that case he tells us:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others."<sup>127</sup>

It is a constitutional principle that a state may not impose taxes on interstate commerce. It is another constitutional principle that a state may impose taxes on the privilege granted to a foreign corporation to carry on local business within the state. The taxes involved in the *Western Union Case* and in the *Looney Case* were on such a privilege. They were also on interstate commerce. They come within both constitutional principles. One would declare them valid; the other, invalid. One or the other must yield, for the taxes cannot be both valid and invalid. With respect to such taxes on the privilege of being a domestic corporation, Chief Justice White agrees that the commerce clause must yield. With respect to similar taxes on foreign corporations, he insists that the commerce clause must prevail, or else "the limitations of the Constitution of the United States are not paramount." If either case stood alone, it would be simpler than when the two are found side by side, and both by a unanimous court.

The situation is one that cannot be solved by a formula, as Mr. Justice Holmes has told us. Nevertheless in his dissenting opinion in the *Western Union Case* he made use of a formula

<sup>126</sup> 209 U. S. 349, 28 Sup. Ct. Rep. 529 (1908).

<sup>127</sup> 209 U. S. 349, 355, 357, 28 Sup. Ct. Rep. 529 (1908).



which he seemed to regard as convincing. "It does not matter," he says, "if the sum [imposed by the State] is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."<sup>128</sup> Thus he implies that complete prohibition of local business is a whole, of which the imposition of heavy burdens for the privilege of conducting such local business is a part. But the relation of whole and parts exists only where we are dealing with units that are commensurable; and the power of imposing heavy burdens is not a part of the power of absolute exclusion, for the two are not commensurable. It might as well be urged that capital punishment is a whole, of which a day's torture is a part, and that, therefore, the government which might put a man to death for treason may impose torture instead. Less of life is taken by brief torture than by death. But the interests affected by torture are not identical with those affected by death. One conflicts with the constitutional prohibition against cruel and unusual punishments, and the other does not. So the interests affected by heavy burdens on corporations doing a combined local and interstate business are different from those affected by excluding the corporation from local business. A state legislature which forbade all foreign corporations to carry passengers on intra-state journeys within the state would soon learn that it had affected interests which had not been touched by measuring a tax on such corporations by their total capital stock. A state is not exercising its power of exclusion when it imposes an excise tax. If necessary, this can be established by a syllogism. And a syllogism would show that the power to exclude does not necessarily carry with it the power to impose heavy burdens,<sup>129</sup> any more than the power of an owner of property to forbid, or to permit, others to use it, carries with it the power to exact any and all conditions whatever of those admitted to its use.

Of course the policy which permits complete exclusion may well permit the exaction of heavy burdens on those admitted. But this is not necessarily true. The interests to be balanced are not the same in both exertions of state authority. And the decision with respect to each should be based on the pros and contras of

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<sup>128</sup> Quoted on page 585, *supra*.

<sup>129</sup> See 16 COL. L. REV. 99, 110-11.

the particular issue in dispute. The problem is a "practical," rather than a "logical or philosophical," one, if logic and philosophy involve the disregard of practical considerations. According to a modern, mundane school of philosophy, however, logic can stoop to the practical, and wade through a world of particulars making differentiations on the basis of results, rather than of superimposed categories. This school would doubtless rephrase the *dictum* of Mr. Justice Holmes and say that the problem is a "logical," rather than a "metaphysical," one.<sup>130</sup> But the difference would be merely one of nomenclature. Both would agree in general that burdens as the price of admission should be treated differently from exclusion, if the two had substantial differences of result. Mr. Justice Holmes, it is to be observed, implied in his dissent in the Western Union Case that the corporation would abandon its local business if such business did not yield the tax assessed thereon. If he was correct in this, the burden would be no greater than that ensuing from exclusion from such business. But the corporation might, on the other hand, continue the local business and recoup itself for the tax thereon by maintaining or increasing interstate rates, if the Interstate Commerce Commission would permit it. This might be more of a burden on interstate commerce than would follow from exclusion from connected intra-state commerce.

It seems likely, however, that heavy taxation on connected intra-state commerce is no more of a burden on interstate commerce than exclusion from the local business would be. Mr. Justice Holmes is probably correct in insisting that the two exercises of state power should be treated alike. The doctrine of the majority in the Western Union Case really shakes the foundation of the previously declared rule that the state has complete power to exclude from local business a foreign corporation seeking to do a combined local and interstate business. Mr. Justice Holmes seems aware of this when he says in his dissent in the Pullman Case, that

<sup>130</sup> Compare Mr. Justice Bradley, in *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336-37, 7 Sup. Ct. Rep. 1118 (1887): "If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not a mere form, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."



exclusion from local business is not a burden on interstate business, but only the denial of a collateral benefit.<sup>131</sup> He, it would seem, regards local and interstate transportation, not as joint products, but each as a by-product of the other. The contrary view seems in better accord with business sense. It is now established that intra-state rates must fit into the system of interstate rates,<sup>132</sup> because interstate commerce is affected by relatively low intra-state rates. And in *West v. Kansas Natural Gas Co.*,<sup>133</sup> Mr. Justice McKenna quoted with approval a statement that "no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate interstate commerce or the right to carry it on."<sup>134</sup> From such a statement it would follow that a state could not refuse to let a corporation carry on intra-state commerce in connection with its interstate commerce, if such refusal unreasonably burdened the interstate commerce. It is to be anticipated that a state, if it actually forbade unconditionally any intra-state commerce which was intimately connected with interstate commerce, would find its power circumscribed as is its power over intra-state rates which affect interstate commerce. Exclusion from local business and burdensome taxation on that business are probably so similar in their effect on economically related interstate commerce that they should be treated alike in deciding whether in substance they constitute "regulations" of interstate commerce. Grant Mr. Justice Holmes' hypothesis, and his conclusion is sensible. But his hypothesis is one that the modern development and integration of certain kinds of commerce require us to scrutinize and probably to abandon.

But this scrutiny should keep close to the turf of fact. It should not be as doctrinaire as the assertion that a tax, if levied on local business, cannot be a regulation of interstate commerce, or the contrary assertion that a tax, if measured by elements of interstate commerce, must necessarily be a regulation of that commerce, even though the subject taxed is local commerce. In form all the state taxes which we have been considering are regulations

<sup>131</sup> See passage quoted on page 585, *supra*.

<sup>132</sup> *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. Rep. 833 (1914); *American Express Co. v. South Dakota*, 244 U. S. 617, 37 Sup. Ct. Rep. 656 (1917).

<sup>133</sup> 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

<sup>134</sup> 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

of something else than interstate commerce. In substance they have all had some effect on interstate commerce. At the beginning the form was regarded as controlling. The reason given for refusing to consider the substance was that the privilege taxed by the state might be surrendered, and the imposition thereby avoided. Later a majority of the court became convinced that in certain kinds of business the abandonment of local business would itself be so substantial a burden on the interstate business as to amount to a "regulation" thereof. Such an abandonment might in a very real sense be a "regulation" of interstate commerce, even though it were to be regarded as the denial of a collateral benefit rather than the imposition of a burden. For in common sense the effective and economical conduct of interstate transportation requires the collateral benefit of uniting local transportation with that between the states. So also local transportation requires the collateral benefit of interstate transportation. The same roadbed and the same facilities and men are used for both. The physical separation of the two would be an act of folly. To allow a state to require a corporation to choose between such separation and excessive burdens on the local business is to allow it to interfere seriously with the only reasonable method of conducting the interstate business.

It by no means follows, however, that what is true of the transportation business is true of all other businesses. And if the transition which the court made in the *Western Union Case* was one from form to substance, substance rather than form should be regarded in applying the new doctrine to other businesses than those which inevitably use the same facilities in both local and interstate commerce. But the reasoning of Chief Justice White in the *Looney Case* is formal rather than substantial. On the one hand, it is conceded that the state is exercising "an intrinsically local power." This is because the subject on which the tax is levied is within the taxing jurisdiction of the state. On the other hand, the tax so levied, "intrinsically and inherently considered," is a direct burden on interstate commerce. This is because it is measured by total capital stock, and therefore depends for its amount on the entire assets and business of the corporation, and not merely on those local to the state. The Chief Justice concludes that it inexorably follows that a tax so measured is an invalid regulation of interstate commerce. All his colleagues concur in



the result and none expresses dissent from the reasoning. Yet the Chief Justice and the same colleagues all agree that a tax on a domestic corporation similarly measured is not a regulation of interstate commerce.<sup>135</sup> On any basis of purely formal reasoning, the two decisions are irreconcilably opposed.<sup>136</sup>

<sup>135</sup> *Kansas City, M. & B. R. Co. v. Stiles*, note 108, *supra*.

<sup>136</sup> There may be a practical reason why it is not necessary to circumscribe the power of a state in its taxation of the franchises of domestic corporations engaged in interstate commerce. If the tax becomes unduly burdensome, the corporation may surrender its state charter and obtain a federal charter. Congress, under the power to establish post offices and post roads, and the further power to make all necessary and proper laws for carrying into effect the postal power, may charter a corporation to engage in intra-state, as well as in interstate, transportation. Such a franchise would be immune from state taxation. *California v. Central Pacific Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888). See note 171, page 371, *supra*. See also LINDSAY ROGERS, *THE POSTAL POWER OF CONGRESS* (Baltimore, 10, 91-96, 150-57).

Now that the federal government has taken over the control and management of the railroads under the war power, and under the terms proposed at this writing (January 7, 1918), will pay to the roads guaranteed dividends on the stock, and will therefore be affected financially by all state taxes on the property and franchises and intra-state business of the roads, interesting and important questions are raised with respect to the power of the states to impose without the consent of Congress any taxes which affect the net income from operation and management. From an economic standpoint the fact that the roads are still privately owned is unimportant, if the government is to pay what amounts to a rental determined by dividends in past years. A state tax on intra-state receipts will come out of the United States government. Could such a tax be imposed without the consent of Congress? It is clear that no state could tax receipts derived from business for the government. *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1881). But does this rule now apply to all the business done? *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. Rep. 110 (1905), establishes that the federal government may tax business of a private nature conducted by a state. It does not follow, however, that a similar doctrine will be applied to state taxation of private business conducted by the United States government; for, though the state cannot tax franchises granted by the United States, *California v. Central Pacific Railroad Co.*, *supra*, the United States can tax franchises granted by the state, or, what is the same in effect, the doing of business by virtue of such franchises. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. Rep. 342 (1911). Furthermore, in *Van Brocklin v. Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670 (1886), it was declared by Mr. Justice Gray that "The United States does not and cannot hold property, as a monarch may, for private or personal purposes." But this was nearly twenty years before the *South Carolina Case*, and things have moved since then. One who was not timid about making prophecies might feel fairly safe in venturing to predict that the Supreme Court would not withdraw from the taxing powers of the states, the local and private business done by the railroads under government operation, unless Congress should expressly prescribe otherwise.

Since it is held that a state tax on property may be measured by receipts from interstate commerce, *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup.

This return to scholasticism after the realistic attitude adopted in the Western Union Case is disappointing, especially to one who had previously completed for incorporation in this article a discussion of state decisions subsequent to the Western Union Case, which discussion had as its keynote the statement that "the Supreme Court has abandoned the test of artificial legal distinctions for the test of practical results," and the further statement that "whether any tax on domestic business burdens interstate commerce depends of course on the effect on interstate commerce of abandoning the local business." In this unpublished discussion the opinion was ventured that the Supreme Court might, in dealing with taxes on corporations not engaged in transportation, "regard the actual burden imposed by any tax on interstate commerce," and therefore "take account of the rate of levy as well

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Ct. Rep. 211 (1912), and that property privately owned, but employed in work for the federal government, is not exempt from state taxation, *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904), and *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. Rep. 499 (1912), it seems likely that the existing state taxes on the property of the railroads would not be affected by their transition to governmental control. If a state tax on property may be measured by receipts from interstate commerce, it would seem that it might also be measured by receipts from the federal government, under the doctrine of *Home Insurance Co. v. New York*, note 31, *supra*. See 31 HARV. L. REV. 321, 334-35. Of course the theory of the opinion in *Looney v. Crane Co.*, note 114, *supra*, would require the overruling of the *Home Insurance Case*, since the most recent pronouncement of the Supreme Court takes the position that the states cannot use their lawful powers in ways that resemble too closely the use of unlawful powers, and that, therefore, they cannot measure taxes on proper subjects by elements that cannot be taxed directly. But no case has as yet applied this doctrine to state taxes which are indirect encroachments on federal instrumentalities.

The *Home Insurance Case* would by inference authorize the states to measure taxes on corporate franchises by receipts from the United States government. But later cases under the commerce clause forbid measuring state taxes on privileges of foreign corporations by total capital stock, though taxes on domestic franchises may be so measured. From these decisions, except for the doubts engendered by the opinion in the *Looney Case*, we might assume that state taxes on the franchises of domestic corporations operating railroads will not be affected by the federal control of the roads. As to state taxes on privileges of foreign corporations engaged in transportation, and now managed by the federal government, the answer to the question, whether they can be measured by receipts from the United States, would depend upon whether the court will regard the measure of receipts as vicious as the measure of total capital stock, and of course upon the general question whether, since the new enterprise of the national government is essentially private and pecuniary as distinguished from governmental, the doctrine of the *South Carolina Case* will apply. At any rate, Congress should by specific legislation prevent all these troublesome questions from arising.



as the measure to which that rate is applied." But the opinion of the Chief Justice in *Looney v. Crane Co.*<sup>137</sup> seems to give a death blow to those prophecies. It indicates that no longer does each case depend upon its own circumstances, as previous decisions of the court had declared.<sup>138</sup>

There is of course a distinct advantage in declaring that the measure of total capital stock, with no provision for a maximum, cannot be applied to an excise on a foreign corporation engaged in any kind of interstate commerce in connection with its local business. Such a measure has vicious potentialities, and it may be well to outlaw it, even when it is kept in leash by an infinitesimal rate of levy. Such outlawry will relieve the court from considering in each case the ratio between the local business and the total business of the corporation, and from determining whether the sum exacted by the application of the measure is out of proportion to the value of the privilege of conducting local business. The court will still have to consider such questions in determining whether the maximum provision in such statutes as that applied in the Baltic Case is sufficiently low. Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them. The Supreme Court may be pardoned for a desire to get back to some broad general rules, after the confusion engendered by its distinction between the Western Union Case and the Baltic Case. Yet the references to the business of the complainants in the Baltic Case, and to the excess of their actual assets over their authorized capital, warrant the belief that the court in that case did not mean to declare that a \$2,000 maximum rendered completely innocuous the measure of total capital stock, so that the Massachusetts statute was necessarily applicable to every foreign corporation. If Massachusetts should increase its rate of levy, the provision that the tax should not exceed \$2,000 might not be sufficient to save it from burdening the interstate commerce carried on by corporations with a small capital stock. So that even after the Looney Case, it may be impossible for the court to avoid the consideration of the details and size of the business of a foreign cor-

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<sup>137</sup> Note 114, *supra*.

<sup>138</sup> See quotations to this effect, on pages 595, 598, 600, *supra*.

poration subjected to an excise tax, measured by total capital stock, but limited in amount. So long as the court gives weight to such considerations, it may apply the statute to some corporations and decline to apply it to others. It is by no means certain that such formal reasoning as was applied in the Looney Case will be applied to future cases on the subject under consideration. The reasoning in a judicial opinion reflects primarily the attitude of the particular judge who writes it. So long as his colleagues are satisfied with the disposition of the case, they may be disinclined to express disagreement with the opinion, merely because it may strike some contributor to a legal periodical as tending to formalism, where formalism is thought undesirable.

It cannot be gainsaid that there is wholesome sense in forbidding a state to measure any excise tax by property or business without the state. The opinion in the Looney Case, by invoking the due-process clause as well as the commerce clause, indicates that a tax on foreign corporations engaged solely in domestic business cannot be measured by total capital stock. This doctrine would overrule *Horn Silver Mining Co. v. New York*.<sup>139</sup> Such an intention on the part of the Supreme Court is, however, not to be safely inferred, since the due-process clause may be used in the Looney Case merely as a flying buttress to support the wall erected on the foundations of the commerce clause. But the law on the taxation of foreign corporations has shown itself to be far from rigid since 1910, and prophecies are dangerous, as the plight of one who wrote before the Looney Case demonstrates.

A consideration of Chief Justice White's discussion of earlier cases may lead to the conclusion that he does not abandon practical considerations so completely as some of his language in the Looney Case suggests. But his use of the practical is for the purpose of differentiating the cases adduced on behalf of the state. Of the Western Union Case and those following it which sustained objections of the taxpayers,<sup>140</sup> he says that they

<sup>139</sup> 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See also *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, 7 Sup. Ct. Rep. 108 (1886).

<sup>140</sup> These are the cases cited in notes 43, 44, 81, and 83, *supra*, and *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. Rep. 481 (1910). The Pigg Case involved a statute requiring all foreign corporations, as a prerequisite to bringing suit in the courts of the state, to file with the secretary of state a statement of their financial condition, etc. The case held that the statute could not be applied to



"were concerned in various forms with the identical questions here involved and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state in violation of the Constitution, or because of the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment."<sup>141</sup>

This is true, in so far as the general principle is concerned. But the cases involved, not only the general principle, but the application of it to the facts of each case. Those facts included the character of the complainant's business<sup>142</sup> as well as the measure of the tax. The questions involved in the earlier cases are not identical with those involved in the Looney Case, unless the businesses in all the cases are identical. This point the Chief Justice overlooks. This is apparent from the following quotation from his opinion:

"The dominancy of these adjudications is plainly shown by the fact that as a result of the decision in the leading case (*Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355) the Supreme Court of the state of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (*Western Union Telegraph Co. v. State*, 103 Tex. 306, 126 S. W. 1197), . . ."<sup>143</sup>

But that Texas decision involved the same corporation which succeeded in escaping from the Kansas statute in the Western Union Case. The Texas decision was rendered less than three months after that of the Supreme Court,<sup>144</sup> and three years before the

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foreign corporations engaged in interstate commerce, and that the correspondence school whose rights were in issue was engaged in such commerce.

<sup>141</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

<sup>142</sup> Note the emphasis on this point by Mr. Justice White in the passage quoted on page 587, *supra*, and by Mr. Justice Harlan in the passage quoted on pages 590-91, *supra*.

<sup>143</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

<sup>144</sup> The full opinion of the Texas supreme court, by Mr. Chief Justice Gaines, was as follows:

"Since this suit was brought to this court, the Supreme Court of the United States in the case of *Western Union Telegraph Co. v. The State of Kansas*, has ruled that a similar law of Kansas was unconstitutional. This renders unnecessary any dis-

decision in the Baltic Case,<sup>145</sup> which involved a business like that of the complainant in the Looney Case, and not like that of the Western Union Telegraph Company.

In the Looney Case, the state naturally sought to sustain the tax on the authority of the Baltic Case and those following it, in which the complaining taxpayer was denied relief.<sup>146</sup> But the Chief Justice answers:

"The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases. . . .<sup>147</sup> These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. . . .<sup>148</sup>

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles propounded in the previous cases upon which we have rested our conclusion since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable."<sup>149</sup>

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cussion of the question involved in this suit. Upon the authority of the case cited, the judgments of the District Court and of the Court of Civil Appeals are reversed and judgment here rendered for the Western Union Telegraph Company."

<sup>145</sup> Note 85, *supra*.

<sup>146</sup> These are the cases cited in notes 85, 94, 97, and 108, *supra*.

<sup>147</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

<sup>148</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

<sup>149</sup> 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917). In the same paragraph, the Chief Justice also says of the Baltic Case and those following it in which taxes were sustained:

"In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clauses of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 698, 15 Sup. Ct. Rep. 268, 270 that 'the substance, and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such results."

From the application of the foregoing language to the Stiles Case, note 108, *supra*,



The general and recognized rule adverted to may be phrased as the rule that the power of the state to tax intra-state commerce, or some privilege granted by the state, does not involve the power to destroy intra-state commerce, if such destruction would substantially burden interstate commerce. But the application of this general rule to any particular case necessitates the inquiry whether the abandonment of intra-state commerce in order to escape the tax, would in fact substantially burden interstate commerce. Previous to the Looney Case, at any rate, there was no *general* rule that a state tax on a proper subject could not be measured by elements which could not be subjected to direct taxation. If there was any *general* rule, it was to the contrary effect.<sup>150</sup> The only recognized exception to this previous general rule was, that a tax on the privilege of a foreign transportation corporation to carry on domestic commerce could not be measured by total capital stock with no maximum limitation. In the Looney Case, a similar exception is established in favor of foreign corporations making both local sales within the state, and also interstate sales within and without the state. But the exceptions now seem to constitute a new "general and recognized rule." Yet to this new rule there are exceptions in favor of excises on domestic corporations, even if engaged in interstate transportation, and in favor of foreign corporations engaged in local sales, if a reasonable limit is set to the annual imposition.

The opinion in the Looney Case is to be criticized for its failure

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a tax on a domestic corporation engaged in interstate as well as intra-state transportation, measured by total capital stock with no maximum limitation, is not on its face inherently repugnant to the Constitution. From its application to the Baltic Case, note 85, *supra*, a tax on a foreign corporation, measured by total capital stock with a maximum limitation of \$2,000, is not inherently repugnant to the Constitution, even as applied to corporations engaged in interstate as well as intra-state sales. But the Texas statute under review, by selecting the total capital stock as a measure of a tax on the franchise of a foreign corporation whose business is substantially like that of the S. S. White Dental Company involved in the Baltic Case, makes the tax one which "intrinsically and inherently considered" is a direct burden on interstate commerce, and the exercise of "a power which could not be called into play consistently with the Constitution. . . ."

<sup>150</sup> For recognitions of this rule in opinions of the Supreme Court subsequent to the Western Union Case, see the quotations from the opinion in the Baltic Case on page 596, *supra*, from the opinion in the Stiles Case on page 599, *supra*, and from the opinion in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 165, 166, 31 Sup. Ct. Rep. 342 (1911), in note 42 on pages 333-34, *supra*.

to tell us why foreign corporations engaged in the business of making local and interstate sales within the state are excepted from the former general rule, and included in the new general rule, when domestic corporations conducting a combined local and interstate transportation business are not. None of the reasoning in the opinion accounts for this difference of treatment. It would have been well, too, to have pointed out explicitly that the provision for a maximum in the Massachusetts statute applied in the Baltic Case was essential to the decision of that case, and that the fact that the corporations there involved were not engaged in transportation was not alone sufficient to justify measuring an excise on their local business by their total capital stock. For the Massachusetts supreme court assumed the contrary<sup>151</sup> three months before the United States Supreme Court decided the Looney Case. By reverting to "general and recognized rules" the Supreme Court is unnecessarily confusing the state courts, particularly when the Supreme Court recognizes that there are exceptions to these "general" rules, and fails to state specifically why the case at bar does not come within such exceptions.

Though the opinion in the Looney Case is less illuminating than might be desired, the decision establishes that the measure of total capital stock, with no provision for a maximum, is inherently and incurably vicious, when applied to an excise on a foreign corporation manufacturing goods in other states, and making domestic and interstate sales within the state. The reasoning of the opinion would, taken by itself, lead one to infer that the doctrine of the case would apply also to a foreign corporation engaged in local manufacturing and making local and interstate sales within the state.<sup>152</sup> It would lead one to infer that the doctrine would apply to an excise on foreign corporations, measured by any receipts which included receipts from interstate commerce.<sup>153</sup> But the reasoning would lead also to the inference that the doctrine would apply to a domestic corporation and to a tax on the property of a foreign corporation, measured by receipts which include receipts from interstate commerce. We know, however, that the doctrine

<sup>151</sup> *International Paper Co. v. Commonwealth (Mass.)*, 117 N. E. 246 (September 13, 1917).

<sup>152</sup> The contrary was held in *International Paper Co. v. Commonwealth*, note 151, *supra*, and *Atlas Powder Co. v. Goodloe*, 131 Tenn. 490, 175 S. W. 547 (1915).

<sup>153</sup> The contrary was held in *Baldwin Tool Works v. Blue*, 240 Fed. 202 (1916).



does not apply to such cases.<sup>154</sup> Therefore we cannot rely for our exposition of the law on the general statements made in the Looney opinion. We must still seek the law in the concrete decisions, and not in the general statements. Of course in this respect the decisions and opinions under review are not peculiar. The vital principle of the law is to be found not in abstract doctrine, but in specific and detailed adjustments of concrete situations.

*(To be continued.)*

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<sup>154</sup> *Kansas City, F. S. & B. R. Co. v. Stiles*, note 108, *supra*; *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).

## RECOVERY UNDER WORKMEN'S COMPENSATION ACTS FOR INJURY ABROAD

WORKMEN'S compensation acts have for the most part been held to permit recovery for injuries or death suffered abroad; these holdings are consistent with the nature of the rights and duties created by the acts. An employee, acting under a contract of hire made in a state where there is a workmen's compensation act, goes into another state or country and is there injured or killed under circumstances which, apart from the jurisdictional question, entitle him or his dependents to compensation under the act of the state where the contract was made. The jurisdiction where he is killed or injured may also have a compensation act. May there be recovery of compensation, and if so, by the law of which jurisdiction? The rapidly growing number of decisions under the compensation acts of over thirty American states and of other jurisdictions of Anglo-American law show that this question is no mere academic puzzle.

In general our law is territorial and not personal.<sup>1</sup> This does not mean that rights and duties can be enforced only in the territory of the jurisdiction which created them; it does mean that such law does not ordinarily purport to create rights and impose duties by reason of acts, to which legal consequences may be annexed, occurring beyond the geographical confines of its territory.

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<sup>1</sup> *Whitford v. Panama R. Co.*, 23 N. Y. 465, 471 (1861): "*Prima facie* all laws are coextensive, and only coextensive with the political jurisdiction of the law-making power." *Davis v. N. Y. & N. E. R. Co.*, 143 Mass. 301, 303, 9 N. E. 815 (1887): "It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action." *Howarth v. Lombard*, 175 Mass. 570, 572, 56 N. E. 888 (1900): "The fundamental question is whether there is a substantive right originating in one state and a corresponding liability which follows the person against whom it is sought to be enforced in another state. Such a right, arising under the common law, is enforceable everywhere. Such a right arising under a local statute will be enforced *ex comitate* in another state, unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him." *Mulhall v. Fallon*, 176 Mass. 266, 268, 57 N. E. 386 (1900): "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State."



From this arises the presumption that, in the absence of clear indications to the contrary, a statute has no extraterritorial effect.<sup>2</sup>

### A. THE OPTIONAL STATUTES

Optional statutes, by far the most common in this country, rest upon the actual or implied expression of consent thereto of employer or employee or both. Some of these acts provide that the employer shall pay compensation under stated conditions of employment where one or both parties give affirmative notice of their election to come under the act.<sup>3</sup> The majority provide that the obligation to pay compensation under the stated conditions shall exist unless the parties file written notice of their election not to operate under the act. In either case there are certain penalties imposed for electing to remain under the common-law system. The distinction between the two types is immaterial, as each depends in the last analysis upon the consent of the parties, and each may therefore be termed optional.

In the absence of a compensation act in the state of the injury, may there be a recovery of compensation under the act of the home state? If the statute be construed not to provide compensation for injuries, etc., abroad, there can then clearly be no recovery.<sup>4</sup>

Before the question under an act of opposite intent and construction can be answered, one must inquire somewhat into the nature of the basis of workmen's compensation. Text-writers and courts have demonstrated that the right to claim and the duty to pay compensation do not arise out of tort.<sup>5</sup> It is sufficient to

<sup>2</sup> Gould's Case, 215 Mass. 480, 484, 102 N. E. 693 (1913): "In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter [workmen's compensation] are designed to control conduct or fix the rights of parties beyond the territorial limits of the state." MAXWELL, *INTERPRETATION OF STATUTES*, 4 ed., 212.

<sup>3</sup> MICH., ACTS 1912, ch. 63, Pt. I, § 6; MASS., ACTS 1911, ch. 751, Pt. IV, § 20, 21; CAL., STATUTES 1913, ch. 320, § 87 (b) (elective portion).

<sup>4</sup> Gould's Case, 215 Mass. 480, 484, 102 N. E. 693 (1913); Keyes-Davis Co. v. Alderdyce, Detroit Legal News, May 3, 1913, 3 N. C. C. A. 639 n. (1913); Croad v. Paraffine Paint Co., 1 Cal. Ind. Acc. Comm. Dec., 2 (1914) 10. Cf. limitation by express language in the act to injuries, etc., occurring within the state: NEV., LAWS 1911, ch. 183, § 3; WASH., LAWS 1911, ch. 74, § 3; WIS., LAWS 1911, ch. 50, § 1; PA., P. L., 1915, 758, § 30.

<sup>5</sup> Ives v. S. Buffalo Ry. Co., 201 N. Y. 271, 285, 94 N. E. 431 (1910); Smith, "Se-

point out that liability in tort for personal injury depends in the main upon the element of negligence or wilful fault attributable in law to the defendant.<sup>6</sup> On the other hand, compensation rights and duties are based solely on the fact of injury or death suffered under the stated conditions of the employment; these are wholly divorced from the element of negligence or wilful fault on the part of the employer.

Some have professed to regard compensation as a form of taxation.<sup>7</sup> But in the great majority of jurisdictions the general taxing machinery of the state is not called into use, no general fund for the purpose is collected, and the payment of compensation is a private matter between employer and employee subject in greater or less degree to the approval of a state commission. Even if it be regarded as taxation, this ignores the purpose and method. In both of these fundamental respects workmen's compensation is a kind of insurance, and it is most frequently regarded as such, optional or compulsory according to the statute.<sup>8</sup>

The enforcement of rights under an ordinary private contract of insurance against accidental injury or death is not limited, in the absence of special provisions, to injury or death occurring in the jurisdiction wherein the contract was made.<sup>9</sup> The obligation to fulfil the principal terms of a unilateral contract such as insurance arises in the first instance from the terms of the contract itself; the agreement of the parties becomes by force of the controlling law a binding obligation. The question is not that of a

quel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344; N. Alaska Salmon Co. v. Pillsbury, 162 Pac. 94 (Cal.) (1916).

<sup>6</sup> Cf. Smith, "Tort and Absolute Liability — Suggested Changes in Classification," 30 HARV. L. REV. 241, 319.

<sup>7</sup> Cunningham v. N. W. Improvement Co., 44 Mont. 180, 119 Pac. 554 (1911); BOYD, WORKMEN'S COMPENSATION, §§ 67, 70, 83, 87, 88, 91. Cf. Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209 (1911); *In re Farrell*, 211 Fed. 212 (1914); Mountain Timber Co. v. State of Washington, 243 U. S. 219 (1917).

<sup>8</sup> Ross v. Ericksen Constr. Co., 89 Wash. 634, 155 Pac. 153 (1916); Perlsburg v. Muller, 35 N. J. L. J. 202 (1912); 1 BRADBURY, WORKMEN'S COMPENSATION, 1 ed., 47, 48; SALMOND, TORTS, 2 ed., 101; POLLOCK, TORTS, 9 ed., 109.

<sup>9</sup> In Millard v. Brayton, 177 Mass. 533, 59 N. E. 436 (1901), a contract of insurance was made in Massachusetts and contemplated payment of premiums and principal sum in New York. It was held that the rights of the parties were to be governed by the law of Massachusetts. *Accord*: Equitable Life Assur. Soc. v. Clements, 140 U. S. 226 (1891); N. Y. Life Insur. Co. v. Cravens, 178 U. S. 389 (1900); 1 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 559.



breach of contract, but rather the creation of the primary obligation contemplated by a unilateral contract.

There are three theories prevalent regarding the law which controls contracts in general. One is that the rights of the parties depend on the law of the place where the contract was made.<sup>10</sup> Another theory is that these rights depend on the law which the parties to the contract choose to have govern, which is generally assumed to be the *lex loci contractus*.<sup>11</sup> The third is that the law of the place of the performance of the contract governs.<sup>12</sup> No one of these rules can be said to have the overwhelming weight of authority. The one first mentioned seems the most satisfactory, as more nearly conforming to the territorial character of our law. It is based upon the sound proposition that the law of the place where the parties enter into the agreement shall be held determinative of the rights of the parties. The intention of the parties is rarely, if ever, manifest, and this throws the door open to presumptions which have no foundation in fact. Insurance contracts seem more generally to have been interpreted by the courts under the first of these theories. The compensation decisions follow this rule.

The law applicable to the ordinary insurance contract should be held equally applicable to the special form of insurance found in the compensation acts. The act has been elected by the real choice of the parties, and it may truly be said to have become an implied but real term of the contract of hire. Compensation then becomes due upon the occurrence of injury or death wherever it happens. This conclusion is reached by the overwhelming majority of the decisions.

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<sup>10</sup> *Carnegie v. Morrison*, 2 Metc. (Mass.) 381, 400 (1841): "So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract, operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendants' agent, and making it a contract binding on them."

<sup>11</sup> *In re Missouri S. S. Co.*, 42 Ch. Div. 321 (1889); *Liverpool & G. W. S. Co. v. Phenix Insur. Co.*, 129 U. S. 397 (1889); *Hicks v. Maxton*, 1 B. W. C. C. 150 (1907). This theory probably prevails in England and in the United States Supreme Court, although this tribunal has given expression to all three theories. *Mayer v. Roche*, 77 N. J. L. 681, 75 Atl. 235 (1909).

<sup>12</sup> *Brown v. C. & A. R. Co.*, 83 Pa. 316 (1877); *Pritchard v. Norton*, 106 U. S. 124 (1882); *Burnett v. Pa. R. Co.*, 176 Pa. 45, 34 Atl. 972 (1896).

In *Rounsaville v. Central R. Co.*<sup>13</sup> the contract of hire was made in New Jersey and the employee was injured in Pennsylvania. He brought an action in New Jersey under the optional act of that state and a recovery was allowed, the court saying: "The place where the accident occurs is of no more relevance than is the place of the accident to the assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action of life insurance."

In *Grinnell v. Wilkinson*<sup>14</sup> the contract was made in Rhode Island and the plaintiff was injured in Connecticut; a recovery under the optional act of the former state was sustained, on the ground of the contractual relation of the parties. The court disagreed with the construction of similar language in the *Gould Case*.<sup>15</sup>

In *Kennerson v. Thames Towboat Co.*,<sup>16</sup> the deceased employee, a resident of Connecticut, was hired in that state by the defendant, a Connecticut corporation, and was drowned in the navigable waters of New Jersey. Recovery of compensation under the optional act of Connecticut was sustained. Apart from considerations of possible conflict with the federal admiralty jurisdiction, the recovery was based on the theory that the act became a part of the contract of hire and that the recovery sought was contractual rather than tort.

The doctrine that compensation may be recovered under the act of the state of injury, though the common law is still in force in the state of the contract, may seem to conflict with the theory that the *lex loci contractus* governs the contract. It may be difficult, perhaps impossible, to draw a fixed line between situations where the law of the place of contracting may be declared to control notwithstanding differences in contractual incidents found in the law of the place of the performance and situations where such differences are so strongly marked as to render that rule quite contrary to reason and good sense. Where the legislature has seen fit to abolish the type of legal remedies formerly prevailing there, and still prevailing in the state of the making of the contract, the

<sup>13</sup> 87 N. J. L. 371, 94 Atl. 392 (1915).

<sup>14</sup> 98 Atl. 103 (R. I.) (1916).

<sup>15</sup> 215 Mass. 480, 102 N. E. 693 (1913).

<sup>16</sup> 89 Conn. 367, 94 Atl. 372 (1915). *Accord*: *Deeny v. Wright Co.*, 36 N. J. L. J. 121 (1913); *Vincent v. Grand Trunk R. Co.*, 45 Que. Super. 353.



difference has surely become so startling as no longer to countenance the applicability of the general rule. It is always competent for the sovereign to prescribe the incidents of a contract to be performed within its territory; specific provisions should, therefore, govern. It follows that whether the statute is optional or compulsory is quite immaterial. Under the optional type of case the result is that a new contract is created when one or both of the parties cross the state line and thus subject themselves to the act. This is no more offensive to sound reasoning, it deals no more in vacant fiction than the notion of a statute becoming an implied but real term of a contract of hire originally made within that jurisdiction. The whole doctrine is somewhat novel, but only because the optional statute is itself a novelty or at least a rarity. It will be seen that a different conception must be invoked, though the ultimate result be the same, in considering the compulsory type of statute.

It may be objected that the public policy of the state where the injury or death is suffered is opposed to the principle of workmen's compensation, in the absence of such an enactment. All reported holdings are to the contrary.<sup>17</sup> It has also been suggested that the compensation act of the state of employment cannot confer a remedy for injury received in another jurisdiction because compensation is in the nature of a penalty.<sup>18</sup> This is clearly a misconception of the nature of the right, at least under the optional acts, since it is not created irrespective of consent or for failure to fulfil any legal duty. It is clear, however, that a penalty, as distinguished from compensation benefits, imposed by the home state for failure to pay such benefits cannot be enforced abroad.<sup>19</sup>

The question of the enforcement of the primary right, once the conditions precedent to its creation are claimed to have been ful-

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<sup>17</sup> *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. S. 942 (1912); *Pensabene v. Auditore Co.*, 78 Misc. 538, 138 N. Y. S. 947 (1912); *Wasilewski v. Warner Sugar Refin. Co.*, 87 Misc. 156, 149 N. Y. S. 1035 (1914). In *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681 (1914), an action for personal injuries received in another state where the common law still prevailed was brought in Washington, where there was a compensation act in force; the policy of Washington was declared not to be opposed to the bringing of such common-law action.

<sup>18</sup> 83 CENT. L. J., 127-128 (1916).

<sup>19</sup> *Huntington v. Attrill*, 146 U. S. 657 (1892); *Taylor v. Western U. Tel. Co.*, 95 Ia. 740, 64 N. W. 660 (1895); *Cody v. Packet Co.*, 15 Ohio N. P. N. S. 529 (1914), an action under the optional compensation act of Ohio of 1911.

filled, raises serious difficulties. The great majority of the acts provide special machinery of administration, such as boards of arbitration, supervision or control by state commissions, the abolition of jury trial if the matter does go to court, limitations on the right of appeal, etc. In the event of the inability of the employer and employee to agree on the compensation payable, they must make use of this special machinery; and that can in the main be done only in the home state.<sup>20</sup>

The converse situation is presented when the contract is made in a state where the common-law system still prevails and the loss is suffered in a state where there is an optional act in force. Here too there may be a recovery of compensation, for the contract exists as well in the state of injury as in that where it was made, and becomes equally subject to the act. If affirmative notice is required, it would first have to be given to bring the parties under the act. The leading case on this aspect of the question is *American Radiator Co. v. Rogge*,<sup>21</sup> where it appears that the contract was made in New York, at a time when there was no compensation in effect there, and the injury was received in New Jersey. A recovery under the act of New Jersey was sustained. The court said:

"The act makes no distinction between cases where that relationship (employer and employee) is created by a contract made in New Jersey and a contract made in another state. . . . We find no evidence in this case of any term in the New York contract that prohibits the applicability of the New Jersey statute. . . . It is open to the employer under the New York contract to prevent the operation of Section 2, if he wishes, by notice; if he fails to give that notice, and undertakes to perform the contract in New Jersey, he voluntarily subjects himself to our law and is governed by it."

<sup>20</sup> *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U. S. 481, 490 (1912): "Where the statute creating the rights provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." In *Lehmann v. Ramo Films, Inc.*, 92 Misc. 418, 155 N. Y. S. 1032 (1915), action was brought in New York under the New Jersey compensation act; it was held that this action could not be brought in New York, as the New Jersey act provides that the action shall be brought in the New Jersey courts. *Accord*: *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120 (1904); *Erickson v. Nesmith*, 4 Allen (Mass.) 233 (1862); *Lowry v. Inman*, 46 N. Y. 119 (1871); *Russell v. Pac. Ry.*, 113 Cal. 258, 45 Pac. 323 (1896); *Young v. Farwell*, 139 Ill. 326, 28 N. E. 845 (1891); *Finney v. Guy*, 111 Wis. 296, 87 N. W. 255 (1901). Cf. WORKMEN'S COMP. ACT OF VERMONT, ACTS 1915, ch. 164, § 42.

<sup>21</sup> 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85 (1914).



A dissenting opinion held that the law which controls a contract is the law which the parties intended or may be presumed to have intended, and that there was no finding by the trial court that the parties intended the New Jersey act to apply. This would not seem sound in view of the fact that that act expressly establishes a rule of presumption of the intention of the parties to contracts under regulation of that act.

In *Johnson v. Nelson*<sup>22</sup> the plaintiff had been engaged by the defendant in Minnesota and had been injured in Wisconsin, the compensation act of which state the defendant had accepted. The action before the court was one at common law for a tort. Judgment was rendered for the defendant on a motion on the ground that the remedy provided by the compensation act of Wisconsin excluded the right to bring a common-law action for tort and that the law of Wisconsin controlled the rights of the parties.

If the employee seeks recovery under the common law of the state of injury in the absence of any act there rather than under the compensation act of the state of contract, this statute cannot be interposed as a bar. To permit this would conflict with the established rule that in matters of tort the *lex loci delicti* governs. If after recovery of such common-law damages, he then also sought compensation under the act of the home state, he would be precluded by the universal provisions of the compensation acts which make the right to compensation and to damages alternative and reciprocally exclusive. So long as the right to compensation be assumed to have been created for an injury received abroad, it seems difficult to believe that such provisions would be held applicable only to common-law actions prosecuted or recovery obtained at home. If he first sought and obtained compensation under the act of the state of the contract, and then sued for damages under the common-law of the state of the injury, a situation would arise in which there would be no statutory declaration against a double recovery. The remedy which the employee would then be seeking could not be affected by the statute law of another state, where the contract happened to have been made. At least three types of cases are analogous. In ordinary insurance contracts against accident or death, the prior receipt of insurance

<sup>22</sup> 128 Minn. 158, 150 N. W. 620 (1915). Accord: *Pendar v. H. & B. Amer. Mach. Co.*, 35 R. I. 321, 87 Atl. 1 (1913).

is no defense to the defendant sued by the insured in tort,<sup>23</sup> nor is the insurer subrogated to the rights of the insured against the tortfeasor.<sup>24</sup> On the other hand the prior receipt of damages is not a defense to the insurer in an action by the insured on the policy.<sup>25</sup> This rule, however unsatisfactory its reasoning be regarded, is firmly established and has been carried over into the law of compensation. It has been held in a number of well-considered cases that as damages and compensation are of utterly different nature, the prior receipt of one is no defense either to employer or tortfeasor in an action for the other.<sup>26</sup> In each of these types, really only variations of the same principle, the insured (the employer) and the tortfeasor are different persons; but in the case now under consideration the second proceeding is against the same person. Here the rule against double recovery from the same person for a single loss should be held to apply. It is true that compensation is a remedy based upon the contract and damages remedy for tort. Nevertheless the employee has suffered but a single injury, and he or his dependents are now seeking a double recovery from the same person, who should not be required to respond twice. No decisions on this point have been found.<sup>27</sup>

<sup>23</sup> *Nussbaum v. Trinity, etc. Ry. Co.*, 149 S. W. 1083 (Tex. Civ. App.) (1912); *Harding v. Townshend*, 43 Vt. 536 (1871); *L. E. & W. R. Co. v. Falk & P. Ins. Co.*, 62 Ohio St. 297, 56 N. E. 1020 (1900); *Clune v. Ristine*, 94 Fed. 745 (1899); *West. & Atl. R. Co. v. Meigs*, 74 Ga. 857 (1885); *Sherlock v. Alling*, 44 Ind. 184 (1873); *Hayward v. Cain*, 105 Mass. 213 (1870).

<sup>24</sup> *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754 (1877); *Conn. Mut. Life Ins. Co. v. N. Y., N. H. & H. R. Co.*, 25 Conn. 265 (1857); 1 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 3904-3905; SHELTON, SUBROGATION, § 239.

<sup>25</sup> *Aetna Life Ins. Co. v. J. B. Parker & Co.*, 30 Tex. Civ. App. 521, 96 Tex. 287 (1903).

<sup>26</sup> *Perlsburg v. Muller*, 35 N. J. L. J. 202 (1912); *Newark Pav. Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91 (1914); *Jacowicz v. Del. L. & W. R. Co.*, 87 N. J. L. 273, 92 Atl. 946 (1915); *Biddinger v. Steininger-Taylor Co.*, 25 Ohio Dec. 603 (1915).

<sup>27</sup> But *cf.* *Roundsaville v. Central R. Co.*, 87 N. J. L. 371, 374, 94 Atl. 392 (1915): "If it be said that the Pennsylvania law may provide a different scheme of compensation, and that the effect of our decision may be to allow a double recovery, we can only say that questions of that kind had better be dealt with as they arise, and in the light of the exact scheme of compensation that may be involved. It is enough for the present to say that recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance."

The court, however, fails to distinguish between the theory expressed in actions arising upon ordinary life and accident policies that no exact monetary value can be set upon life and limb (see notes 23, 24, and 25, *supra*), and the theory of compensa-



If there are optional acts in both states there could be no recovery under both acts. Not only would this be a situation for the application of the rule against double recovery, but the matter would be *res adjudicata*. The recovery already had must have been based on a finding that the contract of employment brought in question in the second proceeding was made in contemplation of one of the two statutes; a second recovery under the other statute would have to be based on a contrary holding which would be a denial of full faith and credit under the Fourth Amendment of the federal Constitution.<sup>28</sup> If the second court should find there were two different contracts of hire between the same parties, there would not necessarily be a denial of full faith and credit, but the rule against double recovery, even under separate rights, would apply. The result should be the same whether one or both of the statutes are compulsory.

#### B. THE COMPULSORY STATUTES

The acts of some few American states impose the obligation to pay compensation irrespective of any actual or presumed consent. The nature of compensation is not changed by the mere fact that it becomes payable solely by fiat of law and irrespective of the consent of the parties to the contract of hire; it is still insurance. As the overwhelming majority of the acts are optional, it is to be expected that there should be but few decisions on this question under the compulsory acts. Although the British act is of this latter type the decisions under it afford no help, as they hold that the act was not intended, by its terms, to have extraterritorial effect. In *Hicks v. Maxton*<sup>29</sup> an English resident was taken by her English employer under a contract made in England to work in France and was there injured. It was held that there was nothing in the contract to show that the parties intended the law

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tion for the ascertained economic loss of money wages only. The second recovery at most could only be of the percentage of wages not covered by the statute under which the first recovery was had.

<sup>28</sup> *Fauntleroy v. Lum*, 210 U. S. 230, 237 (1908): "A judgment is conclusive as to all the *media concludendi* . . . ; and it needs no authorities to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law." *Accord*: *Amer. Express Co. v. Mullins*, 212 U. S. 311, 314 (1908); *Sistare v. Sistare*, 218 U. S. 1 (1910); *Spencer v. Brockway*, 1 Ohio 259 (1824).

<sup>29</sup> 1 B. W. C. C. 150 (1907).

of England to govern and that therefore there could be no recovery under the act. In *Tomalin v. S. Pearson & Son*<sup>30</sup> both parties to the contract were English residents, and the deceased was sent out from England to work at Malta and was there killed. It was held that the act does not operate abroad and the decision turned on the construction of the act. None of these cases discuss the extra-territorial power of the legislature.

The New York courts, however have gone squarely on record in support of a right to compensation under the compulsory act of that state by reason of injury received abroad in the course of employment under a contract of hire made in New York. In *Matter of Post v. Burger & Gohlke*<sup>31</sup> the employer and employee were both citizens of New York and the contract was made there; the plaintiff suffered injuries while at work in New Jersey, and a recovery of compensation under the New York act was sustained by the Court of Appeals, in whose opinion it was said: "It is well settled that the legislature has the power, in a case like that now under consideration, to compel a contract between employer and employee that is extraterritorial in effect." All the arguments in favor of the compensation as against the common-law system were rehearsed, and the decision was based on the conclusion that the statute becomes a true term of the contract of hire. The effect of the act was explained thus:

"The act, in view of its humane purpose, should be construed that in every case of employment there is a constructive contract, general in its terms, and unlimited as to territory, that the employer shall pay as provided by the act for a disability or death of the employee as therein stated. The duty under the statute defines the terms of the contract. . . . If the relation between the employer and employee is contractual the contract should be construed as binding upon both parties thereto without limitation as to territory the same as all ordinary contracts, based upon mutual agreement independent of statutory duty."

<sup>30</sup> 100 L. T. 685, 2 B. W. C. C. 1 (1909). *Accord*: *Schwartz v. India Rubber*, etc. Co. [1912] 2 K. B. 299, 5 B. W. C. C. 390.

<sup>31</sup> 216 N. Y. 544, 111 N. E. 351 (1916). But *cf.* *Gardener v. Horseheads Construction Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899, holding that where a New York contract contemplated work entirely outside the state it was not within the New York act, and there could be no recovery of compensation for injury suffered in Pennsylvania. The decision was based upon the assumed intention of the legislature, payrolls on jobs outside the state not being used as a basis for computing the employer's insurance premiums.



In the earlier case of *Spratt v. Sweeney & Gray Co.*,<sup>32</sup> there was a similar holding based principally on the argument also stated in the Post Case, that as the cost of insurance under the act to any given New York employer is determined by considering all the employees and the total of their wages, and not merely those employed in New York, the act therefore may have the effect claimed for it as to disability and death suffered abroad. The argument is not entitled to weight beyond the field of determining the intention of the legislature, for the problem here is one of legislative power. A dissenting opinion in the Spratt Case was based on the statement that the recovery sought was in the nature of a tort and that the act was not intended to operate extraterritorially. It was said that: "The liability created by the act is thus imposed by law upon the parties, so that the contract, if any there be, is one not freely entered into, such as is the ordinary contract of insurance. The act is a compulsory one in this state."

In *Gooding v. Ott*,<sup>33</sup> an action under the optional act of West Virginia, there is a dictum: "Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the state."

Where the common law or the compensation act of the state of injury is considered, in addition to the right to compensation for injury abroad under the result reached in the Post Case, the result should be the same as under an optional act. The employee or his dependents could not be deprived of rights acquired under the law of the state of injury by reason of the fact that rights had also been acquired under the law of the state where the contract was made. But rights could not be asserted under both to the double loss of the employer; recovery of compensation or damages would bar any attempt at further recovery. Again, there are no reported decisions.

The theory of the Post Case is that the legislature has power to compel a contract between employer and employee to which there shall be no territorial limits.<sup>34</sup> It is submitted that although the

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<sup>32</sup> 168 App. Div. 403, 153 N. Y. Supp. 505 (1915).

<sup>33</sup> 87 S. E. 862 (W. Va.) (1916).

<sup>34</sup> In the Post Case the court also relied on cases arising in the maritime law, wherein the law of the place of the making of the contract is held to be controlling, even to the granting of a remedy. These decisions are clearly not in point; they merely hold that the law obtaining on a vessel is the law of its home port, the vessel

decision for the plaintiff (employee) was correct, this conception of the relation between the parties is unsound, for a "contract" imposed by law is no contract at all. An optional act becomes truly a term of the contract; but the consensual act of the parties in making the contract of hire cannot be held a consent to the compulsory act itself. On this point there has been no *aggregatio mentium*.<sup>35</sup> To reply that the law will presume that every contract

being inaccurately termed "floating territory" of the flag it flies. Under these decisions a remedy exists under the home law for an injury suffered on board the vessel wherever she may happen to be at the time. The rule is confined to maritime law. Cf. *Crapo v. Kelly*, 16 Wall. 610 (1872); *McDonald v. Mallory*, 77 N. Y. 546 (1879); *Schweitzer v. Hamburg-A. P. A. G.*, 78 Misc. 448, 138 N. Y. S. 944 (1912); *Edwardsen v. Jarvis Light Co.*, 168 App. Div. 368, 153 N. Y. Supp. 391 (1915). In *Foley v. Home Rubber Co.*, 89 N. J. L. 474, 99 Atl. 624, the widow of a traveling salesman recovered compensation under the New Jersey act for the death of her husband upon the *Lusitania*.

<sup>35</sup> The People *ex rel.* *Dusenbury v. Speir*, 77 N. Y. 144 (1879). The court was called upon to decide whether the judgment for the enforcement of which these statutory proceedings were instituted was founded upon contract, express or implied, or resulted from a suit which had for its cause of action a claim for damages, for the non-performance of a contract. The judgment in question had been rendered upon the finding of a fraudulent procuring and withholding of money. The court below upheld such statutory proceedings. The Court of Appeals reversed this holding on the ground that there was no contract, express or implied, saying (page 150):

"On the contrary we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which if broken an action will lie for damages, or is implied, when the intention of the parties if not expressed in words, may be gathered from their acts, and from surrounding circumstances; and in either case must be the result of the free and *bonâ fide* exercise of the will, producing the '*aggregatio mentium*'; the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if a man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all"; and on page 151: "The court below expressly puts the obligation upon the mere authority of the law, and makes a contract 'by force of natural equity.' The learned judge says: 'the law implied a promise to pay over, as the judgment directed that to be done.' So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation, and permits the tort to be waived, but there is no contract. That can only come from a convention, or agreement of two, not by the option, or at the election of one. In the case before us there is not even an election, for the complaint states no contract, nor charges any *assumpsit*."



of hire made in a state where there is a compulsory statute is made in contemplation of that statute, or that the law will not permit the parties to show that their contract expressly repudiates the act, begs the question. A compulsory act cannot in any true sense be a part of the contract merely by reason of its existence upon the statute books, but can only impose an obligation, law-created, upon the fulfilment of the conditions stated. Once concede that there is a true contract for extraterritorial operation of the law, and the difficulty is avoided, the remedy clear on the sound reasoning of the cases previously discussed under the optional acts. But in truth there is no contract, no agreement.

Cases arising under the common-law doctrine of assumption of risk before compensation acts had been thought of in common-law countries furnish an interesting analogy to the present problem. That defense was commonly, and by some courts still is, considered a matter of implied but real contract.<sup>36</sup> The similar defense of the common employment may be considered with this. If these defenses were truly matters of contract, the rights arising out of an injury to an employee would be controlled by them wherever the injury was received, if the law of the place of the contract were deemed the governing law. Thus for an injury received in state A. by an employee working under a contract made in state B., one should look to the law of B. for the existence of these rights as determining their extent and applicability as defenses. To answer that the common-law action for personal injuries is one sounding in tort and is therefore determined wholly by the *lex loci delicti* begs the question, which concerns supposedly affirmative defense arising as matters of contract. These cases, however, all hold that these defenses are not matters of contract, nor determined by the *lex loci contractus*. In *Alabama Great Southern Ry. Co. v. Carroll*<sup>37</sup> the plaintiff entered the employ of the defendant in Alabama, where there was in force an employers' liability statute, and was injured by the negligence of a fellow servant in Mississippi. He sued the railroad in Alabama relying upon that statute, and it was urged that by the contract of hire this act had become a part of

<sup>36</sup> *Narramore v. C. C. C. & St. L. Ry. Co.*, 96 Fed. 298, 301 (1899); *C. B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725, 729 (1912); *Seaboard Air Line v. Horton*, 233 U. S. 492, 504 (1913); *Railway Co. v. Ranney*, 37 Ohio St. 665, 669 (1882).

<sup>37</sup> 97 Ala. 126, 11 So. 803 (1892).

the contract, and that the rights and liabilities of the parties were to be determined by it. The court repudiated this notion flatly. The same question was presented in *Kansas City, Ft. S. & M. R. Co. v. Becker*,<sup>38</sup> except that here the action was brought in the state where the injury occurred. The court held that the action was to be governed by the law of the place of injury, saying: "It is true that the relation was created by contract, but the duty upon which the appellee relies to recover in this action, if it existed, was imposed by law, and arose from the relation, rather than from the contract." In the Carroll Case the court said: "The courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired."

The eminently sound principle of these cases, that law-imposed duties are not matters of contract to govern abroad the incidents of contractual relations, is equally applicable to the reasoning employed to sustain a recovery for injury abroad under a compulsory compensation act. The duty to pay compensation was no more contractual, under the New York act considered in the Post Case, than the duty to provide safe facilities for work under an employers' liability act. Further legislative encroachment upon the old field of unrestrained contract is to be expected, and it cannot be worked out satisfactorily upon a basis of the survival of the legal philosophy which attempted to reduce all legal relationships and duties to those of contract. In this instance the archaism of a fictitious term of the contract of hire is unnecessary and confusing.

In a recent case<sup>39</sup> the Supreme Court of California held that the compulsory portion of the compensation act of that state was not intended by the legislature to give a remedy for injury or death abroad. The court also considered the question, here discussed, of the nature of the correlative rights and duties under such a compulsory act. The New York Court of Appeals had dodged the question by treating the matter as entirely one of contract; the California court held squarely and, we think, properly, that these

<sup>38</sup> 57 Ark. 1, 39 S. W. 358, 53 S. W. 406 (1899). *Accord*: B. & O. S. W. Ry. Co. v. Jones, 158 Ind. 87, 62 N. E. 994 (1901); Indiana I. & I. R. Co. v. Masterson, 16 Ind. App. 323, 44 N. E. 1004 (1896); DRESSER, EMPLOYERS' LIABILITY, § 3; WHARTON, CONFLICT OF LAWS, § 478 b.

<sup>39</sup> North Alaska S. Co. v. Pillsbury, 162 Pac. 93 (Cal.) (1916).



rights and duties are not contractual, but are imposed by law upon the contractual status of employer and employee. It is only to be regretted that the statute was not found to intend an extraterritorial effect, loosely speaking, in order that this court might also have considered whether such intention could successfully be worked out under our American constitutions. On the principal point the court reasoned thus:

"The case is before us on rehearing. Our former decision, upholding the jurisdiction of the commission (to make an award for an injury abroad to an employee hired in California), was based on the theory that the workmen's compensation law entered into and became a part of the contract of employment, and that, where such contract was made in this state, the statute fixed the rights of the parties with respect to any injuries arising out of the employment, wherever such injuries might occur.

"Upon further study, we are satisfied that this view is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, *i.e.* that of employer and employee, and affixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but, once that relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law. Our decisions upholding the validity of this legislation have emphasized, and found support in the proposition that the statute is one regulating the rights and obligations attaching to the status of employer and employee. . . . If the right to compensation rested upon contract, it would seem to follow that such right would exist only in cases of employment under agreements made after the passage of the statute. . . . It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged. The obligation is to be defined as a statutory one, attached by law to a given status."

If the reasoning of the Post Case be unsound and the obligations and rights be law-imposed, irrespective of consent, how can the result there reached be upheld? Sustaining the right to compen-

sation for injury abroad seems to substitute for our Anglo-Saxon territorial system one based upon or analogous to the personal theory that a citizen carries his law with him wherever he goes. This is *pro tanto* legislating for another jurisdiction. It would seem clear that our constitutions will not permit the legislature of one state to legislate for another, to impose rights and duties solely by reason of events occurring abroad; the territorial conception is too deeply ingrained.

If the statute is in form and substance a genuine regulation of contracts subject to its sovereignty, the statute may then constitutionally be found to intend a recovery for injury abroad. The legislature may lawfully impose that right and duty upon those operating under a contract subject to that legislative power. The older line of cases at common law and under the employers' liability statutes, while sound, is not conclusive here. The law touching these duties, or so-called defenses, was not a regulation of contracts, but an expression of positive duties for the breach of which recovery could be claimed only on the basis of tort, which is conceded to be a matter for the exclusive regulation of the jurisdiction wherein the defendant's responsible act or omission took place.

Of the compulsory acts now in force in the United States, that of Washington,<sup>40</sup> by its express terms is confined to injuries suffered within that state. The California act has been noted. The Ohio act<sup>41</sup> seems to be a genuine regulation of contracts, as it provides that "every employee . . . who is injured . . . in the course of employment, wheresoever such injury has occurred . . . shall be entitled to receive . . . from his employer . . . such compensation," etc.; and it defines both employer and employee in terms of "any contract of hire, express or implied, oral or written." The New York act<sup>42</sup> is not so clearly in form a regulation of contracts, the only explicit reference to the contract of hire occurring in sect. 3 (9): "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident," etc. In substance, however, the act could probably be construed as a regulation of contracts, and the decisions giving it extraterritorial effect thus supported.

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<sup>40</sup> LAWS 1911, ch. 74, § 3.

<sup>41</sup> General Code, §§ 1465-68; Acts 1913, Senate Bill, 48.

<sup>42</sup> LAWS 1914, ch. 41.



The notion of a compulsory statute as a contract cannot satisfy us in this day; the new and growing categories of law-imposed duties cannot be twisted into the older and simpler classifications of contract and tort. On the other hand legislatures cannot substitute personal for territorial law. Fortunately we may support the imposition of the new duties for injury and death suffered in another jurisdiction as a regulation of contracts. Due process is not defeated by the legislature imposing on contracts subject to it the same duties and rights, as incidents to acts abroad, that are lawfully imposed as incidents to the same acts occurring within the geographical limits of its sovereignty. Whatever be the reasoning employed, other courts will doubtless reach the same result as did the Court of Appeals of New York.

Reverting to the general situation already discussed of "conflict" between the remedies of the state of contract and the remedies of the state of injury, it is clear that the compulsory or optional character of one or both of the statutes cannot affect the limitation of the single recovery. If both statutes are optional, the similarity of remedies offered might conceivably permit the application of the *lex loci contractus*; but as it is difficult to conceive of one jurisdiction refusing to hold supreme its declared legislative policy, this would undoubtedly be found to apply, on the theory already advanced in support of the control by the optional act of the state of injury as against the common law of the state of the contract. If the first statute is compulsory the duty under it cannot be set aside, though it continues everywhere, by an optional or compulsory act in the jurisdiction of the loss; alternative remedies exist, both of which may not be enforced for a single loss.

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TERMINATION OF AGENCY BY WAR. — In *Tingley v. Mueller*, [1917] 2 Ch. 144, the plaintiff as purchaser of a leasehold brought action for a declaration that an agreement of sale of June 2, 1915, had been dissolved by act of defendant, vendor, in becoming an alien enemy. The defendant, a German by birth and unnaturalized, resided for many years in England. On May 20, 1915, he executed a power of attorney by which he appointed his solicitor, White, his attorney, to sell his house. The power was declared to be irrevocable for twelve months. On May 26 defendant started for Germany by government permit. Under the power of attorney the premises were sold to the plaintiff a week later. The Court of Appeal held that there was sufficient evidence that defendant reached Germany before the sale; that before the sale, therefore, he became "an alien enemy" by residence in Germany; that the power of attorney, having been given by defendant at a time when he was not an alien enemy, being irrevocable, was not terminated by his becoming an alien enemy; that the agreement did not involve any intercourse with the enemy and was not, therefore, within the prohibition of the common law or of the Trading with the Enemy Proclamation, or Acts; and that the plaintiff was not entitled to have the agreement rescinded.

It is unnecessary to discuss the more difficult questions in regard to the irrevocability of a power coupled with an interest.<sup>1</sup> It is sufficient to note, that, if the court rested its decision that the power was irrevocable

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<sup>1</sup> See *Hunt v. Rousmanier's Adm.*, 8 Wheat. (U. S.) 174; *Walsh v. Whitcomb*, 2 Esp. 565.



upon the ground of the principal and the agent so contracting, its decision is not sanctioned by the American, and probably not by the English, cases.<sup>2</sup> The principal may have the power without the right to revoke. He may be able to prevent the agent involving him with third parties, though he must respond to the agent in damages for breach of contract of employment. And if irrevocability of the power was based on the theory that the interest of the attorney in the commission from the sale of the property rendered it a power coupled with an interest, this part of the decision is also contrary to the American and English authorities.<sup>3</sup>

We reach, then, the question of the effect of war on the existence of a revocable power of attorney. The authorities in the United States hold that a power of attorney given by a resident of one belligerent nation to a resident of an opposing belligerent nation is void because of the intercourse with the enemy involved.<sup>4</sup> If such a power be given before hostilities, or if a power be given between residents of the same country and during war the principal or agent changes his residence to the country of an opposing belligerent, the termination of the power depends according to one line of cases, upon the consent of the parties expressed or presumed.<sup>5</sup> In the absence of express consent if the continuance of the agency is against the interests of the principal the authority is terminated.<sup>6</sup> But if it is for the interest of the principal that the relation continue there is no cessation of the agency.<sup>7</sup> Another line of cases draws distinction between agencies which require communication between the principal and the agent and those which do not. War suspends all intercourse between *residents* (not necessarily between *citizens*) of two opposing belligerent countries, and it is therefore against public policy that the relation should continue after the outbreak of the war, provided it is contemplated in the particular agency that there should be communication between principal and agent. Where no such contemplation exists, however, the agency may continue. On this theory it has been held that agencies to collect debts survive the commencement of the conflict.<sup>8</sup> However, one case at least seems to proceed upon the short ground that war terminates under all circumstances agencies between residents of enemy countries.<sup>9</sup>

Between these conflicting theories it is not difficult to choose. The cessation of agency by war depends not upon the consent of the parties, but upon the broader ground of public policy. That policy forbids all intercourse between residents of opposing belligerent countries. If there

<sup>2</sup> *Chambers v. Seay*, 73 Ala. 372; *Walker v. Denison*, 86 Ill. 142; *Cloe v. Rogers*, 31 Okla. 255; *Blackstone v. Buttermore*, 53 Pa. 266. See *Toppin v. Healey*, 11 WKLY. REP. 466; *MECHEM, AGENCY*, 2 ed., § 568.

<sup>3</sup> *Taylor v. Burns*, 203 U. S. 120; *Toppin v. Healey*, 11 WKLY. REP. 466.

<sup>4</sup> *Insurance Co. v. Davis*, 95 U. S. 425.

<sup>5</sup> It is to be noted that under this theory there would never be a revocation until the parties to the relation knew of the outbreak of hostilities.

<sup>6</sup> *Insurance Co. v. Davis*, 95 U. S. 425.

<sup>7</sup> *Williams v. Paine*, 169 U. S. 55, 73, 74 (*semble*); compare *Darling v. Lewis*, 11 Heisk. (Tenn.) 125.

<sup>8</sup> *Ward v. Smith*, 7 Wall. (U. S.) 447; *Fisher v. Krutz*, 9 Kan. 501; *Rodgers v. Bass*, 46 Tex. 505; *Robinson v. International Life Assur. Soc.*, 42 N. Y. 54. Compare *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Small's Adm. v. Lumpkin's Exr.*, 28 Gratt. (Va.) 832; *Shelby v. Offutt*, 51 Miss. 128; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137. For the law of Germany see 17 COL. L. REV. 660.

<sup>9</sup> *Howell v. Gordon*, 40 Ga. 302.

were revocable agencies which offered by no possibility a necessity of communication between the parties to the relation, the distinction taken by some of the American cases cited above would be sound enough. But such a relation cannot be conceived. There is always the possibility that the principal may desire to revoke his authority, which of course requires communication. Furthermore the agent owes a duty of loyalty which may at any time require him to notify his employer of change in circumstances affecting his powers. The best rule, therefore, is to regard war as, at once and without regard to the knowledge or consent of the parties, terminating the relation.<sup>10</sup>

The Court of Appeal further found that the contract was not within the mischief aimed at in the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, and the acts of Parliament dealing with trade with the enemy, 4 & 5 GEO. V, c. 87 (1914), 5 GEO. V, c. 12 (1914), and 5 & 6 GEO. V, c. 105 (1916).<sup>11</sup> The judges reached this conclusion on the ground that the purchase money when paid to the agent would not be transmitted to the principal in Germany, but would vest in the Public Trustee under Trading with the Enemy Acts of 1914 and 1916. The recent federal legislation approved October 6, 1917, known in this country as the "Trading with the Enemy Act" contains provisions resembling those of the English statutes. Trading with the enemy is declared unlawful and punished severely.<sup>12</sup> The word "enemy" is defined in section 2 (a) as "any individual . . . resident within the territory . . . of any nation with which the United States is at war." The words "to trade" are defined among other things to mean in section 2 (c) "enter into, carry on, complete, or perform any contract. . . ." And the prohibition of section 3 renders it unlawful "to trade . . . with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge, or reasonable cause to believe that such other person is an enemy. . . ." This legislation, as well as the English legislation, would seem to render invalid the agent's contract in *Tingley*

<sup>10</sup> BATY AND MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS. London, 1915, 273. And see a decision of Conseil de Revision de Lyon, July 31, 1916; CLUNET, JOURNAL DU DROIT INTERNATIONAL, vol. 44, 166.

<sup>11</sup> The material portions of this legislation for present purpose are contained in the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, in which, after reciting (*inter alia*) that "it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission," it is declared (*inter alia*) as follows:

Par. 3: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. . . ."

Par. 5: ". . . We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions —

"(1) Not to pay any sum of money to or for the benefit of an enemy.

"(9) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy.

" . . . whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime . . ."

<sup>12</sup> Sections 3, 16.



*v. Muller*. It might be argued that as the property of an alien enemy is taken from him and vested in the alien property custodian,<sup>13</sup> that a contract made by an agent in his name is not a contract on behalf of him or for his benefit, but for the benefit of the government. But this is not true in either country, for the property is not permanently taken from the enemy, but merely held for him during the war, and then disposed of as Congress<sup>14</sup> or the King by Order in Council may direct.<sup>15</sup> The alien enemy may or may not receive a penny of it.

The principal case should, therefore, be decided differently if considered solely from the point of view of war legislation in either the United States or in England.

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EFFECT OF WAR ON CONTRACTS. — War between states rather than between their subjects, as set forth in Rousseau's "athletic-contest" theory of belligerency,<sup>1</sup> never seemed farther from reality than in the present war, so emphatically a struggle between peoples rather than between princes. In such a contest, whatever may be the amelioration of military practices, the old restrictions upon commercial intercourse persist with undiminished rigor. The most significant effects of war upon contracts are seen in its intrusion as an intervening circumstance making performance impossible, in its prohibition of trading and negotiating with enemies, in its postponing the remedy on executed contracts, and in its suspending or dissolving executory contracts.<sup>2</sup>

The strict rule of the common law is that subsequent impossibility does not dissolve an express unconditional contract.<sup>3</sup> The law, however, mitigates this harsh doctrine by recognizing implied conditions in many contracts where the contrary intention does not clearly appear in the contract.<sup>4</sup> It is a good defense if performance is made illegal by domestic law,<sup>5</sup> but, it seems, not if foreign law prohibits.<sup>6</sup> It has been held that a

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<sup>13</sup> United States Trading with the Enemy Act, 1917, § 6; 5 GEO. V, c. 12.

<sup>14</sup> Act of 1917, § 12.

<sup>15</sup> 5 GEO. V, c. 12, § 5.

<sup>1</sup> See ROUSSEAU, *DU CONTRAT SOCIAL*, l. 1, c. iv; BORDWELL, *LAW OF WAR BETWEEN BELLIGERENTS*, 3.

<sup>2</sup> See TROTTER, *LAW OF CONTRACT DURING WAR*, 6.

<sup>3</sup> *Paradine v. Jane*, Ayleyn, 26 (1647). See WALD'S *POLLOCK, CONTRACTS*, 3 (WILLISTON'S) ed., 527.

<sup>4</sup> *Horlock v. Beal*, [1916] 1 A. C. 486. Lord Wrenbury, 525, makes this statement of the law: "When a contract has been entered into, and by a supervening cause beyond the control of either party, its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will — if, in other words, he has taken upon himself the risk of such a supervening cause — he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes impossible the contract shall not remain binding." Cf. *Tamplin S. S. Co. v. Anglo-Mexican, etc. Co.*, [1916] 2 A. C. 397.

<sup>5</sup> *Chicago, etc. Ry. v. Hoyt*, 149 U. S. 1 (1892); *Taylor v. Caldwell*, 3 B. & S. 826 (1863); *In re Shipton, Anderson & Co.*, [1915] 3 K. B. 676.

<sup>6</sup> *Tweedie, etc. Co. v. J. P. McDonald Co.*, 114 Fed. 985 (1902).

war between foreign nations, preventing performance of a contract, does not excuse performance.<sup>7</sup> War generally, as an intervening event, is so evidently not within the contemplation of parties that the courts usually find an implied condition to excuse performance. This resulting modification of the rule of *Paradine v. Jane* more nearly approaches equitable considerations. The Supreme Court in the recent case of the *Kronprinzessin Cecilie*<sup>8</sup> has shown itself substantially in accord with the liberal position of the House of Lords in *Horlock v. Beal*.

The general rule of American and British courts is that contracts made with alien enemies during war are illegal and void.<sup>9</sup> The old common law distinguished between contracts and trading with the enemy, but this distinction is now obsolete.<sup>10</sup> A large part of the law about trading with the enemy was handed down by the early prize courts and belongs to the days when privateering was regular. Being accepted as precedent it has not been swept away. Nations no longer depend upon privateers as a part of their naval establishment. Thus one danger of embarrassment from trading with the enemy has now disappeared. The continental publicists tend to the position that trading is legal after the outbreak of war, unless specially prohibited.<sup>11</sup> Prior to the war German law forbade only trade with the enemy that amounted to treason.<sup>12</sup> The French practice during the Franco-Prussian war<sup>13</sup> indicates an approximation to the English rule of *de facto* prohibition of trading on the outbreak of the war.<sup>14</sup> The common law has been declared and extended by statute during the present war by both the United States<sup>15</sup> and Great Britain.<sup>16</sup>

<sup>7</sup> *Richards v. Wreschner*, 156 N. Y. Supp. 1054 (1915). Cf. *Graves v. Miami S. S. Co.*, 29 Misc. (N. Y.) 645, 61 N. Y. Supp. 115 (1899).

<sup>8</sup> "Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs." From opinion of Supreme Court, *Kronprinzessin Cecilie*, North German Lloyd, Clmt. v. Guaranty Trust Co., quoted by Conlen, "Impossibilities of Performance of Contracts," 66 U. of Pa. L. Rev. 28.

<sup>9</sup> *The Rapid*, 8 Cranch (U. S.) 156 (1814); *The Sea Lion*, 5 Wall. (U. S.) 630 (1866); *Potts v. Bell*, 8 D. & E. 548 (1800); *Willison v. Patteson*, 7 Taunt. 439 (1817) (Immaterial that suit is brought after the war); *Bristow v. Towers*, 6 D. & E. 35 (1794). Cases on this and other points may be found conveniently in SCOTT, CASES ON INTERNATIONAL LAW; TROTTER, LAW OF CONTRACT DURING WAR; and *Id.*, LAW OF CONTRACT DURING WAR, SUPPLEMENT. See WALD'S POLLOCK, CONTRACTS, 3 (WILLISTON'S) ed. 427.

<sup>10</sup> *The Anna Catharina*, 4 C. Rob. 107 (1802).

<sup>11</sup> For summary of the conflicting views, see PHILLIPSON, EFFECT OF WAR ON CONTRACTS, 53; 3 OPPENHEIM, INTERNATIONAL LAW, 2 ed., § 101; and 4 HOLTZENDORFF, HANDBUCH DES VÖLKERRECHTS, § 87. See also 2 RIVIER, PRINCIPES DU DROIT DES GENS, 231.

<sup>12</sup> See WESTLAKE, INTERNATIONAL LAW, Pt. II, 38. For a consideration of the principal provisions of German ordinances as to trading and contracts with the enemy see a series of articles by [C. H. Huberich] and Richard King in 59 SOLICITOR'S JOURNAL (London), 22, 39, 55, 70, 126, 378, 394, *et seq.* See also King, "The German Enemy Contract Annulment Ordinance," 2 INTERNATIONAL LAW NOTES (London), 5, and SPEYER AND HUBERICH, "De Noodwengeving van het Duitse Rijk" (THE HAGUE, 1915). Quoted from note, C. H. Huberich, "German Laws Relating to Payments to Alien Enemies," 17 COL. L. REV. 653.

<sup>13</sup> See DESPAGNET, COURS DU DROIT INTERNATIONAL PUBLIC, 540.

<sup>14</sup> See BENTWICH, LAW OF PRIVATE PROPERTY IN WAR, 48; 3 PHILLMORE, INTERNATIONAL LAW, 3 ed., 116 *et seq.*

<sup>15</sup> Trading with the Enemy Act, October 6, 1917, U. S. COMP. STAT., § 3115 $\frac{1}{4}$ , 244 Fed. 437. The prohibitions of this statute extend, in part at least, to enemy allies.

<sup>16</sup> Trading with the Enemy Amendment Act, 1916, 5 & 6 GEO. V, c. 105. The Board of Trade is given comprehensive powers over contracts. § 2. "When it appears



So far the restrictions have been applied only to financial and commercial contracts, though the language of the prohibitions, taken literally, is broad enough to cover even a promise to marry an enemy alien. The Anglo-American law has recognized a few exceptions, notably in the case of licensed trade.<sup>17</sup> Less important are the relaxations in favor of ransom bills<sup>18</sup> and contracts of necessity, especially by prisoners of war.<sup>19</sup> Following the Civil War certain American courts inclined to a rule which would prohibit only intercourse shown to be inconsistent with a state of war,<sup>20</sup> but British opinion has not followed the American suggestion, and there seems little chance of any indulgence during the existing war.

If a contract made before the war is executed, that is, wholly performed on one side, the remedy is suspended as to the alien enemy during the continuance of the war.<sup>21</sup> This rule applies particularly to cases which only require the payment of money. The alien enemy has no standing in an American or British court, but the American courts, especially, regard the plea of alien enemy with scant favor.<sup>22</sup> The fundamental principle is that the alien may not be an *actor*.<sup>23</sup> Recovery will be allowed *against* the alien if he has funds that may be attached. The rule of suspension is solely to prevent advantage to the enemy. The running of the Statute of Limitations is suspended during the period of the war.<sup>24</sup> Interest is generally not recoverable after the debt is due and payable, if war is going on.<sup>25</sup> It has been strongly urged that the whole rule as to the suspension of remedy on an executed contract has been changed by the Fourth Convention of the Hague Conference of 1907.<sup>26</sup> Certainly this was the intention of the German delegates who introduced the article, and their position has respectable support. The English view is that the subsection in controversy merely prohibits the military authorities in command of occupied territory from preventing access to the civil courts

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to the Board of Trade that a contract entered into before or during the war with an enemy . . . is injurious to the public interest, the Board may by order cancel or determine such contract either conditionally or upon such conditions as the Board may think fit." See also Trading with the Enemy Proclamation, No. 2, of September 9, 1914.

<sup>17</sup> *The Hoop*, 1 C. Rob. 196 (1799); *Usparicha v. Noble*, 13 East 332 (1811); *Kensington v. Inglis*, 8 East 273 (1807). See *United States v. One Hundred Barrels of Cement*, 27 Fed. Cas. 292 (1862).

<sup>18</sup> *Goodrich v. Gordon*, 15 Johns. (N. Y.) 6 (1818); *Ricord v. Bettenhand*, 3 Burr. 1734 (1765). By statute, 22 GEO. III, c. 25 (1792), ransom contracts were made illegal and void. Under section 45 of the Naval Prize Act, 1864, 27 & 28 VICT., c. 25, however, the Crown may, by Order in Council, allow British subjects to ransom their property. See TROTTER, LAW OF CONTRACT DURING WAR, SUPPLEMENT, 20.

<sup>19</sup> *Antoine v. Morshead*, 6 Taunt. 236 (1815).

<sup>20</sup> *Kershaw v. Kelsey*, 100 Mass. 561 (1868). (Lease of plantation made during war held valid.) The famous opinion of Mr. Justice Gray contains an exhaustive examination of authorities.

<sup>21</sup> *Ex parte Boussmaker*, 13 Ves. 71 (1806); *Alcinous v. Nigreu*, 4 E. & B. 217 (1854).

<sup>22</sup> See C. M. Picciotto, "Alien Enemies in English Law," 27 YALE L. J. 167.

<sup>23</sup> *McVeigh v. United States*, 11 Wall. (U. S.) 259 (1870). See also 31 HARV. L. REV. 470.

<sup>24</sup> *Hangar v. Abbott*, 6 Wall. (U. S.) 532 (1867). There are English *dicta*, *contra*.

<sup>25</sup> *Bean v. Chapman*, 62 Ala. 58 (1878).

<sup>26</sup> Fourth Hague Convention, 1907, XXIII (*b*). It is hereby prohibited "to declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings." The general subject of the Fourth Convention is Hostilities. See HIGGINS, HAGUE PEACE CONFERENCES, 263 *et seq.*

on the part of residents of that territory. The British opinion is probably shared in the United States. The old rule will doubtless stand throughout the war.

Executory contracts, that is, contracts wholly unperformed, or in which something remains to be done, if made before the war, are suspended or not, according to the circumstances. As Mr. Justice Gray said in *Kershaw v. Kelsey*, modern commercial conditions demand that war shall not interfere with the incorporeal, any more than with the corporeal, private rights of belligerent subjects, save where the upholding of the right would add to the security or strength of the enemy during the contest. It is fundamental that contracts involving dealing with the enemy are dissolved,<sup>27</sup> unless the government waives its right in the premises.<sup>28</sup> Even a contract with a neutral is dissolved if it involves trading with the enemy.<sup>29</sup> The principles of equity determine whether many contracts and relationships shall be deemed abrogated or suspended. Thus partnerships are generally dissolved by war,<sup>30</sup> while mortgages are suspended.<sup>31</sup> The circumstances of the particular case will determine whether an agency continues during the war.<sup>32</sup> If time is of the essence, a contract is dissolved.<sup>33</sup> If postponement of performance involves altering the contract itself, the contract is dissolved.<sup>34</sup> It is not true that *inter arma silent leges*, but it is undeniable that a long and bitter war makes for greater severity, even by the courts, in considering the interests of alien enemies. Particularly in case of contracts of affreightment and charter-parties, British courts are inclined to strictness in determining the rights of German charterers. The recent dissolution of a charter-party by the Court of King's Bench in the case of *Clapham S. S. Co. v. Handels-en-Transport-Maatschappij Vulcaan*,<sup>35</sup> notwithstanding a clause of suspension in the contract, is only a stern application of the rule that no contract shall continue if it makes the enemy a more powerful antagonist. What one finds to deplore is the tendency to consider present enemies as foes *in perpetuo*, and to overlook that the prospective advantage to the defendant after the war will benefit an alien friend, not an alien enemy.

<sup>27</sup> *Zinc Corporation v. Hirsch*, [1916] 1 K. B. 541. Cf. *Furtado v. Rogers*, 3 B. & P. 101 (1862). See SCHUSTER, EFFECT OF WAR AND MORATORIUM ON COMMERCIAL TRANSACTIONS, 9.

<sup>28</sup> *Clementson v. Blessig*, 11 H. & G. 135 (1855).

<sup>29</sup> *Esposito v. Bowden*, 7 E. & B. 763 (1857). Cf. *Duncan, Fox & Co. v. Schrempft & Bonke*, [1915], 1 K. B. 365.

<sup>30</sup> *Matthews v. M'Stea*, 91 U. S. 7 (1875); *Griswold v. Waddington*, 16 Johns. (N. Y.) 438 (1819).

<sup>31</sup> *Dorsey v. Dorsey*, 30 Md. 522 (1869).

<sup>32</sup> *Williams v. Paine*, 169 U. S. 55 (1898); *N. Y. L. Ins. Co. v. Davis*, 95 U. S. 425 (1877).

<sup>33</sup> *N. Y. L. Ins. Co. v. Statham*, 93 U. S. 24 (1876). For a summary of the insurance cases see WAMBAUGH, CASES ON INSURANCE, 651, note; and SCOTT, CASES ON INTERNATIONAL LAW, 516, note. Marine-insurance policies and fire-insurance policies are generally held good against all losses except those due to the hostile acts of the forces of the country of the insurer. The problem as to the extent to which war affects the obligations on a life-insurance policy is complicated by the different views as to the nature of the contract of assurance.

<sup>34</sup> *Distington, etc. Iron Co. v. Possehl & Co.*, [1916] 1 K. B. 811.

<sup>35</sup> [1917] 2 K. B. 639. See Recent Cases, page 661.



THE GROWTH OF ADMINISTRATIVE LAW IN AMERICA. — The most striking change in the political organization of the last half century is the rapidity with which, by the sheer pressure of events, the state has been driven to assume a positive character. We talk less and less in the restrained terms of nineteenth-century individualism. The absence of governmental interference has ceased to seem the ultimate ideal. There is everywhere almost anxiety for the extension of governmental functions. It is inevitable that such an evolution should involve a change in the judicial process. The administrative departments, in the conduct of public business, find it essential to assume duties of a judicial character. Where, for example, great problems like those involved in government insurance are concerned, there is a great convenience in leaving their interpretation to the officials who are to administer the act. They have gained in its application an expert character to which no purely judicial body can pretend; and their opinion has a weight which no community can afford to neglect. The business of the state, in fact, is so much like private business that, as Professor Dicey has emphasized,<sup>1</sup> its officials need "that freedom of action necessarily possessed by every private person in the management of his own personal concerns." So much is at least tolerably clear. But history suggests that the relation of such executive justice to the slow infiltration of a bureaucratic regime is perilously close; and the development of administrative law needs at each step to be closely scrutinized in the interests of public liberty.<sup>2</sup> The famous *Arlidge Case* in England<sup>3</sup> is a striking example of what the seventeenth century would have termed star-chamber methods. It was there decided by the highest English tribunal that when a government department assumes quasi-judicial functions, the absence of express injunction in the enabling statute means that the department is free to embark upon what procedural practice may seem best to it; nor will the courts inquire if such practice results, or can by its nature, result in justice. In such an attitude, it is clear that what Professor Dicey has taught us to understand as the rule of law<sup>4</sup> becomes largely obsolete. If, as in the *Zadig Case*,<sup>5</sup> the Secretary of State may make regulations of any kind without any judicial tests of fairness or reasonableness being involved, it is clear that a fundamental safeguard upon English liberties has disappeared. Immediately administrative action can escape the review of the courts, it is clear that the position of a public official has become privileged in a sense from which the administrative law of France and Germany is only beginning to escape. Nor is it likely that these issues have become significant merely in relation to abnormal conditions. American administrative law, in the sense of a law different in content from a mere law of public officers, goes back to the *Ju Toy Case*<sup>6</sup> where a majority of the Supreme Court, perhaps somewhat doubt-

<sup>1</sup> 31 L. QUART. REV., 150.

<sup>2</sup> Cf. Pound, Address to the New Hampshire Bar Association, June 30, 1917.

<sup>3</sup> [1915] A. C. 120, and cf. Dean Pound's comment in the address cited above.

<sup>4</sup> THE LAW OF THE CONSTITUTION [8 ed.], 179*f*. It is interesting that as late as 1914 Professor Dicey still retained his belief in the absence from England of any *Droit Administratif*. In 1915 he was already discussing its development.

<sup>5</sup> *R. v. Halliday*, [1917] A. C. 266. Cf. especially the dissenting opinion of Lord Shaw and cf. 31 HARV. L. REV. 296. <sup>6</sup> *United States v. Ju Toy*, 198 U. S. 253.

fully, held the courts powerless, in view of the Chinese Exclusion Act of 1894, to review a decision of the Secretary of Commerce and Labor. But no one would object to action by a government department so long as assurance could be had of absolute fairness in the methods by which a decision was reached; it was exactly the absence of those methods which constituted the source of grievance and disquiet in the Arlidge Case. A recent decision of the Supreme Court,<sup>7</sup> very strikingly comparable with the issue in the English case, suggests that the Supreme Court will be careful of these safeguards, as, indeed, the due-process clause obviously demands it must be careful. The Public Service Commission of New York ordered a gas company, after a hearing in which witnesses were cross-examined, testimony introduced, and the case argued, to provide gas service to a certain district. The company believed that, relative to the expenditure required, a sufficient return would not be had. It therefore appealed on the ground that the order of the commission "was illegal and void in that it deprived the Gas Company of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States . . ."; and after the requisite intermediate stages the issue came before the Supreme Court on this single ground of error. Mr. Justice Clarke upheld the action of the Public Service Commission. He admitted, for the court, that the finding of an expert body such as the commission is final and will not be discussed again by the courts. Such, of course, has been the general practice of the Supreme Court;<sup>8</sup> and, so far, the decision in no sense differs from the bearing of the opinion rendered in the Arlidge Case by the House of Lords. But there is at this point a significant departure. "This Court," says Clarke, J.,<sup>9</sup> "will nevertheless enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission as to violate the due-process clause of the Constitution." No one, it may be suggested, who studies the history of the due-process clause can deny that, on occasion, it has been sadly perverted from its original purposes. But here at least, and in the perspective here outlined, its value must be obvious even to those who are suspicious of the rigidity of a written constitution. The Supreme Court, as the learned judge points out, does not propose to go into issues probably better settled by the administrative tribunal; but it does, and rightly, propose to examine into the fundamental questions of whether the means taken by that tribunal to attain its end were such as were, on the plain face of it, adequate to the securing of justice. That, of a certainty, is a safeguard to which the courts will more and more be driven with the expansion of administrative law. Under the Defense of the Realm Consolidation Act,<sup>10</sup> for instance, the Secretary of State has just issued a regulation which prohibits publica-

<sup>7</sup> *New York v. Public Service Commission*, 38 Sup. Ct. Rep. 122.

<sup>8</sup> *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Interstate Commerce Commission v. Union Pac. R. R. Co.*, 222 U. S. 541.

<sup>9</sup> *New York v. McCall et al.*, 38 Sup. Ct. Rep. 122, 124.

<sup>10</sup> 5 GEO. V, c. 8.



tion of any pamphlet or book relating to the conduct of the war or the terms of peace without its previous submission to the censor who may prohibit such publication without the assignment of cause.<sup>11</sup> That is to say that the merest and irresponsible caprice of a junior clerk may actually be the occasion of suppressing a fundamental contribution to our understanding of the war. So ridiculous a proceeding is at least prevented by this decision. It would have to be shown to the Supreme Court that the methods taken to secure the decision were such as to warrant it; and in so vital a thing as freedom of speech one may feel tolerably certain that the methods would be subject to close scrutiny. It has been the habit of past years to sneer rather elaborately at Bills of Rights. It may be suggested that, with the great increase of state activity which is clearly foreshadowed, there was never a time when their value will have been so manifest. The human needs that history has demonstrated to be essential must be put beyond the control of any organ of the state; that, and no more than that, is what we mean today by natural rights.<sup>12</sup> Governmental power is a thing which needs at every stage the most careful regard; and it is only by judicial control in terms of those rights that the path of administration will become also the path of justice.

#### THE EXTRATERRITORIAL FORCE OF A DECREE BY A COURT OF EQUITY.<sup>1</sup>

— Though a court of equity having the person of the defendant before it might conceivably order him to act in any way it might see fit, and punish him for failure to comply with the decree, this power is not under the settled rules of the conflict of laws, pushed to the extent of interfering with the laws or property of a foreign sovereign.

There is no interference, however, where the order is to refrain from action in a foreign jurisdiction by an injunction against either the commission of a foreign tort,<sup>2</sup> or the breach of a contract in foreign territory.<sup>3</sup> But relief in such cases has frequently been denied on the ground of inexpediency.<sup>4</sup> Nor is there a fatal interference where the order calls for affirmative action within the territorial jurisdiction of the court issuing the order, even though compliance therewith may affect a foreign *res*. Thus a court of equity may order the defendant to account for the proceeds of foreign land,<sup>5</sup> or decree the conveyance of land outside its

<sup>11</sup> REG. 51. Cf. *London Nation*, December 8, 1917.

<sup>12</sup> Cf. W. WALLACE, *LECTURES AND ESSAYS*, 213 ff.

<sup>1</sup> For former discussions of this problem see 23 HARV. L. REV. 390; and Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 283, 294.

<sup>2</sup> *Alexander v. Tolleston Club*, 110 Ill. 65; *French v. Maguire*, 55 How. Pr. (N. Y.) 471; *Frank v. Peyton*, 82 Ky. 150.

<sup>3</sup> *Western Union Tel. Co. v. Pittsburg, C. C. & St. L. Ry.*, 137 Fed. 435; *Schofield v. Ry.*, 43 Ohio St. 571, 3 N. E. 907.

<sup>4</sup> *No. Ind. Ry. Co. v. Mich. Central Ry.*, 15 How. (U. S.) 233 (Foreign tort); *Delaware L. & W. Ry. Co. v. New York S. W. Ry.*, 12 Misc. (N. Y.) 230 (Breach of contract in foreign territory).

<sup>5</sup> *Edwards v. Ballard*, 14 La. Ann. 362; *Sullivan v. Kenney*, 148 Iowa, 361; 126 N. W. 349.

jurisdiction,<sup>6</sup> provided the law of the *situs* does not require the act of conveyance to be performed within the local jurisdiction.<sup>7</sup> Here, too, relief may be denied on the ground of inexpediency.<sup>8</sup>

But the rule against interfering with a foreign sovereign does preclude a court of equity from ordering affirmative action outside its jurisdiction.<sup>9</sup> Thus there can be no specific performance of a contract performable abroad,<sup>10</sup> and no abatement of a foreign nuisance.<sup>11</sup> An apparent exception to this rule was developed in the Salton Sea cases.<sup>12</sup> There the defendant constructed a canal intake in Mexico, which caused water to accumulate in Arizona and flood the plaintiff's property in that state. The federal court sitting in Arizona, having personal jurisdiction over the defendant, enjoined it from further allowing the water to accumulate to the plaintiff's injury. The decree manifestly called for affirmative action in Mexico as the only practicable means of compliance therewith. But the exception is apparent only, and not real. The decree was negative in form and might conceivably have been carried out by action wholly within Arizona. The circumstances that the only practicable means of compliance was by affirmative action in Mexico ought not be taken to oust the court of jurisdiction, so long as action in Mexico was not absolutely essential.

A real exception, however, is indicated in *Vineyard Land and Stock Co. v. Twin Falls Salmon River Land and Water Co.*,<sup>13</sup> recently decided by the United States Circuit Court of Appeals, Ninth Circuit. The case involved the respective rights of the plaintiff and the defendant to water from an interstate stream. The defendant's land was in Nevada, the plaintiff's in Idaho. The court upheld a decree of the United States District Court of Idaho fixing the amount of water to which the defendant was entitled under its senior appropriation, and ordering the defendant to install in its irrigation ditches in Nevada automatic measuring devices, and refrain from using water without such devices. Apart from the question of jurisdiction, the propriety of the decree under the general common law rules as to water rights might well be questioned.<sup>14</sup> But under the Nevada statute<sup>15</sup> regulating water rights, the order was quite proper on its merits as the only effective way of enforcing the statute. Since it is impossible for the defendant to comply with this decree in any way by action in Idaho, the reasoning on which the Salton Sea cases can be explained is not applicable. Here, then, is a case holding that a court of equity may, in order to prevent a domestic tort, order the defendant to take affirmative action in a foreign jurisdiction as the only efficient means of prevention. The objection that the defendant would

<sup>6</sup> *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cranch (U. S.), 148.

<sup>7</sup> *Waterhouse v. Stansfield*, 10 Hare, 254.

<sup>8</sup> *Mariposa v. Garrison*, 26 How. Pr. (N. Y.) 448.

<sup>9</sup> *People ex rel Van Dyke v. Colo. Central Ry.*, 42 Fed. 638 (Mandamus to compel operation of foreign railroad denied); *Waterhouse v. Stansfield*, note 7, *supra*.

<sup>10</sup> *Port Royal Ry. Co. v. Hammond*, 58 Ga. 523.

<sup>11</sup> *People v. Central Ry. Co.*, 42 N. Y. 283.

<sup>12</sup> 172 Fed. 792. This case is not unsupported by precedent. *Miller & Lux v. Rickey*, 218 U. S. 258.

<sup>13</sup> 245 Fed. 9. See Recent Cases, p. 652.

<sup>14</sup> For the common law rules see WIEL, *WATER RIGHTS* (3 ed.), §§ 299, 300.

<sup>15</sup> REVISED LAWS OF NEVADA, 1912, § 4675.



have to go outside the jurisdiction of the court to comply with the decree is not fatal, for, as a practical matter, the defendant can install these meters as well by an agent as it could install them personally; indeed, since the defendant is a corporation it would have had to employ the former method, had the decree been by a Nevada court. Nor ought the territorial sovereign of Nevada have a valid objection against interference where the act is necessary efficiently to enforce his own laws. The case represents the culmination of a tendency evinced in the decisions of the federal courts for the past decade to disregard state lines when, in the interest of efficient administration of justice, it is necessary to do so. While the principle is undoubtedly contrary to classical thought on the subject, it should be welcomed by progressive jurists as a wholesome innovation.

The court further upheld an order of the District Court of Idaho giving the plaintiff the right perpetually to go upon the land of the defendant in Nevada for the purpose of inspecting the meters. This is not simply a decree *in personam* affecting a foreign *res*, but a decree *in rem* directed immediately against a *res* outside the jurisdiction of the court, and, therefore, wholly beyond its control. The order is objectionable not merely because there is an interference with a foreign sovereign, but because there is a total lack of power over the object which it seeks to bind.<sup>16</sup> It is quite impossible to support this part of the decree.

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INJUNCTIONS IN LABOR DISPUTES. — In the preceding number of this volume the principle of the balancing of interests was discussed in its relation to labor disputes.<sup>1</sup> A recent decision of the Supreme Court raises this question under slightly different conditions.<sup>2</sup> Officers of a labor union were enjoined from approaching the plaintiff's employees whose employment was at will, but who had contracted not to join a union while in the plaintiff's employ. The court decides the case by presenting a dilemma. To unionize the mines the defendant must either induce the plaintiff's employees not to work for him and join the union, or else to join the union while in his employ. Both methods it brands as illegal. In pursuing the former the defendant would be committing an intentional injury to a business relation existing only at will, and would be liable unless he could produce a justification.<sup>3</sup> This is the common procedure of all strikes and the converse of inducing an employer to discharge non-union employees. The *dictum* of the opinion — for the decision goes upon the second point — adopts the policy of those jurisdictions led by Massachusetts which allow no justification but the immediate,

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<sup>16</sup> Such an objective was deemed fatal in the following cases: *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145 (Subjection of foreign land to payment of alimony); *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. Rep. 960 (Invalidation of deed to foreign land); *White v. White*, 7 Gill & Johnson (Md.), 208 (Partition by sale of foreign land).

<sup>1</sup> 31 HARV. L. REV. 482.

<sup>2</sup> *Hitchman Coal & Coke Co. v. Mitchell*. 38 Sup. Ct. Rep. 65. See Recent Cases, p. 657.

<sup>3</sup> For a thorough analysis of the common law on this subject see GELDART, THE PRESENT LAW OF TRADE DISPUTES AND TRADE UNIONS.

individual self-interest of those who interfere with the relationship.<sup>4</sup> The more modern and, it is thought, the sounder view has been discussed before.<sup>5</sup> The decision, however, is put upon the ground that the defendant has committed a tort by inducing a breach of the plaintiff's contract under the doctrine of *Lumley v. Guy*.<sup>6</sup> The court truly says that persuading the men to agree to join is in substance persuading them to join, that damages are inadequate, because a repetition is threatened; therefore it concludes an injunction will issue.

It is beyond dispute that a party to a contract has a right against the world that it shall not be disturbed.<sup>7</sup> The common method of our law by which interferences with a property right are redressed is the payment of money damages. The extraordinary remedies do not issue as of right but are determined by the balance of administrative justice.<sup>8</sup> Assuming that this is such a contract as to give rise to a right *in rem*, and that the defendant has intentionally induced a breach of it, the only question is one of remedy. Every labor struggle is prompted by as much a desire for a greater share in the power of control as for the enjoyment of more wealth. While the law will not consider any earnestness of desire a justification for the interference with the property of another, neither should it grant to anyone a vested right in power, either political or economic. *Sic utere tuo ut alienum non laedas* does not mean that the existing power of one class to control another is inviolable. The right to supremacy cannot be decided on *a priori* grounds, if it is a justiciable question at all. As well might the court take evidence on the intrinsic worth of the Republican and Democratic policies and decide which party should be put in power. Approaching, then, the question of extraordinary relief, the court is met on the one hand by the consideration that money damages will not prevent a repetition of the wrong, and on the other by the fact that injunctive relief will go beyond protection of the plaintiff's property, and will decide in his favor the struggle for control. It is again a question of the balancing of interests. However regrettable it may be that the people have not expressed their will as to a method for the solution of this problem, it is none the less a problem which the courts cannot decide, and which it is not its duty to decide. It would seem, then, that a court of equity exercising its discretion to attain justice should leave the plaintiff to the compensation granted by law and refuse a form of relief which would usurp the decision — or at least take sides — in a great social struggle because of an incidental injury to property.

<sup>4</sup> Walker v. Cronin, 107 Mass. 555; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011; Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753; Berry v. Donovan, 188 Mass. 353, 78 N. E. 753.

<sup>5</sup> 31 HARV. L. REV. 482.

<sup>6</sup> 2 E. & B. 216.

<sup>7</sup> Lumley v. Guy, 2 E. & B. 216.

<sup>8</sup> Richard's Appeal, 57 Pa. 105; Wahl v. Cemetery Ass'n, 197 Pa. 197, 209, 46 Atl. 913; Owen v. Phillips, 73 Ind. 284, 288; Potter v. Street Co., 83 Mich. 285, 47 N. W. 214; Dana v. Craddock, 66 N. H. 593, 595, 32 Atl. 757; Goodall v. Crofton, 33 Ohio St. 271, 277; English v. Progress Co., 95 Ala. 259, 10 So. 134. See Georgia v. Tennessee Copper Co., 206 U. S. 230, 236. See also, *contra*, Bogni v. Perotti, 227 Mass. 152, 112 N. E. 853; commented on in 30 HARV. L. REV. 75.



## RECENT CASES

AGENCY — TERMINATION OF AUTHORITY — WAR. — The defendant, an unnaturalized German, resident in England, being about to proceed to Germany executed a power of attorney appointing his solicitor his attorney to sell his house. The power of attorney was declared to be irrevocable for twelve months. A week later the defendant departed for Germany. There was evidence on which the court found that the defendant had reached Germany before the premises were sold to the plaintiff, under the power of attorney. The plaintiff as purchaser brings an action for a declaration that the agreement of sale had been dissolved by act of the defendant vendor in becoming an alien enemy. *Held*, that the power of attorney having been given by defendant at a time when he was not an alien enemy, being irrevocable, was not terminated by his becoming an alien enemy, and that the plaintiff was not entitled to have the agreement rescinded. *Tingley v. Mueller*, [1917] 2 Ch. 144.

For a discussion of this case, see NOTES, p. 637.

ALIENS — NATURALIZATION — ACTION TO CANCEL CERTIFICATE OF CITIZENSHIP. — The defendant entered the United States ignorant of the immigration laws, and was not registered. He was unable, therefore, to file with his petition for naturalization a certificate of arrival, as required by section 4 of the Naturalization Act (34 STAT. AT L. 596). The Iowa court, in which he sought naturalization, granted a certificate of citizenship in spite of this defect. This was a proceeding under section 15 of the Naturalization Act to cancel the certificate of citizenship. *Held*, that the certificate should be cancelled. *United States v. Ness*, 38 Sup. Ct. Rep. 118.

A proceeding under section 15 is a suit in equity to cancel the certificate "on the ground of fraud or on the ground that such certificate was illegally procured." The case depends on the construction of the phrase "illegally procured." The general rule of statutory construction is that, when there are general words following specific words, the general words must be confined to things of the same kind. See SUTHERLAND, STATUTORY CONSTRUCTION, §§ 268-281. Under this rule, it would seem that the certificate should not be set aside on the ground that it was "illegally procured," unless the facts amounted to something so serious as to be analogous to fraud. The Iowa court was a court of general jurisdiction, upon which the Congress of the United States had conferred the full judicial power "to naturalize aliens as citizens of the United States." The court should have refused citizenship, because of the failure to file a certificate of arrival. *In re Liberman*, 193 Fed. 301; *In re Hollo*, 206 Fed. 852. See *United States v. Ginsberg*, 243 U. S. 472, 474. But cf. *In re Page*, 206 Fed. 1004; *In re Schmidt*, 207 Fed. 678; *In re McPhee*, 209 Fed. 143. But section 15 does not provide for a general review of the action granting citizenship. The filing of the certificate of arrival was not a jurisdictional fact, and the granting of citizenship without it would seem not to be an illegality within the meaning of section 15. This was the view taken by the Circuit Court of Appeals. *United States v. Ness*, 230 Fed. 950. The case marks an interesting change in the attitude of the Supreme Court towards naturalization. Cf. *Boyd v. Nebraska ex rel. Thayer*, 143 U. S. 135.

ARREST — ARREST BEFORE REQUISITION — VALIDITY UNDER FEDERAL LAW. — A federal statute under the extradition clause of the Constitution provides that when the state having jurisdiction of the crime demands the fugitive, in due form, from the asylum state, "it shall be the duty of . . . the State . . .

to which such person has fled to cause him to be arrested" (R. S. § 5278). Plaintiff was arrested on the belief that she was implicated in a recent murder committed in another state. Investigation showed that the belief was unfounded, whereupon the plaintiff was discharged. The police acted solely on telegraphic communication; no warrant had been issued, nor had the prosecuting state made requisition. The question before the Supreme Court was whether such arrest before requisition was contrary to federal law. *Held*, that no federal right was infringed. *Burton v. New York Central, etc. R. Co.*, 38 Sup. Ct. Rep. 108.

Obviously the power of a state to arrest, within its borders, persons charged with having committed a crime elsewhere, arises not from any theory of authorization from another state, but from its own sovereignty, and is subject only to such duties and restrictions as it has empowered the federal government to impose. The statute in question makes it a duty to arrest when proper demand is made by the prosecuting state. But to imply from this a restriction that a state shall not arrest one under suspicion of crime committed in another state until the prosecuting state issues the papers of requisition is an unwarranted construction, and would seriously hinder the operation of interstate rendition. This was the only federal question involved; the decision is plainly right. At common law it has been uniformly held that arrest prior to requisition is legal. *In re Fetter*, 23 N. J. L. 311; *Simmons v. Van Dyke*, 138 Ind. 380, 37 N. E. 973; *State v. Taylor*, 70 Vt. 1, 39 Atl. 447. In many states the matter is specifically regulated by statute. *Ex parte Rosenblatt*, 51 Cal. 285; *Ex parte Ammon*, 34 Ohio St. 518; *Malcolmson v. Scott*, 56 Mich. 459. See 2 MOORE, EXTRADITIONS AND INTERSTATE RENDITION, Appendix.

**BANKS AND BANKING — NATIONAL BANKS — ASSESSMENTS — APPLICATION OF PAYMENTS.** — A receiver was appointed for the insolvent, A. National Bank, which owned bonds, then worth sixty-five cents on the dollar on the market. A 100-per cent assessment was levied by the comptroller. The shareholders agreed to an apportionment of the bonds. All shareholders, except defendant savings banks, were to purchase their allotments at 95 cents on the dollar. Since defendants could not purchase such bonds they were to pay to the receiver the required advance over the market value, *i. e.*, 30 cents on the dollar, on the bonds allotted to them. This advance payment was equal to 82 per cent of the assessment. After the agreement was carried out the assessment was withdrawn. An action is brought against the savings banks on a second assessment of 49 per cent. *Held*, that the defendants are not liable. *Korbly v. Springfield Institution for Savings*, 38 Sup. Ct. Rep. 88.

Adopting the court's view that there was a contract between shareholders by which the savings banks were bound to pay to the receiver 30 cents on the dollar on the bonds allotted to them, since neither the banks nor the receiver made any express application of the payment made, the court should construe the acts of the parties to determine what application was actually made. See 21 HARV. L. REV. 623. But the real transaction appears to be a purchase of the bonds by those shareholders who had power, and a payment by all shareholders of 82 per cent of the first assessment. There is nothing denying the comptroller's power to withdraw an assessment as to that part unpaid. See U. S. REV. STAT. § 5151. The policy of the statute clearly favors such power. The comptroller has power to make successive assessments. *Studebaker v. Perry*, 184 U. S. 258. But the total liability of shareholders is limited to 100 per cent. See U. S. REV. STAT. § 5151. Therefore, an assessment of 49 per cent, after 82 per cent of the total liability was paid, was excessive and void.

**COLOR OF TITLE — WHAT DIVESTS COLOR OF TITLE.** — The owner of vacant land conveyed it to plaintiff by a valid warranty deed. Plaintiff was delin-



quent in payment of taxes, and a tax deed was issued to the county, which conveyed to defendant's grantor. Thereafter plaintiff paid all the taxes and after seven years brought suit to clear his title. By statute, one "having color of title made in good faith to vacant and unoccupied lands" shall, having paid taxes seven years, be deemed the owner (1915 REM. CODE, [Wash.] § 789). *Held*, that plaintiff had color of title, and judgment should therefore be in his favor. *Bassett v. City of Spokane*, 168 Pac. 478 (Wash.).

It seems settled that if the writing under which color of title is claimed is adjudicated void in an action to which the claimant is a party, he no longer holds under color of title within the meaning of the short limitation statutes. *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585; *Sholl v. German Coal Co.*, 139 Ill. 21, 28 N. E. 748. It has also been held that color of title is divested by a sale of the land on execution. *Wilson v. Brown*, 134 N. C. 400, 46 S. E. 762. But where the claimant continues to hold the land believing the sale invalid, it is not divested. *Gaines v. Saunders*, 87 Mo. 557. The theory underlying these decisions would seem to be that color of title remains, but that an adjudication or sheriff's sale is *prima facie* evidence that the claimant does not hold in good faith. The test of good faith is subjective. *Lee v. O'Quinn*, 103 Ga. 355, 30 S. E. 356. Therefore the *prima facie* case made out by the decree or sale is rebuttable by any proof that the claimant believed his deed was still valid, however unreasonably. *Gaines v. Saunders*, *supra*. In the *May* case, where the decision was expressly based on want of good faith, the court seems to have thought the decree made out a conclusive case, but as there was no rebutting evidence of good faith it cannot be taken as an authority to that effect. *May v. Sutherlin*, *supra*. So the distinction made in the principal case between *in personam* adjudications of title and judgments *in rem*, which seems to have no basis on principle, is not borne out by the decisions. In the principal case good faith was not in issue, but if it had been, then under this view plaintiff must have affirmatively proved good faith in order to prevail.

CONFLICT OF LAW — EQUITY — ORDERING AFFIRMATIVE ACTION OUTSIDE THE JURISDICTION TO PREVENT A TORT WITHIN. — In a case involving the respective rights of the plaintiff and the defendant to water from an interstate stream, the United States District Court of Idaho ordered the defendant to install automatic measuring devices in its irrigation ditches in Nevada, and decreed that the plaintiff should have the right perpetually to go upon the defendant's land in Nevada for the purpose of inspecting them. An appeal was taken to the Circuit Court of Appeals. *Held*, that the action of the District Court be sustained. *Vineyard Land and Stock Co. v. Twin Falls Salmon River Land and Water Co.*, 245 Fed. 9.

For a discussion of this case, see Notes, page 647.

CONSIDERATION — WHAT CONSTITUTES CONSIDERATION — PERFORMANCE OF A PREEXISTING CONTRACT. — The daughter of the defendant was engaged to be married. The defendant promised her intended husband, that, if the marriage took place, he would pay his daughter an annuity. They were married, and the assignee of the husband and wife sued on the promise. *Held*, that he may recover. *De Cicco v. Sweitzer*, 58 N. Y. L. J. 633.

The finding by the lower court of an intent to contract removes the possibility of a conditional gift. See *Kirksey v. Kirksey*, 8 Ala. 131. The beneficiary has the right to sue in New York. *Lawrence v. Fox*, 20 N. Y. 268; *Buchanan v. Tilden*, 158 N. Y. 109, 52 N. E. 724. The question in the case is the validity of the consideration. An act which the promisee is legally bound to perform is not valid consideration for the promise of a third person. *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872. But see Samuel Williston, "Consideration in Bilateral Contracts," 27 HARV. L. REV. 503. However, in the present case the act

called for, marriage, was the joint act of the promisee and beneficiary. Although each was bound to the other, together they were not bound to anyone. In marrying, they performed an act which no one had a legal right to call upon them to do, and which, therefore, was good consideration. It is immaterial that the consideration did not move from the promisee. *Rector, etc. of St. Mark's v. Teed*, 120 N. Y. 583, 24 N. E. 1014; *West Yorkshire Darracq Agency v. Coleridge*, [1911] 2 K. B. 326. There was, therefore, no necessity to make the parties out joint promisees, as the court attempted to do.

**CONSTITUTIONAL LAW — CONSTRUCTION OF CONSTITUTION — SCOPE OF HOME RULE AMENDMENT.** — The Ohio constitution provides that "every white male citizen of the United States, of the age of twenty-one years . . . shall have the qualification of an elector, and be entitled to vote at all elections." (OHIO CONSTITUTION, Article V, § 1.) A constitutional amendment provides that "municipalities shall have authority to exercise all powers of local self government." (OHIO CONSTITUTION, Article XVIII, § 3.) A city charter gave women the right to vote for municipal officers. *Held*, that the provision of the charter is valid. *State ex rel. Taylor v. French*, 117 N. E. 173 (Ohio).

It has frequently been held that constitutional provisions concerning the elective franchise apply only to offices created by the constitution. *Hanna v. Young*, 84 Md. 179, 35 Atl. 674; *State v. Hanson*, 80 Neb. 724, 115 N. W. 294; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276. *Contra*, *Coggeshall v. City of Des Moines*, 138 Iowa, 730; 117 N. W. 309; *Allison v. Blake*, 57 N. J. L. 6, 29 Atl. 417. *Cf. State v. Halliday*, 61 Ohio St. 171, 55 N. E. 175. However, the court expressly disclaims resting its decision on that ground. The decision must then rest on the ground that the constitutional provision is not intended as an exhaustive statement of who may vote, though this does not clearly appear. If that doctrine is sound, it is not perceived what limit there would be upon the legislature enacting state-wide woman's suffrage. Both authority and sound reason would seem opposed to such a construction of the constitution. *McCafferty v. Guyer*, 59 Pa. 109. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 902. It is generally held that the legislature may confer upon women the right to vote for members of a school board. *State v. Board of Election*, 9 Ohio C. C. 134, affirmed by a divided court, in 54 Ohio St. 631, 47 N. E. 1114; *Belles v. Burr*, 76 Mich. 1; *Wheeler v. Brady*, 15 Kan. 26. But this is because of the extensive powers given to the legislature in school matters, and goes no further. See *State v. Board of Elections*, *supra*, 138; *State v. Adams*, 58 Ohio St. 612, 616, 51 N. E. 135, 136. *Cf. Coffin v. Election Commissioners*, 97 Mich. 188, 56 N. W. 567. One more possible basis upon which the decision might rest is, that in so far as they conflict, the Home Rule amendment repeals the original provision of the constitution. It is improbable that this was the intent of the people in adopting the amendment. In 1912, the people of Ohio rejected state-wide woman's suffrage by a vote of 336,000 to 249,000. It was again defeated in 1914 by a majority of 189,000. In 1917, a law giving the franchise to women in presidential elections was submitted to a referendum and defeated. Further, if this is a sound construction of the amendment, a city might extend the suffrage to lunatics, criminals, and minors, and conversely it might confine it to women. If the word "male" were stricken from the constitution, a city might still restrict the suffrage in municipal elections to men. Such a result can hardly have been contemplated. The decision is difficult to support either on principle or authority.

**CONSTITUTIONAL LAW — DUE PROCESS OF LAW — FINALITY OF ORDER OF PUBLIC SERVICE COMMISSION.** — The Public Service Commission of New York, after a hearing at which testimony was introduced and the case was argued, ordered a gas company to provide gas service to an outlying district. The lower



state court, acting on the theory that it had the authority to review generally the reasonableness of such orders, annulled the order. The Court of Appeals reversed the decision, and the case came before the Supreme Court of the United States on the assignment of error that the order of the commission deprived the gas company of property without due process of law. *Held*, that there was no power in the court to substitute its own judgment for the determination of the Public Service Commission as to what was reasonable under the circumstances of the case. *People ex rel. New York Gas Co. v. McCall*, 38 Sup. Ct. Rep. 122.

For a discussion of this case see Notes, page 644.

**CORPORATIONS — STOCKHOLDERS; RIGHTS INCIDENT TO MEMBERSHIP — UNREASONABLE REFUSAL OF A DIRECTOR TO CONSENT TO STOCK TRANSFER.** — The articles of association provided that "no share shall be transferred without the consent of the directors." The regulations stipulated that "the directors . . . determine the quorum" and that "in case of an equality of votes the chairman shall have a second or casting vote." There were two directors; the one recognized as chairman executed a transfer of shares to the plaintiff, and called a director's meeting to sanction the transfer and order the plaintiff's name to be entered on the register. The other director refusing to attend, no meeting could be had. Plaintiff filed motion to compel the company to enter the transfer on the register. *Held*, that the company must enter the transfer. *In re Copal Varnish Co., Ltd.* (1917) 2 Ch. 349.

By-laws attempting to restrict the right to transfer stock are generally considered invalid. But such right may be limited by statute, or by restrictions incorporated in the charter. *Kretzer v. Cole Bros. Co.*, 181 S. W. 1066 (Mo.); *Steele v. Farmers', etc. Telephone Ass'n*, 95 Kan. 580, 148 Pac. 661. See 2 COOK, CORPORATIONS, 7 ed., §§ 408, 622 d. See also 28 HARV. L. REV. 705. It has been considered, however, that a clause in a charter prohibiting transfer without the consent of the board of directors is invalid. See *Johnston v. Laflin*, 103 U. S. 800, 803; N. Y. OPINIONS OF ATTORNEY-GENERALS, 404, 405. A statute, providing specially that the agreement of association shall state "the restrictions, if any, imposed upon the transfer" of stock, has been held to contemplate a restriction to the effect that no "shares . . . shall be . . . transferred without the consent of three-fourths of the capital stock of the corporation." *Longyear v. Hardman*, 219 Mass. 405, 106 N. E. 1012. In England such restrictions are allowed when incorporated into the articles of association. See *In re Joint Stock Discount Co.*, L. R. 2 Ch. App. 16. But even then, as is illustrated by the principal case, the power cannot be exercised capriciously. *Shortridge v. Bosanquet*, 16 Beav. 84; *Moffatt v. Farquhar*, L. R. 7 Ch. D. 591 (1878).

**EQUITY — PROCEDURE — MEANING OF "PARTIES INTERESTED."** — Testator devised property in trust, to pay a certain annual sum out of the income to his son and the son's wife, and the survivor for life, the trust to terminate on the death of the survivor, and the property to vest in the son's issue, if any, or in the testator's right heirs. Trustees were given power of sale. Executor, who was also a trustee, filed a petition for the sale of land in preference to personalty for the payment of debts of testator, citing only the trustees, who answered, joining in the petition. Land was then sold. Statute requires that in such a proceeding "all parties interested" should be cited (1906, MISS. CODE, § 2079). The son and his wife now petition, with substituted trustees, to have the decree and conveyance set aside. *Held*, that the petition be denied. *Brickell v. Lightcap*, 76 So. 489 (Miss.).

The view of the court is that the trustees are the only parties interested, and that the beneficiaries and contingent devisees are sufficiently represented by them. But it seems clear that the beneficiaries at least are directly inter-

ested in the result of the suit, as being the beneficial owners of the property involved, and hence should have been made parties to the proceeding. *McIlroy v. Allsop*, 45 Miss. 365; *Cotton v. Coit*, 88 Tex. 414, 31 S. W. 106. And the statute governing would seem to include equitable owners in the class of parties interested. *Atkins v. Billings*, 72 Ill. 597; *Meek v. Spracher*, 87 Va. 162, 12 S. E. 397. For the trustees can hardly have more than legal title to the life estate, and hence cannot be considered sole parties in interest, to the exclusion of the present petitioners. *Luguire v. Lee*, 121 Ga. 624, 49 S. E. 834; *Brown v. Richter*, 25 App. Div. 239, 49 N. Y. Supp. 368. On the question as to the contingent devisees, there is more basis for the position of the court on the authorities. *Barbour v. Whitlock*, 4 T. B. Mon. (Ky.) 180; *Baylor v. Dejar-nelle*, 13 Gratt. (Va.) 152. *Contra*, *McDonald v. Bayard Savings Bank*, 123 Iowa 413, 98 N. W. 1025.

**ESTOPPEL — SILENCE — REPRESENTATION OF LAW.** — The assignee of a mortgage met the mortgagor before time for redemption had expired. The mortgagor made it clear to the assignee that he would redeem, and that he believed the time for redemption had been extended by reason of pending litigation concerning the mortgaged premises. The assignee, knowing that the litigation did not extend the time, said, "Yes," without further comment. The mortgagor acted upon his belief as expressed. *Held*, that the assignee is estopped to deny that time for redemption had been extended. *Fenderson v. Fenderson*, 102 Atl. 69 (Me.).

It is well settled that mere silence, a failure to assert one's rights, may give rise to an equitable estoppel. *Pickard v. Sears*, 6 A. & E. 469; *Main v. Brown*, 56 Conn. 345, 15 Atl. 743. See 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 818; BIGELOW, ESTOPPEL, 6 ed., 648. See also 30 HARV. L. REV. 647. An intent to mislead or defraud is not necessary to an estoppel. *Rogers v. Portland & Brunswick St. Ry.*, 100 Me. 86, 60 Atl. 713. It is generally stated as the settled rule that estoppel cannot be founded on a misrepresentation of law. *Mason v. Harpers Ferry Bridge Co.*, 28 W. Va. 639; *Whitwell v. Winslow*, 134 Mass. 343. The basis of this rule is either that everyone is presumed to know the law, or that a statement of law can be only an opinion. See EWART, ESTOPPEL, 72 *et seq.* However, an exception to the rule is recognized when the person making the statement is in a particularly good position to know the law. *Seward v. Johnson*, 65 Mo. 102. *A fortiori*, a further exception to the general rule seems proper where, as in this case, the misrepresentation by a person who knows the law is made to a person clearly not knowing the law. A presumption of knowledge where there is known ignorance is unjustified. A statement of law should not be called an opinion when made and acted upon as a fact. See EWART, ESTOPPEL, 72 *et seq.*

**EVIDENCE — PAROL EVIDENCE — ADMISSIBILITY OF EVIDENCE AS TO A COLLATERAL AGREEMENT CONCERNING A NEGOTIABLE INSTRUMENT.** — Indorsee sued the indorser on a negotiable note. The defendant sought to put in evidence an agreement made by the indorsee to stamp above the indorsement, "Without recourse." *Held*, that the evidence was not admissible to contradict the contract as evidenced by the blank indorsement. *Lake Harriet State Bank, v. Miller*, 164 N. W. 989 (Minn.).

There seem to be four views as to when extrinsic evidence of a collateral agreement is admissible, in a suit between the parties to a negotiable instrument. One view would allow it only when recovery would result in circuity of action. See 2 AMES, CASES ON BILLS AND NOTES, 804. Another view would not admit extrinsic evidence when it is offered to change one of the express terms of the instrument, but would admit it when it is offered to change one of the implied terms, *i.e.*, a term attached to the instrument by operation of



law. *Coughenour v. Suhre*, 71 Pa. 462. See 4 WIGMORE, EVIDENCE, §§ 2443-2445. The third view applies the rule to negotiable instruments that is usually applied to collateral agreements concerning other writings, and admits extrinsic evidence on the theory that it does not alter the instrument but shows that the instrument was never enforceable. *Burke v. Dulaney*, 153 U. S. 228. The fourth view differs from the third in that it regards the instrument as enforceable but subject to the defense arising from the collateral agreement, extrinsic evidence of this defense being admitted as is extrinsic evidence of the defense, fraud. Cf. *American National Bank v. Cruger*, 44 S. W. 1057 (Tex. Civ. App.). The principal case illustrates the hardship resulting from strict conformation to the parol-evidence rule.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — POSSESSION OF GOODS OTHER THAN THOSE STOLEN. — The two defendants were indicted for larceny of jewelry to the value of \$5,000. Evidence was admitted that, when arrested two months after the larceny charged, the defendants had in their possession jewelry to the value of \$2,300, but none of the articles covered by the indictment. It appeared that defendants had no visible means of support. *Held*, that the evidence was properly admitted. *Commonwealth v. Coyne*, 117 N. E. 337 (Mass.).

Any evidence having probative value is admissible, unless it falls within some rule of exclusion. See 1 WIGMORE, EVIDENCE, § 10. See also J. B. Thayer, "Presumptions and the Law of Evidence," 3 HARV. L. REV. 141, 144. Admissibility is usually a question not of the sufficiency of the evidence, but of its fitness to be considered. See *Commonwealth v. Jeffries*, 89 Mass. 548, 566. See also 1 WIGMORE, EVIDENCE, §§ 28, 29. Logically relevant evidence is sometimes excluded, if its value is only remote. See MCKELVEY, EVIDENCE, 128. The value of the evidence in the principal case, and consequently its admissibility, depends somewhat on the financial condition of the defendant. Under the circumstances shown, it would seem to be admissible. See *Commonwealth v. Mulrey*, 170 Mass. 103, 110, 111, 49 N. E. 91, 94. This evidence does not fall within the rule of exclusion as creating unfair prejudice. See 1 WIGMORE, EVIDENCE, § 193. The decision seems to have the support of authority as well as principle. *Carr v. State*, 84 Ga. 250, 10 S. E. 626. Cf. *Commonwealth v. Montgomery*, 11 Met. (Mass.) 534. But cf. *United States v. Williams*, 168 U. S. 382, 396. See 1 WIGMORE, EVIDENCE, § 154, n.

EXTRADITION — INTERSTATE EXTRADITION UNDER THE UNITED STATES CONSTITUTION — FUGITIVE FROM JUSTICE: PRISONER BROUGHT FROM REQUISITIONING STATE BY EXTRADITION PROCEEDINGS. — Petitioner was arrested in Texas, charged with a crime against that state. Before trial, he was extradited to California on requisition from the governor. The California charge was not pressed; and the governor of California, acting on requisition from Texas, issued a warrant to extradite him to Texas. He applies for a writ of *habeas corpus*. *Held*, that the prisoner be discharged. *In re Whittington*, 167 Pac. 404 (Cal.).

Since there is no state statute covering the question, extradition is governed solely by the provisions of the federal constitution. *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. 825; *In re Kopel*, 148 Fed. 505. The Constitution provides only for the surrender of persons who "flee from justice." U. S. CONST. Art. IV, § 2. *State v. Hall*, 115 N. C. 811, 20 S. E. 729; *People ex rel. Genna v. McLaughlin*, 145 App. Div. 513, 130 N. Y. Supp. 458. It is the function of the executive to deal with the problems of extradition, and hence to determine whether the person requisitioned is a fugitive. *Ex parte Reggel*, 114 U. S. 642; *Katyuga v. Cosgrove*, 67 N. J. L. 213, 50 Atl. 679. But the courts have jurisdiction to pass on the validity of the imprisonment, and the finding

of the governor is not conclusive, but may be treated by the court much as the finding of a jury. *Bruce v. Rayner*, 124 Fed. 481; *Robb v. Connolly*, 111 U. S. 624. Wherever the accused leaves the state of his own free will, he is conclusively regarded as a fugitive from justice, and his real motive for leaving will not be inquired into. *People ex rel. Draper v. Pinkerton*, 17 Hun (N. Y.) 199. Even where he was extradited into the state, he may yet be treated as a fugitive. *Hackney v. Welsh*, 107 Ind. 253, 8 N. E. 141. But it is difficult to conceive of a man, taken from a state by the arm of the law and continuously in custody, as a fugitive from that state. Hence the result reached by the court would seem to be sound. The case raises the same difficulty as the case of the extradition of a person for a crime which he committed, without being physically present in the state. *Ex parte Hoffstot*, 180 Fed. 240; *Wilcox v. Nolze*, 34 Ohio St. 520. The best remedy in such cases would seem to be state legislation. See 21 HARV. L. REV. 224.

**INJUNCTION — TRADE UNIONS — UNLAWFUL MEANS.** — The plaintiff, a mine owner, employed his men under a contract that they would not join a union while in his employ. The employment was terminable at will. The defendants, officers of the United Mine Workers, were endeavoring to induce plaintiff's employees to agree to join their union. *Held*, defendants are enjoined from further approaching plaintiff's employees inasmuch as they are inducing a breach of contract. *Hitchman Coal & Coke Co. v. Mitchell et al.*, 38 Sup. Ct. Rep. 65.

For a discussion of this case see Notes, p. 648.

**INSURANCE — LIABILITY INSURANCE — RIGHT OF THE INSURER TO CONTROL LITIGATION.** — Under a policy insuring plaintiff against accidents in the operation of his automobile, but imposing no obligation on the company to settle out of court, after the insured had been sued the insurer refused to make a settlement for a sum less than the limit of the policy unless the insured contributed to the settlement, threatening to allow the case to go to trial, and subject the insured to the hazard of having a verdict against him in excess of the limit of the policy. *Held*, plaintiff cannot recover money so paid. *Levin v. New England Casualty Co.*, 166 N. Y. Supp. 1055.

The policy commits to the insurer the decision whether to settle or defend. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574, 43 Atl. 503; *C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co.*, 244 Pa. 286, 90 Atl. 653. But it should not be allowed to exercise this power *mala fides*, or for purposes of extortion. See *New Orleans & C. R. R. v. Casualty Co.*, 114 La. 154, 159, 38 So. 89, 92; *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 54, 155 N. W. 1081, 1087. The facts of the main case suggest that the defendant was not acting in good faith. Therefore recovery should have been allowed under the principles governing a case of money received and held without consideration. See POLLOCK, CONTRACTS (WILLISTON'S WALD'S ed.), 732.

**INSURANCE — RIGHT OF BENEFICIARY — WHETHER CONDITIONS OF RESERVED RIGHT TO CHANGE BENEFICIARY MUST BE STRICTLY COMPLIED WITH — WHETHER DIVORCE ACTS AS REVOCATION.** — The plaintiff was the beneficiary of a life-insurance policy taken out by her husband. The policy had been delivered to her on an oral agreement to pay the premiums, which agreement she fulfilled. The insured had the right to change the beneficiary by delivering the original policy to the insurance company for indorsement. After divorce from the plaintiff, the insured, representing the original as lost, induced the defendant company to issue a new policy. His mother was beneficiary thereunder, and, after his death, recovered thereon. The plaintiff now sues



on the original policy claiming as beneficiary and assignee. *Held*, that plaintiff may recover. *Lloyd v. Royal Union Mutual Life Ins. Co.*, 245 Fed. 162.

It is well established that the beneficiary under an ordinary life-insurance policy has a vested interest. *Mutual Life Ins. Co. v. Allen*, 212 Ill. 134, 72 N. E. 200; *Washington Life Ins. Co. v. Berwald*, 97 Tex. 111, 76 S. W. 442. See 13 HARV. L. REV. 682. Where the insured has reserved the right to change beneficiaries some cases hold that the beneficiary still has a vested right. *Roberts v. N. W. Nat. Life Ins. Co.*, 143 Ga. 780, 85 S. E. 1043; *Holder v. Prudential Ins. Co.*, 77 S. C. 299, 57 S. E. 853. But the beneficiary's vested right can exist only if the parties to the insurance contract intended that it should; and reservation of the right to change beneficiaries shows an obvious intent that no right should vest. *Equitable Life Assurance Soc. v. Stough*, 45 Ind. App. 411, 89 N. E. 612; *Hick v. North Western, etc. Co.*, 166 Iowa 532, 147 N. W. 883. Paying the premiums gave to the beneficiary an equitable lien on the proceeds. *Stockwell v. Mutual Life Ins. Co.*, 140 Cal. 198, 73 Pac. 833. See 17 HARV. L. REV. 203. Divorce, of itself, aside from statutory provisions, does not defeat the beneficiary's right. *Overhiser v. Mutual Life Ins. Co.*, 63 Ohio St. 77. To revoke a trust where the power to do so has been reserved, the stated conditions of revocation must be complied with. *Tudor v. Vail*, 195 Mass. 18, 80 N. E. 590; *Lippincott v. Williams*, 63 N. J. Eq. 130, 51 Atl. 467. On this analogy the right of an insurance-policy beneficiary should not be cut off except through faithful fulfilment of the conditions of revocation. The decisions would seem to uphold such a view, without clearly stating the correct grounds. *Canavan v. J. Hancock Mutual Life Ins. Co.*, 39 Misc. (N. Y.) 782, 81 N. Y. Supp. 304; *Sangunitto v. Goldey*, 88 App. Div. 78, 84 N. Y. Supp. 989. But more than a matter of form was involved. Delivery of a stock certificate to a donee makes him irrevocably *dominus* of the shares and the rights represented by it. *Commonwealth v. Crompton*, 137 Pa. 138. See AMES, CASES ON TRUSTS, 155, 156, n. The same apparently is true in the case of insurance policies. *Harrison v. McCouley*, 1 Md. Ch. 34; *Crittenden v. Phoenix Co.*, 41 Mich. 442. On these principles the decision in the principal case appears to be sound.

INTOXICATING LIQUORS — LEGISLATION — CONSTITUTIONALITY: STATUTE PROHIBITING POSSESSION FOR PERSONAL USE. — An act of the legislature of Idaho made it unlawful for any person to have in his possession within certain prohibition districts any intoxicating liquors not obtained under a permit as provided in the act. (1915, IDAHO SESSION LAWS, c. 11.) Plaintiff in error was arrested on the charge of violating this act by having in his possession a bottle of whisky for his own personal use. *Held*, that the act in question was not in conflict with the Fourteenth Amendment. *Crane v. Campbell*, 38 Sup. Ct. Rep. 98.

There have been various decisions to the effect that statutes prohibiting possession for personal use violated state constitutional guarantees. *State v. Williams*, 146 N. C. 618, 61 S. E. 61; *Ex parte Brown*, 38 Tex. Cr. App. 295, 42 S. W. 554. See FREUND, POLICE POWER, §§ 453, 454. The precise point seems never to have come up before under the federal constitution, though there is a strong *dictum* to the effect that a state may prohibit manufacture of intoxicating liquor for personal use. See *Mugler v. Kansas*, 123 U. S. 623, 662. Numerous cases, also, have upheld statutes prohibiting the sale or possession of game during the closed season, even though it was imported from another jurisdiction where it had been legally taken. *Silz v. Hesterberg*, 211 U. S. 31; *Magner v. People*, 97 Ill. 320; *Smith v. State*, 155 Ind. 611, 58 N. E. 1044. *Contra*, *People v. Buffalo Fish Co.*, 164 N. Y. 93, 58 N. E. 34. A statute making it a misdemeanor to sell adulterated milk with or without fraudulent intent has likewise been held not a denial of due process. *People v. West*, 106 N. Y. 293,

12 N. E. 610. The decision of the principal case would seem to follow from these authorities. Although a new application of the doctrine of administrative necessity, it does not seem in the light of modern tendencies to be an unwarranted one.

**INTOXICATING LIQUORS — LEGISLATION — VALIDITY OF STATE LEGISLATION UNDER THE WEBB-KENYON LAW.** — By statute, carriers doing business in the state were required to keep a comprehensive record of shipments of liquor. Said record was to be open to inspection by any citizen of the state. Defendant was indicted for a violation of this latter requirement. As a defense it was argued that the statute was void as attempting to regulate interstate commerce. *Held*, that the statute is valid. *Seaboard, etc. R. Co. v. North Carolina*, S. C. U. S., No. 18, October Term, 1917.

The Supreme Court was here called upon to determine the validity of state legislation complementary to the Webb-Kenyon Law of 1913. The theory propounded to sustain such legislative action is that the states have a police power concurrent with, but inferior to, the commerce power of Congress; that it is impliedly the intent of Congress that this police power be forbidden to impose restraint on commerce, save that where uniformity of regulation is not essential; but that the impediment to its operation may be, and in certain cases by the Webb-Kenyon Law has been, removed by congressional action. See *Clark Distilling Co. v. Western, etc. R. Co.*, 242 U. S. 311, 328, 329; *Adams Express Co. v. Kentucky*, 238 U. S. 190, 196-199. But to say that this is not a regulation of interstate commerce, but a mere extension of the police power, where it is obvious that such regulation is in fact accomplished, seems a rather arbitrary classification of governmental powers. To avoid this the following theory has been suggested: The states have concurrent power with congress over all interstate commerce, the latter having precedence. Presumptively there must be no restraint by the states on commerce requiring uniformity of regulation, but express enactment will rebut the presumption. Then the sole question is whether the state regulation is in harmony with the federal. See T. R. Powell, "The Webb-Kenyon Law," 2 So. L. Q. 112, 137. Whatever the theory adopted, the statute in question was reasonably calculated to give effect to the state's power. *State v. Seaboard, etc. R. Co.*, 169 N. C. 295, 84 S. E. 283. Hence the soundness of the decision cannot be seriously questioned.

**LEGACIES — ADEMPMENT — WHETHER ADEEMED BY SUBSEQUENT COVENANT TO PAY AN EQUAL AMOUNT.** — By will, a man left \$30,000 to his wife. Later, by a separation agreement, he promised to pay her \$30,000 if she survived him, and covenanted to secure payment by a legacy. The man died, and the wife now claims as legatee as well as creditor. *Held*, she can recover only as creditor. *Rissmuller v. Balcom*, [1917] 3 WEST. WKLY. REP. 535.

It is generally stated that whether or not a legacy shall be adeemed by a gift or contract is solely a question of the intent of the testator. *Johnson v. McDowell*, 154 Iowa. 38, 134 N. W. 419. It has been pointed out, however, that this statement is not quite accurate, and that the testator's intent must be communicated to and understood by the legatee before the death of the testator. *In re Shields*, [1912] 1 Ch. 591. Where an indebtedness is contracted after making the will, no presumption can arise that the legacy was meant to be satisfaction of the debt. See JARMAN, WILLS, 6 ed., 1172. Nor has the fact that the creditor is the testator's wife any significance. *Fowler v. Fowler*, 3 P. Wms. 353. But extrinsic evidence may be introduced to show it was understood that satisfaction of the legacy was intended. *Allen v. Allen*, 13 S. C. 512; *Richards v. Humphreys*, 15 Pick (Mass.) 133. And such understanding may be sufficiently indicated by such an identity between the provision of the will and



those of the contract, as to make it appear that the latter was intended as a substitute. See *Youngerman v. Youngerman*, 136 Iowa, 488, 493. It would seem, therefore, that the decision in the principal case is sound.

**LIFE ESTATES — CHATTELS PERSONAL — PERSONALTY TO FOLLOW LIMITATIONS OF REALTY.** — Chattels and a fund were bequeathed to trustees to allow the chattels to devolve as heirlooms, and the income of the fund to be received by the persons from time to time in possession, or receipt of the rents and profits of estates which the testator had entailed to his four sons successively in tail male. It was provided that the chattels and the capital of the fund should not vest absolutely in any person in the line of the entail, living at the time of the testator's death, but on the death of any such person should devolve, as to the chattels, "as heirlooms with the estates to the person next in the line of entail," and as to the fund, "with the estates in like manner as if the said sum" had been land of the estates. All four sons survived the testator. Upon the death of the two older sons the third son barred the entail. *Held*, that the third son is entitled to the fund absolutely, but the chattels followed the line of the entail. *In re Fowler*, [1917] 2 Ch. 307.

Under the English authorities a chattel personal can be bequeathed, for life. *In re Tritton*, 6 Morr. Bankr. Cas. 250. Though the theory of the interest that the legatee for life takes is different in the old and the later authorities. *Cf. In re Tritton, supra; Vachel v. Vachel*, 1 Ch. Cas. 129. The former holds that the legatee for life takes the absolute property, subject to an executory devise, for later legatees of the chattel, while the latter holds that the legatee in fee takes the absolute interest subject to a use in the legatee for life. The bequest of a fee tail in a chattel personal, however, gives the legatee an absolute interest. *Foley v. Burnell*, 1 Bro. C. C. 274. Such a result is reached from the fact that the Statute *De Donis*, which created estates of fee tail, applied only to land. See 13 EDW. I, c. 1. See also 2 BLACKSTONE, COMMENTARIES, 113; 1 WASHBURN, REAL PROPERTY, 6 ed., 86. The principal case shows the court construing its way, with the aid of words carefully used by the conveyancer, away from a bequest in fee tail to a bequest for life, thus getting nearer the testator's intent. But on account of a prior decision, the court felt bound to disregard the testator's probable intent, that the chattels should remain with the realty. *Baroness Wesselenyi v. Jamieson*, [1907] A. C. 440.

**RULE AGAINST PERPETUITIES — INTERESTS SUBJECT TO RULE — OPTION TO PURCHASE STOCK.** — An insurance company granted an unlimited option for the purchase of its entire capital stock at par. Stockholders seek to have the option annulled on the ground *inter alia* that it violates the rule against perpetuities. *Held*, that the option is valid. *Kingston et al. v. Home Life Ins. Co.*, 101 Atl. 898 (Del.).

As the rule against perpetuities is aimed to prevent remoteness in the vesting of property interests, contracts are affected by it only in so far as they create such interests. An agreement to sell stock not obtainable on the market raises an equitable right in property because it is generally enforceable in specie. *New England Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432; *Johnson v. Brooks*, 93 N. Y. 337. *Contra, Barton v. DeWolf*, 108 Ill. 195. Possibly equity would deny performance in the present case on the ground of resulting hardship. *Friend v. Lamb*, 152 Pa. 529, 25 Atl. 577; *Chicago, etc. Ry. Co. v. Schoeneman*, 90 Ill. 258. See 4 POMEROY, EQUITY JURISDICTION, 3 ed., § 1405. But assuming this objection to be untenable, is the property right void as violating the rule in question? An unlimited option to purchase land is invalid on this basis. *London, etc. R. Co. v. Gomm*, 20 Ch. D. 562; *Barton v. Thaw*, 246 Pa. 348, 92 Atl. 312. See 18 HARV. L. REV. 379. The contingent transfer of chattels personal is subject to the rule. See GRAY, RULE AGAINST PER-

PETUITIES (3 ed.). § 319. Hence it would seem equally applicable to the present case. This difficulty might be overcome by invoking certain theories that have been applied in land-option cases. Exercising the option is said to cause a conversion which relates back to the grant thereof. *Townley v. Bedwell*, 14 Ves. 591; *Kerr v. Day*, 14 Pa. 112. *Contra*, *Smith v. Loewenstein*, 50 Ohio St. 346, 34 N. E. 159. This is a questionable extension of equitable conversion and is confined to options to purchase the fee contained in leases. By another doctrine an option-holder who is virtually the *dominus* of the property by reason of the attendant circumstances has a power which is a vested interest and not subject to the rule against perpetuities. *Diffenderfer v. Public Schools*, 120 Mo. 447, 25 S. W. 542; *Pollock v. Booth*, 11 R. 9 Eq. 229. *Contra*, *Morrison v. Rossignol*, 5 Cal. 64. See KALES, FUTURE INTERESTS, § 260; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 230.

STATUTE OF FRAUDS — ORAL SALE OF PERSONALTY — PAYMENT BY CHECK. — Plaintiff agreed orally with the defendant to buy cattle and gave his check in full payment of the price. The defendant returned the check without presenting it for payment. The plaintiff sued to recover damages for breach of contract, contending that the Statute of Frauds had been complied with. *Held*, that plaintiff cannot recover. *Bates v. Dwinell*, 164 N. W. 722 (Neb.).

Section 17 of the Statute of Frauds requires that the buyer under an oral contract relating to personalty shall give something in part payment to bind the bargain. It has been held that the check of a buyer, drawn upon a deposit and accepted by the seller, has sufficient money value to satisfy the statute. *McLure v. Sherman*, 70 Fed. 190. This would seem wrong. If bare acceptance of a check would suffice, subsequent dishonoring could have no effect, as the statute once satisfied, remains so. Yet in such a case the court held that the statute was not satisfied. *Hessberg v. Welsh*, 147 N. Y. Supp. 44. If the paper is paid, undoubtedly the transaction is within the statute. *Hunter v. Wetsell*, 84 N. Y. 549. Otherwise, such payment is conditional or a means of obtaining money, rather than the absolute payment required. *Groomer v. McMillan*, 143 Mo. App. 612, 128 S. W. 285. See WILLISTON, SALES, § 98. The principal case adheres strictly to the spirit of the statute and renders more certain a point upon which the authority is scant.

WAR — CONTRACTS BETWEEN CITIZENS OF BELLIGERENT COUNTRIES — DISSOLUTION. — A charter-party for five years between an English company and a Dutch corporation, all of whose shares were held by Germans, and whose directors were Germans resident in Holland and controlled by a supervisory committee of Germans, provided that in case of war the charterers and (or) owners should have the option of suspending the contract during hostilities. On the outbreak of war the Dutch company gave notice of its election to suspend the contract for the duration of the war. The English company petitioned for a decree of dissolution. *Held*, that the charter-party be dissolved. *Clapham S. S. Co. v. Handels-en-Transport-Maatschappij Vulcaan*, [1917] 2 K. B. 639.

For a discussion of this case, see Notes, page 643.

WILLS — CONSTRUCTION — TRUST OR ABSOLUTE GIFT — AVOIDING RULE OF MORICE v. THE BISHOP OF DURHAM. — A testator left the residue of his property in trust for various purposes, the last share of the income thereof to be paid to B. "or to any other person or persons whomsoever, as the trustee for the time being in the uncontrolled absolute discretion or pleasure of said trustee shall see fit." *Held*, that the trustee takes this share beneficially. *Norman v. Prince*, 101 Atl. 126 (R. I.).

It seems reasonably clear that the testator intended to give the trustee such complete dominion over this share as amounts to the beneficial ownership



thereof. See *Ellis v. Selby*, 1 Myl. & Cr. 286, 299. And certainly the fulfillment of the intent of the testator is the final aim of the construction of a will. See *Davison v. Wyman*, 214 Mass. 192, 194, 100 N. E. 1105, 1106. Yet the decision in the principal case is opposed to a long line of cases construing similar provisions. Thus courts quite uniformly have held that the use of the words "on trust" in itself sufficiently establishes an intent to create a trust. *Buckle v. Bristol*, 10 Jur. N. S. 1095; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Haskell v. Staples*, 100 Atl. 148 (Me.). Similarly when property is left to a legatee designated by the name of executor or trustee, "to be disposed of as he thinks best," or words of similar effect, it is generally held that the executor or trustee does not take beneficially. *Ellis v. Selby*, 1 Myl. & Cr. 286; *Fowler v. Garlike*, 1 Russ. & M. 232; *Vezev v. Jamson*, 1 Sim. & S. 69; *Balfe v. Halpenny*, [1904] 1 I. R. 486. If in addition to the phrase "on trust," or the description as "trustee," a separate legacy is given to the donee, courts consider the evidence practically conclusive of an intent to create a trust. *Davison v. Wyman*, 214 Mass. 192, 100 N. E. 1105; *Haskell v. Staples*, *supra*; *Balfe v. Halpenny*, *supra*. *Contra*, *Gibbs v. Rumsey*, 2 V. & B. 294; *Ralston v. Telfair*, 17 N. C. 255. In all of the later cases the courts profess to be carrying out the intent of the testator. In fact, however, set judicial construction of these oft-recurring phrases have developed in some courts and find their way into the later decisions. The result is that dispositions like that in the principal case are unnecessarily thrust within the rule of *Morice v. The Bishop of Durham*; the intended trust fails for indefiniteness and the intent of the testator is completely and needlessly thwarted. The principal case, therefore, is notable for its freedom from the constraint of decisions resting on the technicality of an earlier day, and for the intentional avoidance by the court of the unsatisfactory doctrine of *Morice v. The Bishop of Durham*. See J. B. Ames, "The Failure of the Tilden Trust," 5 HARV. L. REV. 389; A. W. Scott, "Control of Property by the Dead," 56 U. of Pa. L. REV. 527, 538, et seq.

## BOOK REVIEWS

THE LAW OF CONVERSION. By Renzo D. Bowers. Boston: Little, Brown, and Company. 1917. pp. lx, 583.

Mr. Bowers, it would seem, has attempted the impossible. A satisfactory treatise on that peculiarly English development, the law governing liability for conversion of chattels, cannot be written without reference to the English cases. The author, it is true, has not attempted to treat the subject historically. His aim is to produce a practical American law book. Somewhere between its covers there are cited a large number (more than 6000, the author tells us) of the American cases relating to its subject matter; and very many of these cases are summarized; and copious extracts from many opinions are given. One may, by the use of a rather comprehensive index or of the table of contents, find cases on most of the specific questions relating to conversion on which the courts of this country have had occasion to pass. It is, in this sense, a practical American law book. But there is little or no analysis of the principles underlying the subject. Why is it that one man may force another who has intermeddled with his property to buy it? How far is the law of conversion a matter of procedure, and how far of substantive law? On these matters the book throws little light. The author simply tells us that, "it is said," thus and so, and that, "on the other hand it is said," contrariwise. Do not the encyclopedias and digests do as much? AUSTIN W. SCOTT.

INTRODUCTION TO JURISTIC PSYCHOLOGY. By P. C. Bose. Calcutta: Thacker, Spink, and Company.

The idea of Mr. Bose's book is admirable. It is becoming yearly more evident that in the formulation of juristic theories full account must be taken of the advance of psychological science. We have too little realized how there lies implicitly in the theories of jurisprudence some theory as to human nature of Bentham, of Jhering; even of Duguit this is almost startlingly the case. Nor is it less true of the psychology of law in action. Criminology has been little less than revolutionized by the scientific analysis of character. No theories of procedure can be adequate which do not take account of what is known of perception and memory, of confession and the unconscious mind. It is, indeed, hardly too much to say, that the apparatus of law in the future will demand its psychological experts, not less surely than it demands today its medical and technical witnesses.

A book which should sum up the present stage of knowledge, and should indicate the substance of things hoped for, is greatly to be desired. Unfortunately it is with an entirely different book that Mr. Bose has provided us. He has, with marvelous industry and patience, culled from literally hundreds of sources quotations with a bearing upon the psychology of law, all of them interesting in themselves, but never at any point so orientated as to give birth on his part to philosophic speculation. Much of his material belongs rather to a textbook on formal psychology than to a treatise of special character. Chapters like those on "Life and Mind" are not only inadequate in themselves, but leave the reader in baffled doubt as to whether Mr. Bose really understands what are the essentials of a psychology of law. Quotation is heaped upon quotation without any visible process of induction. At no place is there any indication as to their source. Modernities, like Freud and Mercier, jostle the antiquated speculations of goodly ecclesiastics, like Archbishop Whately and old-time physiologists, like Carpenter. Tarde and Lombroso are quoted without any indication of their relative value. Tolstoi and J. M. Baldwin, Plowden, and a Mr. J. H. King, all seem to come as equal nourishment to the author's voracious appetite. One title is perhaps as good as another; but it is somewhat humorous to call the book a juristic psychology.

Probably the difficulty of using compositors imperfectly acquainted with the English language accounts for the enormous mass of irritating typographical blunders.

H. J. L.

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INTERNATIONAL CONVENTIONS AND THIRD STATES. A Monograph by Ronald F. Roxburgh. Longmans, Green & Company. 1917. pp. xvi, 119.

This monograph forms one of the series entitled "Contributions to International Law and Diplomacy," edited by Professor Oppenheim of Cambridge University. The monograph was prepared by Mr. Roxburgh, recently Whewell International Law Scholar at Cambridge.

Before the matter of treaties is considered, chapters are given upon third parties and contracts in municipal law, and upon the opinions of publicists. The influence of Roman law interpretations is traced both in state laws and in the opinions of the publicists.

Mr. Roxburgh says that "The practice of states wholly confirms the unanimous view of publicists that a third state cannot incur legal obligation under a treaty to which it is not a party." In support of this he cites the practice of the United States in regard to the observance of the treaties closing the Bosphorus and the Dardanelles. The United States has acquiesced in the exclusion, though affirming that its action is to be regarded as a matter of grace. Here the question may arise whether the formal statements of the United States, disclaiming the obligation to observe the treaty provisions,



outweighs the practice of the United States in observing the rules for many years (page 30). Indeed Mr. Roxburgh's statement on page 95 should be read in connection with this section: "When a state in adopting a new practice makes an express proviso that it does so from motives of convenience or courtesy, this proviso will for a certain time prevent the growth of a conviction of legal duty; but if the practice is continued, and the proviso is not renewed, after lapse of time the proviso will cease to be effective, and a customary rule will grow up."

Mr. Roxburgh in maintaining that if "the treaty infringes the legal rights of a third state, that state is immediately entitled to intervene" (page 32), seems to go further than Professor Oppenheim would sanction, unless the word "intervene" be regarded as equivalent to "take action to maintain a right," or unless there be some *act* by one of the parties to the treaty constituting an actual violation of the right of the third state. Some of the cases mentioned as grounds for intervention seem to be just grounds for action to maintain a right, or even for retaliation, while hardly grounds for intervention in the technical sense.

In the chapter on treaties beneficial to third states there seems to be a tendency to give the policy of neutralization when embodied in treaty a legal standing, even for parties who have not signed the treaties.

Speaking of the Hay-Pauncefote treaty in regard to the Panama Canal, the author says that "it is very probable that in the course of time this treaty will become the basis of a rule of customary international law," even though now under this treaty between two states and under the principle *pacta tertiis nec nocent nec prosunt*, no rights may have accrued to third states.

In order to make the attitude of the United States clear in regard to the Declaration of Paris, it would be necessary to add on page 93 that the President on April 26, 1898, declared that the United States would "adhere to the rules of the Declaration of Paris."

There would be a considerable difference of opinion on the view which Mr. Roxburgh seems to support that a lease of territory by one state to another implies a change in sovereignty which must be recognized by a third state. His contention that the owner of a servitude enjoys a right *in rem*, however, shows the recent tendency.

There is throughout, as always in the use of an analogy, danger in pressing it too far. In using the analogy of treaties and contracts it should be shown that both bind the states parties to them, but that treaties in addition may partake of the nature of legislation as viewed from the obligation of nationals of the states. Legal rights and obligations having treaty sources often give rise to international difficulties through conflict of law. In this brief treatment the field of war and neutrality has scarcely been touched. Nevertheless it is fair to say that whether or not the conclusions of the book are accepted, it is entitled to a place in the series "Contributions to International Law and Diplomacy."

G. G. WILSON.

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ROMAN LAW IN THE MODERN WORLD. By Charles Phineas Sherman. Three Volumes. Boston: The Boston Book Company, 1917. Volume I, History of Roman Law and its descent in English, French, German, Italian, Spanish, and other Modern Law, pp. xxvii, 413. Volume II, Manual of Roman Law illustrated by Anglo-American Law and Modern Codes, pp. xxxii, 496. Volume III, Subject Guides to the Texts of Roman Law, to Modern Codes and Legal Literature; Index to Volumes I-III, pp. 315.

A book is in part, at least, to be measured by its own measure. This work, by one who has for years been a teacher of Roman law, in a school that has been

for many years . . . "a light shining in gross darkness," which is written "for the general reader, the non-professional student, the law student and the law teacher" must be taken seriously and held to a high standard. The first volume, which contains four hundred and thirteen pages, attempts to cover the field of Roman law from its possible origin in Babylon through the monarchy, the early and later republics, the early and later empires, the period of debased popular Roman law, and the modern period following the reception of the Justinian compilation of Roman law in Western Europe. It attempts to give a list of the great Roman jurists and the contribution of each to the law; a list of the great writers and thinkers who worked over the pure Roman law as studied in Western Europe or who attempted to apply its principles to the life that they found about them, together with a statement of the place of each in the history of law; to give a list of the law schools in which Roman law has ever been taught; and to give a detailed account of the history of Roman law in each of the modern states in which it is in any way in force. No matter how well it might be executed, an attempt to compress this mass of information into so small a space must, at best, result in a treatment of the subject in outline, filled in with a list of dates and a few facts under each topic heading. Under such a treatment we have no presentation of the real growth of the Roman law from an historical point of view, no study of its internal development, no idea of its constant striving, while its vitality lasted, to adapt itself to the ever-changing needs of a society that gradually turned from a country town into a world empire, and no discussion of the constant struggle which is apparently just reaching its climax, to adapt the principles of the Roman law to the changed conditions of modern life.

The second volume, which contains four hundred and ninety-six pages, is a manual of Roman law which attempts to set forth "the principles of the Civil law, more especially private law, arranged systematically in the order of a code and illustrated as to their survival from Anglo-American law and the modern Code as copiously as space will permit." The code whose order is taken as a model is the French Civil Code. Now, the French Civil Code was a wonderful piece of work. Under high pressure a working system of law was produced which combined the mass of popular Roman law, Frankish and Norman customary law, pure Roman law, the writings of the French jurists and the Royal ordonnances, into a workable system, and which gave a much-needed uniformity, while it preserved much of the spirit of the old law. But its order has never been regarded as its chief merit, but rather as its great blemish. The clarity of thought, the simplicity of style, and the grasp of essential principles have made the French code great in spite of its order. It is unfortunate that this particular order was selected. One of the immediate results of this selection has been that the great contribution of Roman law to juristic thought — the legal transaction, the juristic act, the act in law — is treated as a topic of minor importance and is placed under obligations *ex contractu*. To this great subject is given but a little over a page — a little more than is devoted to a discussion of *res sacrae*, *res religiosae* and *res sanctae* — a fifth of one per cent of the entire manual.

The third volume of three hundred and fifteen pages is made up of "Subject-guides to the texts of Roman law, to the modern codes and legal literature," a bibliography of Roman law and an index.

The evolution of the law of Rome from the archaic law of a little city-state through the different stages of legal development, up to its ultimate perfection as the world law of a mighty empire is, in one sense, a unique phenomenon. To work out such a law a nation must possess a genius for law and for government. It must have such a geographical position, and it must be so favored by the course of history that it is able to build up and maintain the framework of an efficient administration, and to keep hostile powers at bay on its frontiers



by its armies, and to hold the sea by its navies so that its law can develop without external interferences. Unless these elements coexist its law will be crushed out by the brute force of the physical invader and destroyer on the one hand; or on the other, it will be crushed out by the impact of legal ideas and institutions so far superior to its own that the native product succumbs before the intellectual power of the spiritual invader and destroyer. Only one race besides the Roman has been able to develop its own law, and that is the English. Many kingdoms and empires have flourished and conquered in a material sense for long periods of time; and some, indeed, have endured down to this day, without the ability to develop a native system of law which could resist the alien invisible invader that cannot be stopped by moat or castle, by trench or barrage fire. In France and Germany alike, there was a mass of primitive custom, much like that of England, which in the hands of a race of native legal genius might have developed into a complete and perfected system of law. Neither country possessed that genius. Without lawyers or judges who were technically trained in the native law administered by law tribunals, it remained in a condition of arrested development, while the world grew away from primitive conditions into mediæval; and finally as modern progress began, it yielded the field, vanquished by the law of conquered Rome.

In another sense, therefore, the evolution of Roman law is not unique, and it cannot be understood if it is looked upon as unique. Many of the peculiarities of its development which seem to be most characteristically Roman, when considered without reference to any other system, appear in their true light as universal when considered with reference to the development of other systems. There have been other powers, principalities, and empires besides those of the Roman and the Anglo-American. In many of the Aryan or Semitic peoples we find a development of archaic law which can well be placed by the side of the Twelve Tables. The Code of Hammurabi, compiled eighteen centuries before the Twelve Tables, formed a summing up of the juristic development of Babylon up to that time which, in the hands of a race of legal genius, favored by military success and by continuity of government, might well have served as a starting point for a development of law equal to that of Rome itself. The inability of any one of the states of Babylonia to secure that permanent preponderance which was necessary, in the absence of any ability on their part to co-operate, to secure peace and order, makes its internal history one of civil war, revolution, and counter revolution with a kaleidoscope shifting of political power; and its external history that of one who alternately is conqueror and conquered. Hammurabi's code is therefore not an example of an early step in the evolution of a perfected system of law, but only a case of arrested development, — one out of many. If the Gauls had possessed political capacity equal to their bravery and dash as warriors, if the populace of Carthage had had even a fraction of the spirit of the Barca, or if the Mongol had begun his western raids four hundred years earlier, Roman law, too, might be classed as a case of arrested development.

As each society develops it passes through much the same phases, and life propounds to law much the same problems. If any other society, such as England, were given an opportunity to go through all the stages of development that Rome underwent, the same problems that troubled Roman law would be submitted to it. The fact that Anglo-American law has attempted to solve many of the problems that perplexed Roman law does not in the least prove a conscious or deliberate borrowing or an unconscious influence; nor does the fact that many of the solutions given to similar problems are much the same, prove this. Even if there were no conscious borrowing and no subconscious influence, many of these problems would be solved in much the same manner by each law to which it was submitted. Rome and England alike were Aryan, building on a common foundation of Aryan tradition, having from the first

many common ideas as to the family, property, and social organization. Indeed the wonder is that with so much common tradition and with such temptation on the part of the common law while in its formative period to borrow from the Roman law as a beginning student may sometimes copy from one who is more advanced, the common law kept so aloof, borrowed so little, and regarded the Roman law rather as an example to be rivaled or surpassed by independent endeavor, than as a repository of learning to be copied blindly.

There is one feature in the development of Roman law that is absolutely unique, and that is what Vinogradoff calls the ghost story of the Roman law, — the second life of the Roman law after the death of the body in which it first saw the light. At its resurrection after its long sleep it found a world that lacked historic sense or knowledge and that was ready to yield blind obedience to the written word, — a world that assumed the absolute authority of the Justinian compilations of the law without knowing or caring about the actual growth and origin of the rules and principles contained in the Digest, and which adopted as the first article of its faith the theory that there were no omissions in the Justinian law, that it covered all cases present, past, and future, that it was all-sufficient for another race under a different social organization, and that the only task of the judge was the application of formal dialectic logic as a means of deducing the intention of the legislator from the rules of the statute. But theory cannot change fact, though it may blind our eyes to it. The reception of Roman law was not a reception of Roman life. Western Europe adopted Roman rules of decision. It could not adopt Roman legal relations. The result has been that the same formula which Justinian reenacted is repeated literally, and is thereupon given a different meaning, by its application to a different legal relation. This new legal relation is usually the closest analogy to the Roman legal relation that could be discovered. Sometimes the analogy is very close and sometimes very remote. In either case the Roman name is used and the Roman formula is repeated with the implicit belief that the law must therefore be the same.

In Professor Sherman's manual everything is drawn on a flat background. Historical perspective is lacking. The *jus civile*, the prætor's edict, the writings of the Roman jurists and the imperial constitutions, the writings of the French and German jurists, the modern codes based on the civil law and the Anglo-American law are combined in a mosaic, without regard to time, place, or legal system. This is in part due to the fact that the history of the Roman law which is found in volume one is external, without regard to internal development or history of doctrine, and that volume two presents the analytical side without much regard to historical development. Dates are given, occasionally, it is true, but the book does not bring before us the gradual development of Roman law to meet new social conditions or to respond to the spiritual effect of new ideas. Legal ideas of the common law which resemble those of Roman law are assumed to be the result of deliberate and often of dishonest and unacknowledged borrowing. In fact, this is one of the presuppositions which our author makes of all law, — that whatever resemblance is found, whether in arrangement, doctrine, or result, is due to copying. Assuming this presupposition to be true, the author's classification of England and the United States as civil-law countries is not unnatural. The common-law element is treated as a debasing alloy which prevents these countries from preserving civil law in its purest form. "The Institutes of Justinian are to be best explained as a common source of the fundamental ideas of Anglo-American as well as continental European jurisprudence." An illustration of this tendency of our author is found in the law of the family in Roman law and in Anglo-American law. Each begins in fact with the archaic concept of the family as the legal unit, each runs through its different steps of development, and each concludes with the individualistic theory, in which the idea of the family dissolves into a series of relations



between the various members thereof. Our author, however, regards the Anglo-American law of husband and wife as one of the three most striking illustrations of a reenactment of Roman law in America. Our doctrine of impossibility of performance is treated as identical with the Roman doctrines of *vis major* and *casus fortuitus* and as borrowed directly therefrom. These are examples taken at random. Practically every doctrine of common law or equity to which the most remote analogy can be found in Roman law is treated as a direct and deliberate borrowing from the latter. It may be added that if it is to be assumed that Anglo-American law is a debased form of Roman law, it is but a short step to use the time-honored method of teaching Roman law as proof as strong as holy writ that the case-method of studying common law is fundamentally wrong.

Another presupposition is that Roman law is in most respects the ultimate ideal, the natural law revealed on earth, to which all other law must conform. Only here and there is an exception noted. One of these exceptions is of especial interest. While many of the common-law problems in contract law are problems of universal jurisprudence, which appear in one form or another in every commercial and manufacturing community, the problem of consideration is peculiar to Anglo-American jurisprudence. Every system of law which attempts to enforce any executory informal contracts is puzzled to find a test for determining which to enforce and which to ignore; but only the Anglo-American law has taken consideration as the test; and it is this doctrine of consideration which has seemed to many students of contract law to be the most unfortunate feature of our law. Professor Sherman regards the Roman cause as a partial working out of the doctrine of consideration, — the grub out of which the butterfly of the modern doctrine is to arise. "Modern law has simply completed the evolution of this Roman doctrine by expressly making consideration a requisite for each contract."

The authorities upon which our author relies are many and diverse. Some of them are of value to the student. Ready reference is given to some of the standard French and German works, to specific passages of the Institutes, the Digest, the Code and Gaius, and to specific sections of modern codes. Many of them, on the other hand, are to authorities which of themselves can scarcely be regarded as final. Blackstone is relied upon for the history of the common law; and his admission that any specific doctrine comes from the civil law is regarded as conclusive; Spence is the ultimate authority for the influence of Roman law on Anglo-American law; Robinson for common law and civil law alike, and William's "Institutes of Justinian" for Roman law. In spite of the relatively small amount of English works on Roman law, the bulk of the references other than specific ones to the Institute, Digest, Code, or Gaius are to English works. Some of these are valuable, many are of little or no value; and authorities of great value are omitted altogether.

Fewer are the references to foreign authors, in spite of the enormous bulk of French and German juristic writing. Sins of omission are here more noticeable than sins of commission. For example, the only references under the text on the subject of mistake are to the Institutes, the Digest, Gaius and Robinson's "Elementary Law." Neither the subject guide nor the bibliography gives a hint that Leonhard wrote on mistake. While Bethmann-Hollweg's works on procedure appear in the subject guides and the bibliography, no reference is made to them in the notes to the text on procedure. These examples, selected at random, are characteristic of the annotation of the text. The references, however, are the most valuable portion of the book.

The typographical errors which appear occasionally should not be charged to the author. No one, especially under present conditions, wishes to be held liable for the short-comings of the compositor and the proof reader.

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## TRIAL BY JURY AND THE REFORM OF CIVIL PROCEDURE

IN these days when the demand for a more efficient administration of justice is finding a response as never before in the ranks of the legal profession, when a sympathetic and scientific attempt is being made to simplify procedure in the courts of the several states and of the United States, it is important to consider how far the path is blocked by the provisions in the state and federal constitutions guaranteeing the right to trial by jury.<sup>1</sup> Are these provisions a real obstacle in the path of reform? The answer depends on what is meant by trial by jury.

Perhaps the most striking phenomenon in the history of our procedural law is the gradual evolution of the institution of trial by jury. The jury as we know it today is very different from the Frankish and Norman inquisition, out of which our modern jury has been slowly evolved through the centuries of its "great and strange career."<sup>2</sup> It is different from the assizes of Henry II., that great reformer of procedural law. It is different from the

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<sup>1</sup> It is not the purpose of the writer to discuss the right to trial by jury in criminal actions, nor to consider to what kinds of civil actions the constitutional guaranty extends. Nor will any attempt be here made to discuss the much mooted question of the value of the institution of trial by jury in civil cases. For a discussion of this question, see 3 BL. COMM. \*379, \*385; Second Report of the Common Law Commissioners, 1853; ERLE, *THE JURY LAWS*; *THE FEDERALIST*, No. LXXXIII; FORSYTH, *HISTORY OF TRIAL BY JURY*, chap. 18; Miller, "The System of Trial by Jury," 21 AMER. LAW REV. 859. As to the present English practice, see R. S. C., Order 36, rules 2-9.

<sup>2</sup> THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW*, chaps. 2-4.



trial by jury known to Lord Coke and to the early American colonists who carried to a New World the principles of English jurisprudence.<sup>3</sup> "To suppose," says Edmund Burke, "that juries are something innate in the Constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor is a weak fancy, supported neither by precedent nor by reason."<sup>4</sup> In England there has been a wonderfully steady and constant development of trial by jury from the Conquest to the present day. In this country surely it was not, by the adoption of our constitutions, suddenly congealed in the form in which it happened to exist at the moment of their adoption. The procedure of the first half of the seventeenth century or of the second half of the eighteenth century surely was not "fastened upon the American jurisprudence like a strait-jacket, only to be unloosed by constitutional amendment."<sup>5</sup> The common-law practice described so painstakingly by the learned Mr. Tidd surely did not bodily become a part of the organic law of the United States.

The state constitutions usually contain a general provision that "the right to trial by jury shall remain inviolate," or that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate."<sup>6</sup> In the federal and territorial courts the right to trial by jury in civil cases is guaranteed by the Seventh Amendment to the federal constitution which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law." Since the first ten amendments were intended as limitations on the power of the federal government, the Seventh Amendment does not extend to

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<sup>3</sup> In the seventeenth century the jurors still were expected to decide on their own knowledge of the facts and not merely upon the evidence. THAYER, EVIDENCE, 170-74.

In the early colonial legislation we see recognition of the function of jurors as witnesses. "It is very requisite that part of the jury, at least, come from [the neighborhood where the fact was committed] who by reason of their near acquaintance with the business may give information of divers circumstances to the rest of the jury." 2 HENING'S VA. STAT. L. 63.

<sup>4</sup> BURKE, WORKS (3 ed.), VII, 115.

<sup>5</sup> See *Twining v. United States*, 211 U. S. 78, 101.

<sup>6</sup> See a collection of the various constitutional provisions in the Report of the Board of Statutory Consolidation, New York, 1912, 56-82; also in THOMPSON, TRIALS (2 ed.), § 2226.

the state courts. It does not require trial by jury in an action brought in the state courts, even though the action is based on a federal statute, and though the statute provides that the action if brought in a state court shall not be removed to a federal court.<sup>7</sup>

Now what is this trial by jury, the right to which was so highly prized by our ancestors as to be put beyond the power of the legislature to abolish? The constitutions do not define it. Its meaning must be ascertained by a resort to history.

Two propositions are fundamental:

First. Whatever was an incident or characteristic of trial by jury in a particular jurisdiction at the time of the adoption of the constitutional guaranty in that jurisdiction is not thereby abolished. In determining what is meant by trial by jury under the Seventh Amendment, inasmuch as the practice was different in the different colonies,<sup>8</sup> the federal courts look to the common law of England rather than to the law of any particular colony; and incidents of trial by jury, known in England at the time of the adoption of the Seventh Amendment, are not done away with by its adoption.<sup>9</sup>

Second. Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form.<sup>10</sup>

<sup>7</sup> *Minn. & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211; *St. Louis & San Fran. R. R. Co. v. Brown*, 241 U. S. 223; *Ches. & Ohio Ry. v. Carnahan*, 241 U. S. 241.

<sup>8</sup> THE FEDERALIST, No. LXXXIII; Reinsch, "The English Common Law in the Early American Colonies," 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 367.

<sup>9</sup> *Thompson v. Utah*, 170 U. S. 343, 349; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Maxwell v. Dow*, 176 U. S. 581.

<sup>10</sup> "The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters



It has, indeed, been contended that no change is admissible unless it can be demonstrated that the change tends necessarily the better to preserve the jury, and that it is not enough that it does not tend necessarily to destroy it.<sup>11</sup> This, it is submitted, is not the proper attitude in which to approach the constitutional question. A great chief justice of Massachusetts, speaking of the provision as to trial by jury in the constitution of that commonwealth, wisely said: "I think we are bound to examine it in no nice, criticising spirit, but to take the broadest and most liberal view of it, with a reverential regard to the great objects and purposes of its founders."<sup>12</sup>

An examination of the conception of trial by jury in our Anglo-American system shows that certain elements have long been regarded as of its essence.

I. *Number of jurors.* The term "jury," it is said, connotes a body of twelve, no more and no less. Learned judges have indeed sometimes permitted themselves to say that Magna Charta guaranteed the right to trial by twelve jurors.<sup>13</sup> But this is of course inaccurate; the right to trial by a jury of twelve or of any other number was not guaranteed by the Great Charter.<sup>14</sup> At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number.<sup>15</sup> But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence.<sup>16</sup> It is not strange,

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of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law." *Walker v. Southern Pac. R. R.*, 165 U. S. 593, 596.

<sup>11</sup> Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 381. See also Hackett, "Right to Direct a Verdict," 24 YALE L. J. 127.

<sup>12</sup> Shaw, C. J., in *Comm. v. Anthes*, 5 Gray (Mass.), 185, 222.

<sup>13</sup> See *Thompson v. Utah*, 170 U. S. 343, 349. See also BAC. ABR., tit. Juries; HAWLES, ENGLISHMAN'S RIGHT, 4.

<sup>14</sup> McKECHNIE, *MAGNA CHARTA* (2 ed.), 134-38, 375-82.

<sup>15</sup> THAYER, *EVIDENCE*, 85.

<sup>16</sup> DUNCOMB, *TRIALS PER PAIS* (8 ed.), 92; THAYER, *EVIDENCE*, 85-90. The importance of the number is dwelt upon by Lord Coke, who says: "And it seemeth to me that the law in this case delighteth herself in the number of 12 . . . and that number of twelve is much respected in Holy Writ, as 12 apostles, 12 stones, 12 tribes,

therefore, to find that the very first of our state statutes to be held unconstitutional was a New Jersey statute providing for a jury of six, which, in 1780, was held by the Supreme Court of that state to violate the constitutional provision that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever."<sup>17</sup> This idea that the requirement of twelve persons on the jury is of the essence has been frequently affirmed.<sup>18</sup> But in several states the constitutions have been amended 'so as to permit of juries of less than twelve.<sup>19</sup>

II. *Unanimity*. And next it is held that a unanimous concurrence by the jurors in the verdict is an essential of trial by jury. There is no such requirement in other systems of law than the Anglo-American system. In early times there was no such requirement in the English law. The judges occasionally took the verdict of eleven, and imprisoned or otherwise punished the obstinate twelfth. But in a case in the fourteenth century such a proceeding was severely condemned, and the court refused to render judgment on the verdict, and ordered that a new jury be summoned, and the imprisoned juror discharged.<sup>20</sup> By the middle of the fourteenth

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etc." CO. LITT. 155 a. See also GUIDE TO ENGLISH JURIES, 10; SOMERS, THE SECURITY OF ENGLISHMEN'S LIVES, 94. These works were well known to the American colonists. WARREN, HARVARD LAW SCHOOL, I, 126; JEFFERSON, WORKS, V, 102. By the Duke of York's Laws, 1665, it was provided, however, that "no jury shall exceed the number of seven nor be under six, unless in special cases upon life and death, the justices shall think fit to appoint twelve." But twelve was the number fixed in New York by the Charter of Liberties and Privileges in 1683.

<sup>17</sup> Holmes v. Walton, 4 AMER. HIST. REV. 456, WAMBAUGH, CASES ON CONSTITUTIONAL LAW, 21 (S. C.). This case was decided more than ten years before the adoption of the Seventh Amendment to the federal Constitution.

<sup>18</sup> Thompson v. Utah, 170 U. S. 343; Collins v. State, 88 Ala. 212; Dixon v. Richards, 2 How. (Miss.) 771; Foster v. Kirby, 31 Mo. 496; Opinion of the Justices, 41 N. H. 550; Lovings v. Norfolk etc. Ry. Co., 47 W. Va. 582. But see Froelich v. Express Co., 67 N. C. 1, 8. See note in 43 L. R. A. 33.

<sup>19</sup> Arizona (courts not of record), California, Colorado, Georgia, Idaho (by consent of parties), Illinois (before justices of the peace), Iowa (inferior courts), Minnesota, Missouri (courts not of record), Montana (justices' courts or by consent in other courts), Nebraska (courts inferior to district court), Nevada (by consent of parties), New Jersey (if matter in dispute does not exceed \$50), New Mexico (courts inferior to district court), North Dakota (courts not of record), Oklahoma (county courts and courts not of record), South Dakota (courts not of record), Utah (8 in courts of general jurisdiction, 4 in courts of inferior jurisdiction), Virginia (circuit and corporation courts), Washington (courts not of record), West Virginia (justices of the peace), Wyoming.

<sup>20</sup> Y. B. 41 EDW. III, 31, 36; HALE, PLEAS OF THE CROWN, II, 297; THAYER, EVI-



century the requirement of unanimity seems to have become definitely established. The orthodox method of procuring unanimity was to starve and freeze and jolt the jurors until they were all of one mind;<sup>21</sup> and finally this gave way to the modern and more amiable substitute of simply tiring them into concurrence. Long before the adoption of our constitutions the requirement of unanimity was regarded as fundamental.<sup>22</sup> It is not unnatural, therefore, that the courts should hold that under a constitution guaranteeing the right to trial by jury it is not competent for the legislature to dispense with the requirement of unanimity.<sup>23</sup> In an increasing number of states, however, the constitutions expressly provide for a verdict by less than the whole number of jurors in civil cases.<sup>24</sup>

III. *Impartiality and competence.* There is another fundamental requirement which is clearly of the essence of trial by jury; the jury must be so selected and so constituted as to be an impartial and fairly competent tribunal. Any action, legislative, executive, or judicial, which excludes from the jury all members of a class,

DENCE, 88. Originally in the assizes established by Henry II, if the twelve first summoned were ignorant of the fact, they were rejected and others summoned in their place. If the twelve did not agree, others were added to the jury until twelve did agree. This process was called *afforcement* of the jury. GLANVILL, Bk. II, chaps. 17, 18; FORSYTH, TRIAL BY JURY, 238; THAYER, EVIDENCE, 62.

<sup>21</sup> By a New Jersey statute it was expressly provided that the jury "shall be kept together in some convenient private place without meat, drink, fire or lodging until they all agree upon a verdict." ALLINSON'S LAWS, 470. See also 1 HENING'S VA. STAT. L. 303 (1645); 2 *Ibid.*, 73 (1661-62).

<sup>22</sup> HALE, HISTORY OF THE COMMON LAW (4 ed.), 293; THAYER, EVIDENCE, 86.

<sup>23</sup> *American Publishing Co. v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707; Opinion of the Justices, 41 N. H. 550. See 24 L. R. A. 272. On the policy of requiring unanimity in civil actions, see WILSON, WORKS (Andrews' ed.), II, 162-210; FORSYTH, TRIAL BY JURY, chap. 11; CLARKE, UNANIMITY IN TRIAL BY JURY; LONGLEY, OBSERVATIONS ON TRIAL BY JURY; Miller, "The System of Trial by Jury," 21 AMER. L. REV. 859, 862; Third Report of Commissioners on Courts of Common Law, 1831, 69-70 (advising that if no unanimous agreement is reached after twelve hours of deliberation a verdict concurred in by nine should be good).

It would have been possible of course to take a broader view of the constitutional requirement. James Wilson, judge and professor of law, in his lectures on law said: "When I speak of juries, I feel no particular predilection for the number twelve. . . . I see no peculiar reasons for confining my view to a unanimous verdict, unless that verdict be a conviction of a crime. . . . When I speak of juries, I mean a convenient number of citizens, selected and impartial, who, on particular occasions, or in particular causes, are vested with discretionary powers to try the truth of facts." WILSON, WORKS (Andrews' ed.), II, 162.

<sup>24</sup> Arizona, California, Idaho, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Ohio, South Dakota, Utah, Washington.

deprives a member of that class of the right to trial by jury;<sup>25</sup> indeed, it deprives him of the equal protection of the laws, and of life, liberty, or property without due process of law.<sup>26</sup> So also any other provision which is calculated to allow prejudiced or biased persons to serve on the jury is a violation of the right to trial by jury. But where the interest of a juror is remote or problematical, although sufficient to constitute a ground of exclusion at common law, it is competent for the legislature to allow him to serve. Thus a statute is constitutional which allows an inhabitant or taxpayer of a town or city to be a juror, although the town or city is a party, and the inhabitant or taxpayer may thus be remotely interested in the result.<sup>27</sup> A statute which provides that the mere formation or expression of an opinion shall not necessarily be a ground of exclusion is not unconstitutional;<sup>28</sup> nor a statute providing for struck juries,<sup>29</sup> nor a statute changing the number of peremptory challenges allowable,<sup>30</sup> or the number of the jury panel,<sup>31</sup> or the mode of selecting jurors, provided the method is fair.<sup>32</sup>

IV. *Province of the jury.* Trial by jury, then, involves a unanimous determination by twelve disinterested and reasonably competent persons. A determination of what? Of such matters only as are properly within the province of the jury. The jury after all has only a limited and special rôle. The court also has a part to play.<sup>33</sup> Where, under our constitutions, is to be drawn the line which separates the province of the jury from that of the court? The guiding principle has indeed been laid down at least since the time of Lord Coke. *Ad quaestionem facti non respondent iudices, ad quaestionem juris non respondent juratores.*<sup>34</sup> But the limits of this principle have never been exactly fixed; indeed, they have varied from time to time.

<sup>25</sup> Gibbs v. State, 3 Heisk. (Tenn.) 72.

<sup>26</sup> Dennis, "Jury Trial and the Federal Constitution," 6 COL. L. REV. 423.

<sup>27</sup> Comm. v. Worcester, 3 Pick. (Mass.) 462.

<sup>28</sup> Stokes v. People, 53 N. Y. 164.

<sup>29</sup> Lommen v. Minneapolis Gaslight Co., 65 Minn. 196.

<sup>30</sup> Walter v. People, 32 N. Y. 147.

<sup>31</sup> Conyers v. Graham, 81 Ga. 615.

<sup>32</sup> People v. Harding, 53 Mich. 48; Dowling v. State, 5 Sm. & M. (Miss.) 664; State

v. Slover, 134 Mo. 607; People v. Meyer, 162 N. Y. 357.

<sup>33</sup> See Capital Traction Co. v. Hof, 174 U. S. 1; Opinion of the Justices, 207 Mass. 606.

<sup>34</sup> CO. LITT. 155 b; THAYER, EVIDENCE, 185.



At the time when the first permanent settlements were being established in America there was a great deal of popular enthusiasm in England for trial by jury. This enthusiasm was based chiefly on the value of the institution as a bulwark of liberty, as a means of preventing oppression by the Crown. The Stuart judges were exceeding the bounds of decency in their attempts to coerce juries, and the tide of popular resentment ran strong. There was a rapid fire of eloquent encomiums and panegyrics — I refer to such popular treatises as "The Englishman's Right," "The Guide to English Juries," "The Security of Englishmen's Lives" — which were received with acclaim by the people in England and which soon found their way across the Atlantic.<sup>35</sup> At the time of the English Revolution this feeling was at its height. Since the jury was regarded as a protection against the despotic power of the Crown, popular writers naturally contended that the widest powers belonged to the jury; that they were the sole judges of the law and of the facts; that although the judges might advise them as to the law, yet they had not merely the power but the right to determine for themselves whether the judges' view of the law was correct or not. This doctrine found its most emphatic expression, of course, in criminal suits. In the trial of Colonel Lilburne for treason, in 1649, the doughty defendant uttered a challenge which delighted his fellow countrymen, when he said: "The jury by law are not only judges of fact but of law also, and you who call yourselves judges of the law are no more but Norman intruders, and indeed and in truth, if the jury please, are no more but cyphers to pronounce their verdict." Mr. Justice Jermin in wrathful defense of the bench, replied: "Was there ever such a damnable blasphemous heresy as this is, to call the judges of the law cyphers?"<sup>36</sup> And even in civil cases the same view found wide popular support. In that popular treatise, "The Security of Englishmen's Lives," Lord Somers said:<sup>37</sup> "As it hath been the law, so it hath always been the custom and practice of these juries, upon all general issues, pleaded in cases civil as well as criminal, to judge both of the law and fact."

<sup>35</sup> The first-named book was reprinted in America in 1693; the third-named, in 1720. WARREN, HARVARD LAW SCHOOL, I, 126.

<sup>36</sup> VARAX, TRIAL OF COLONEL LILBURNE (2 ed.), 107; 4 How. St. Tr. 1270, 1379.

<sup>37</sup> Page 95.

Shortly after the English Revolution however a change took place. The direct power of the Crown over the judges ceased when in 1700, by the Act of Settlement,<sup>38</sup> it was provided that they should hold office no longer at the pleasure of the Crown but for life or good behavior. The confidence of the people in the judges increased, and there was a corresponding diminution in the extravagant enthusiasm for wide power in the jury. Burke, that sturdy upholder of liberty, says: "What does a juror say to a judge, when he refuses his opinion upon a question of judicature? 'You are so corrupt, that I should consider myself a partaker of your crime, were I to be guided by your opinion'; or, 'You are so grossly ignorant, that I, fresh from my hounds, from my plough, my counter, or my loom, am fit to direct you in your own profession.' This is an unfitting, it is a dangerous state of things."<sup>39</sup> It may safely be said that at the time of the American Revolution the general principle was well established in the English law that "juries must answer to questions of fact and judges to questions of law. This is the fundamental maxim acknowledged by the constitution."<sup>40</sup> But, as we shall see, the inadequacy of the methods of keeping the jury within their proper sphere gave rise to certain difficulties.

In the American colonies during the eighteenth century there was a gradually increasing popular enthusiasm for trial by jury and a popular desire strictly to limit the powers of the judges and to give the jury great latitude. The Crown judges were generally and increasingly unpopular. Often, too, they were incompetent; sometimes they were laymen, ignorant of the principles of the law. It was generally contended that even in civil cases the jury had the right as well as the power to decide questions of law as well as of fact.<sup>41</sup> But this extreme view, which was largely the result

<sup>38</sup> 12 & 13 WILL. III, c. 2.

<sup>39</sup> BURKE, WORKS (3 ed.), VII, 119.

<sup>40</sup> WYNNE, EUNOMUS, Dialogue III, § 53. See FORSYTH, TRIAL BY JURY, chap. 12. See especially Hargrave's note to CO. LITT. 155 *b*. The question of the right of the jury to bring in a general verdict in criminal libel cases gave rise in the latter part of the eighteenth century to a renewal of the controversy as to the respective functions of court and jury. See Woodfall's Case, 20 How. St. Tr. 895; King v. Dean of St. Asaph, 3 T. R. 428, note; BURKE, WORKS (3 ed.), VII, 105-27; FORSYTH, TRIAL BY JURY, 267-82; WORTHINGTON, POWER OF JURIES. There are provisions as to this in many of the state constitutions. See 33 L. R. A. (N. S.) 207.

<sup>41</sup> See a learned note in Quincy's Mass. Rep. 556-72. See also JEFFERSON, WORKS, III, 235; *Ibid.*, V, 102; WILSON, WORKS (Andrews' ed.), II, 214-24; SWIFT, SYSTEM OF LAWS, II, 259.



of a temporary reaction against usurpations by corrupt or incompetent or at any rate unpopular judges, did not by the adoption of the constitutional guaranty of trial by jury become a part of our organic law.<sup>42</sup> No, as we shall see, our courts have recognized the broad principle that the constitutional province of the jury in civil cases is simply the determination of questions of fact in issue as to which reasonable men may reach different results; that the constitutional guaranty is not violated by the exercise of control by the court either (1) in keeping the jury to the determination of questions of fact, or (2) in keeping it within the bounds of reason in determining questions of fact.<sup>43</sup> It is true that at common law it sometimes has the right or at least the power to do more than this. That is due, as we shall see, to certain defects in the machinery whereby the jury is confined to the exercise of its special office.

What, then, are the methods of controlling the jury? At the outset one is struck by the fact that there is no simple, systematic, adequate method. The methods of controlling the jury grew up in a haphazard sort of way. Most of them grew up at a time when the jurors still had a right to decide upon their own knowledge, as well as upon the evidence, a right which in the eighteenth century became obsolete.<sup>44</sup>

A. *Questions arising on the pleadings.* The concurrence of the jury is not always necessary for the rendition of a judgment in an action at law. No question is presented for the consideration of the jury unless the parties have reached an issue of fact.<sup>45</sup> If

<sup>42</sup> *Sparf v. United States*, 156 U. S. 51; *Comm. v. Anthes*, 5 Gray (Mass.), 185; THOMPSON, TRIALS (2 ed.), §§ 940-51, 2132-49. In the constitution of Georgia of 1777 (§ XLI), however, it was expressly provided that "the jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict."

<sup>43</sup> THAYER, EVIDENCE, 208.

<sup>44</sup> 3 BL. COMM. \*374.

<sup>45</sup> See *Willion v. Berkley*, 1 Plowd. 223, 230. In the case of a default or of a demurrer if the damages are unliquidated a question of fact as to the amount of damages will arise. Must this be submitted to a jury? At common law damages in such cases would usually be ascertained by a jury summoned on a writ of inquiry and presided over by the sheriff, but that jury was not necessarily composed of twelve persons (DUNCOMB, TRIALS PER PAIS (8 ed.), 93; CO. LITT. 155 a, Hargrave's note); or the court might determine the question of the amount of damages without reference to any jury. SELLON, PRACTICE (1 Am. ed.), 347. It has been held, therefore, in some cases that the constitutional right to trial by jury does not extend to the question of the *quantum* of damages on default or demurrer. *Raymond v. Danbury & Norwalk*

the pleadings terminate in a demurrer, an issue of law only is raised, and that issue is for the determination of the court. This is the case when the pleading demurred to does not state facts which constitute a cause of action or a defense, or when it discloses an affirmative defense, or when having stated sufficient facts to constitute a cause of action or defense, it then unnecessarily states evidence of those facts, which evidence is insufficient to sustain them.<sup>46</sup> At common law by the use of special pleading, by spreading the facts on the record, a case could sometimes be kept from the jury. This was indeed the great purpose of the special traverse. Instead of simply denying directly, the pleader would allege facts constituting an argumentative denial, and add a direct denial. The purpose was to invite a demurrer, in order that the question, whether the facts alleged in the argumentative denial were sufficient as a matter of law to meet the other's case, might be raised on the pleadings and determined by the court, instead of being raised at the trial, where the jury might or might not follow the instructions of the judge on the law.<sup>47</sup> So also the purpose of the substitution of a plea by way of confession and avoidance for the general issue by the strange method of making an admission of a "colorable" right in the plaintiff, was to get the facts on the record in order to avoid a jury trial.<sup>48</sup> One of the principal ends aimed at by the common-law commissioners in 1830 in advocating the limitation of the general issue and the extension of special pleading was the severance on the record of the law from the facts.<sup>49</sup> All these things which were incidental to trial by jury at common law are not, of course, forbidden by our constitutions. The law has greatly varied from time to time as to just how much should or may properly be stated in the pleadings. Surely the legislature can constitutionally regulate the rules of pleading so as to require matters to be stated on the record which at common law did not have to be so stated and thus, more fully than at common law, separate on the record questions of law

R. R. Co., Fed. Cas. 11593, 14 Blatchf. 133, 43 Conn. 596; *Hopkins v. Ladd*, 35 Ill. 178. But see *Central, etc. R. R. Co. v. Morris*, 68 Tex. 49. See 20 L. R. A. (N. S.) 1.

<sup>46</sup> *First Nat. Bank v. St. Croix Boom Corp.*, 41 Minn. 141.

<sup>47</sup> STEPHEN, PLEADING, \*205.

<sup>48</sup> *Leyfield's Case*, 10 Rep. 88; STEPHEN, PLEADING, \*233; THAYER, EVIDENCE, 232; JENKS, SHORT HISTORY OF ENGLISH LAW, 163.

<sup>49</sup> Second Report, 46.



from questions of fact, — just as indeed it may go to the other extreme and provide that the legal elements constituting a cause of action need not be stated, but only such a description of the cause of action as will give to the opposite party notice of the nature of the claim against him.<sup>50</sup>

B. *Questions not arising on the pleadings.* When questions of law are not separated on the record from questions of fact, it is a more difficult task to keep separate the respective functions of court and jury. If the pleadings terminate in an issue of fact, various questions of law as well as of fact may arise at the trial. How then may the court confine the jury to its special office?

1. *Instructions to the jury.* The duty of the trial judge is not merely to preside at the trial, to keep order, to determine questions on the admissibility of evidence: it is his duty also to instruct the jury. As far back as the Year Books go we find the court delivering a charge to the jury. The difficulty with this method of controlling the jury is of course that when the facts are doubtful there may be no way of determining whether or not the jury has followed the instructions of the judge on the law. At common law it was clearly proper for the judge not merely to state the law and to sum up the evidence, but also to express an opinion on the questions of fact in issue as long as he leaves to the jury the ultimate determination of the issue, and makes it clear that it is not bound to adopt his opinion as its own. Since the judge had this power at common law, he is not deprived of it merely because the right to trial by jury is guaranteed by the constitution.<sup>51</sup> But in many of the states this power has been expressly taken away by constitutional or statutory provisions.<sup>52</sup> It may well be questioned

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<sup>50</sup> The present system of pleading whereby questions of law are supposed to be separated from questions of fact, too often resulted in earlier days in technical decisions, and today, when amendments and pleading over are freely allowed, in delay. The substitution of a system of notice pleading has been urged by Dean Pound in place of the present system. Pound, "Some Principles of Procedural Reform," 4 ILL. L. REV. 388, 491, at pages 494-97. See also Whittier, "Notice Pleading," 31 HARV. L. REV. 501. If there are really effective means of keeping the jury within their province as to questions not arising on the pleadings, the desirability of raising questions of law on the pleadings is greatly diminished.

<sup>51</sup> *Vicksburg, etc. R. R. Co. v. Putnam*, 118 U. S. 545; *United States v. Reading R. R.*, 123 U. S. 113; *Lovejoy v. United States*, 128 U. S. 171; *Simmons v. United States*, 142 U. S. 148.

<sup>52</sup> Sunderland, "The Inefficiency of the American Jury," 13 MICH. L. REV. 302.

how far the legislature can constitutionally curtail in this way the power of the judge. "Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."<sup>53</sup>

2. *The attaint and motion for a new trial.* If a verdict has been rendered by a jury on a material issue of fact, can it be overturned? From the beginning of the thirteenth century at least, and in theory, though not in practice, until the nineteenth century, if the verdict was against the evidence or rather false in fact, it could be set aside by attaint. A new and greater jury could be summoned to examine into the issue tried by the jury, and if it found that the verdict was false, the verdict would be reversed, and the original jury severely punished.<sup>54</sup> Since at that period the jurors might decide on their own knowledge as well as on the evidence, their verdict would not be reversed if supported either by the evidence or by facts not in evidence. This uncouth and barbarous method of controlling the jury was in use in this country in colonial times,<sup>55</sup> and indeed it became so frequent in Massachusetts that a statute had to be passed to prevent its abuse.<sup>56</sup> But gradually both in England and in the American colonies as the idea gained ground that the jurors are to decide merely on the evidence and not on facts known to them, it became obsolete, and a new method of controlling the jury became necessary. In 1665 the first reported decision was rendered holding that the court might order a new trial on the ground that the verdict was against the evidence.<sup>57</sup> This did not necessarily mean that the jurors intentionally went wrong, and did not involve a punishment for them. The granting of new trials on the ground that the verdict was against the evidence or on the ground that the damages awarded were excessive or inadequate soon came into common use in England. In the American colonies new trials were not very frequently granted on these grounds, but they were not unknown.<sup>58</sup> Of course this

<sup>53</sup> THAYER, EVIDENCE, 188, note.

<sup>54</sup> "An attaint, the greatest punishment they know on this side death." GUIDE TO ENGLISH JURIES, 4.

<sup>55</sup> Quincy's Mass. Rep. 559; R. I. Col. Rep. (1647) 200.

<sup>56</sup> 5 Mass. Col. Rec. 449.

<sup>57</sup> Wood v. Gunston, Style 466.

<sup>58</sup> Quincy's Mass. Rep. 84. Compare the old New England and Georgia practices



practice is not unconstitutional. Indeed, it has been held on the contrary that a statute denying the court the right to grant a new trial is unconstitutional.<sup>59</sup> In England the motion was made before the full court in which the case was pending; and no appeal was allowed from its decision until the Common Law Procedure Act of 1854.<sup>60</sup> In this country the courts have upheld the power of the appellate court as well as of the trial court to order a new trial on the ground that the verdict is against the evidence or that the damages are excessive or inadequate.<sup>61</sup> In some of the cases the question whether such practice is a violation of the constitutional right to trial by jury was expressly considered and answered in the negative.<sup>62</sup> The objection to this method of controlling the jury is the delay and expense involved.

At common law if a new trial was ordered, it had to be a new trial as to all the parties and on all the issues. But there is no reason for re-trying the issues as to one party because of an error affecting only another party, or for re-trying one issue because of an error affecting only another issue. Statutes have accordingly provided in some jurisdictions that the new trial shall be confined to the parties as to whom or the issues as to which the verdict is set aside. Such statutes are constitutional.<sup>63</sup> Each issue as to

whereby the losing party was entitled to a new trial as a matter of right. 63 U. of PA. L. REV. 592, note. See also *United States v. 1363 Bags*, 2 Sprague, 85; *Bartholomew v. Clark*, 1 Conn. 472.

<sup>59</sup> *Capital Traction Co. v. Hof*, 174 U. S. 1; *Opinion of the Justices*, 207 Mass. 606. See *Bright v. Eynon*, 1 Burr. 390 ("Trials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials." *Per Lord Mansfield*, 393). See also 3 BL. COMM. \*390.

<sup>60</sup> Section 35. The motion is now made in the Court of Appeal. R. S. C., Order 39, rule 1.

<sup>61</sup> In a few jurisdictions, however, the rule is otherwise. *Southern Ry. Co. v. Bennett*, 233 U. S. 80. See Riddell, "New Trials in Present Practice," 27 YALE L. J. 353, 361. In *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 573, Mr. Justice Matthews, in speaking of the practice of reviewing in an appellate court the action of the trial court in refusing to grant a new trial on the ground that the verdict was against the weight of evidence, said: "Such a practice in the appellate courts of the United States is perhaps forbidden by the Seventh Amendment." But this casual doubt seems not well founded.

<sup>62</sup> *Devine v. St. Louis*, 257 Mo. 470, 51 L. R. A. (N. S.) 860.

<sup>63</sup> *Norfolk So. R. R. v. Ferebee*, 238 U. S. 269; *Sparrow v. Bromage*, 83 Conn. 27; *Opinion of the Justices*, 207 Mass. 606; *Simmons v. Fish*, 210 Mass. 563; *Lisbon v. Lyman*, 49 N. H. 553 ("The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only

each party is determined by a jury; it is not necessary that all the issues should be determined by the same jury.

If a verdict is excessive and the plaintiff is willing to remit the excess and take what the court regards as a fair sum, the court may refuse to grant a new trial. The defendant cannot successfully claim that he has been denied the right to trial by jury.<sup>64</sup> But the court cannot make the plaintiff take less than the amount which the jury has fixed unless there is a liquidated maximum; the plaintiff may insist on taking the sum fixed by the jury or having a new jury fix the amount.<sup>65</sup>

3. *Demurrer to evidence.* As early as the fifteenth century, this method of withdrawing the case from the jury was employed.<sup>66</sup> After the party having the burden of proof, the proponent, as Professor Wigmore calls him, had introduced all his evidence, the opposing party might demur thereto. If in his demurrer he admitted the truth of the evidence offered by his adversary, the latter was compelled to join in the demurrer. It was not until 1793 that it was held that if the evidence is circumstantial, the demurrant must admit the facts which that evidence tends to prove.<sup>67</sup> The jury who had heard the evidence might be asked to find the amount of damages, but all other questions were withdrawn from them. The difficulty with a demurrer to evidence is that it was a two-edged sword; for if the court held that the jury could have found for the proponent judgment would be given for him, whether the court were of the opinion that the jury would have so found or not;<sup>68</sup> and the demurrant waived his right to put in his own evidence or to have a jury decide the issue.<sup>69</sup> It is clear that the constitutional provision as to trial by jury does not preclude

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what is erroneous when the latter can be severed from the former." *Per Doe, C. J.*, 583). Cf. *Robinson v. Smith*, [1915] 1 K. B. 711.

<sup>64</sup> *Gila Valley, etc. Ry. Co. v. Hall*, 232 U. S. 94; *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282; *Trow v. Village of White Bear*, 78 Minn. 432; 39 L. R. A. (N. S.) 1064; Ann. Cas. 1912, C 504. Similarly the defendant may prevent a new trial on the ground that the damages are inadequate by consenting to the entry of a judgment for an adequate amount. *Carr v. Miner*, 42 Ill. 179.

<sup>65</sup> *Atchison, etc. Ry. Co. v. Cogswell*, 23 Okla. 181. See *Kennon v. Gilmer*, 131 U. S. 22.

<sup>66</sup> THAYER, EVIDENCE, 234.

<sup>67</sup> *Gibson v. Hunter*, 2 H. Bl. 187; THAYER, EVIDENCE, 235.

<sup>68</sup> *Cocksedge v. Fanshaw, Doug.* 119, 129; *Southern Ry. Co. v. Tyree*, 114 Va. 318.

<sup>69</sup> *Galveston, etc. Ry. Co. v. Templeton*, 87 Texas, 42.



a demurrer to evidence.<sup>70</sup> It is a practice long antedating the adoption of our constitutions; and it does not deprive the jury of their proper function.

4. *The special verdict.* At common law if the jurors wished to bring in a general verdict they could do so. They ran a risk in so doing, inasmuch as, if the verdict was wrong, they might be attainted, whether they went wrong on the facts or on the law.<sup>71</sup> And it was a question whether the fact that they had followed the directions of the judge on the law constituted a defense. But it was manifestly unfair to the jurors to subject them to the severe punishment of attainder because of a mistake of law, and therefore they were allowed to bring in a special verdict finding the facts in issue and leaving to the court the determination of the legal effect of those facts. In the American colonies the special verdict was well known.<sup>72</sup> The judge could not refuse to accept a special verdict if it was good and pertinent to the issue.<sup>73</sup> The objection to special verdicts is the technical nicety with which they must be framed. The court cannot take the place of the jury in finding any of the facts in issue necessary to the foundation of the judgment.<sup>74</sup> If the jury finds merely evidence of the facts in issue, the court has not power to draw inferences as to the facts themselves. But if the jury finds facts sufficient to enable the court to enter judgment, but also draws a general conclusion based on an erroneous view of the law, the court may give judgment upon the facts as found and disregard the conclusion of the jury.<sup>75</sup> Not infrequently the judges attempted to compel the jurors to bring in special verdicts, but the jurors fought stoutly against such

<sup>70</sup> *Hopkins v. Railroad*, 96 Tenn. 409, and cases cited.

<sup>71</sup> CO. LITT. 228 a. "Although the jury if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attainder; therefore to find the special matter is the safest way where the case is doubtful."

<sup>72</sup> CONN. REV. STAT., 1672, 37; 3 Mass. Col. Rec. 425; New Jersey Statute of April 23, 1724; New York, Duke of York's Laws, 1665-75. It is said that special verdicts were uncommon in the early history of New England. Lechford, *Plain Dealing*, 66. See 3 Mass. Col. Rec. 425. In Georgia special verdicts were expressly forbidden by the constitution of 1777, § XLI.

<sup>73</sup> CO. LITT. 228 a; COMPLETE JURYMAN, 246.

<sup>74</sup> COMPLETE JURYMAN, 247.

<sup>75</sup> *Foster v. Jackson*, Hob. 52 a; *Priddle & Napper's Case*, 11 Co. Rep. 8 a, 10 b; COMPLETE JURYMAN, 252.

attempts on the part of the judges and in the end were successful. By statute in many of the states today, however, the court may compel the jury to bring in a special verdict. And in many jurisdictions the court may compel the jury to make special findings of fact in addition to its general verdict; and if those special findings are inconsistent with the general verdict, the court may disregard the general verdict and enter judgment for the opposite party, and need not order a new trial.<sup>76</sup> Such statutes are constitutional. And yet they decidedly change the common-law rule. They take away from the jury the power to take the law into its own hands by rendering a general verdict on the combined law and facts involved in the issue. They remove the chief prop of the old popular idea that the jury has the right to determine the law.

5. *The special case and reserved point.* Again, the jury might give a general verdict for one party, subject to the opinion of the court *in banc* on a question of law involved, stated in a special case or in a point reserved, drawn up by or under the supervision of the judge.<sup>77</sup> If there was any difference of opinion as to the facts proved, the opinion of the jury was taken and the facts stated in accordance with its opinion. It would seem that the consent of the jury was necessary to this proceeding in the absence of the consent of both parties.<sup>78</sup> If the question was resolved in favor of the party for whom the general verdict was given, judgment would be entered on the verdict for him. If the law was found to be the other way, the verdict would be changed accordingly, and verdict and judgment would be given for the opposite party. If it was so defectively stated that no judgment could be given on it, the court would order a new trial.<sup>79</sup> This practice differed from the special verdict in that the question of law did not appear on the record, and therefore the question could not be carried by writ of error to a higher court,<sup>80</sup> whereas a special verdict was entered on the record, and the question of law could be carried up to the

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<sup>76</sup> Walker v. New Mexico, etc. R. R. Co., 165 U. S. 593.

<sup>77</sup> SMITH, ACTION AT LAW (2 ed.), 113, 129; STEPHEN, PLEADING, \*101. See Dublin, etc. Ry. Co. v. Slattery, 3 App. Cas. 1155, 1204-05.

<sup>78</sup> Mead v. Robinson, Barnes' Notes (3 ed.), 451; 3 BL. COMM. \*378.

<sup>79</sup> TIDD, PRACTICE, II, 597.

<sup>80</sup> This was changed by the Common Law Procedure Act, 1854, §§ 32, 34.



higher court on a writ of error. This practice probably goes back to the seventeenth century;<sup>81</sup> it became very common during the eighteenth century.<sup>82</sup> It is therefore clearly constitutional.<sup>83</sup>

6. *Direction of verdict.* When on the evidence there is no question of fact as to which reasonable men might differ, the courts have had no difficulty in saying that the direction of a verdict does not violate the constitutional provision for trial by jury.<sup>84</sup> This method of withdrawing the case from the jury is different from a demurrer to evidence. The motion is quite informal and is usually oral. If the motion is denied, the moving party is not precluded from putting in his own evidence and from submitting the issues to the jury. Its operation is also different. On a demurrer to evidence the jury is not called upon to take any further part in the trial unless to determine hypothetically the *quantum* of damages. In the case of a directed verdict the jury is called upon to render the verdict. But the jury has no discretion in the matter. The direction of a verdict is sometimes a cumbersome method of disposing of the case; for a juror may for conscientious or less worthy reasons, refuse to accede to the direction of the court.<sup>85</sup> In a few states this difficulty is avoided by

<sup>81</sup> See *Allen v. Dundas*, 3 T. R. 125, 131.

<sup>82</sup> In the second volume of Wilson's Reports, for example, there are about forty instances of this practice.

<sup>83</sup> See *Bothwell v. Boston El. Ry. Co.*, 215 Mass. 467. As to criminal cases, see 4 ILL. L. REV. 200-01.

<sup>84</sup> *Improvement Co. v. Munson*, 14 Wall. (U. S.) 442; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Patton v. Texas, etc. Ry. Co.*, 179 U. S. 658. But if there is a real conflict in the evidence it is unconstitutional to withdraw the case from the jury. *Baylies v. Travelers' Ins. Co.*, 113 U. S. 316. In many jurisdictions a verdict may be directed even for the party who has the burden of proof. *Herbert v. Butler*, 97 U. S. 319; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478; *Delaware, etc. R. R. Co. v. Converse*, 139 U. S. 469. See 11 MICH. L. REV. 198. In 1757, Lord Mansfield directed a verdict for the plaintiff who had the burden of proof. *Decker v. Pope*, 1 Selwyn, Nisi Prius (13 ed.), 91.

<sup>85</sup> It has been said that jurors in a civil case refusing to render a verdict in accordance with the direction of the court may be punished for contempt. *Cahill v. Chicago, etc. Ry. Co.*, 20 C. C. A. 184, 74 Fed. 285; BAC. ABR., tit. Juries, M (2). At common law in civil cases it came to be the view that where an attaint lies, the court cannot punish the jury for refusing to bring in a verdict in accordance with the direction of the court. THAYER, EVIDENCE, 165, 166. But this doctrine was established at a time when the jurors were entitled to act on their own knowledge. And of course in criminal cases where the court is held not to be empowered to direct a verdict of conviction, the jury cannot be punished for refusing to convict. *Bushell's Case*, Vaughan, 135, 6 How. St. Tr. 999; THAYER, EVIDENCE, 160-69.

the use of a very simple practice; when on the evidence there is no question of fact as to which reasonable men might differ, the court may dismiss the jury and enter a verdict without the formal concurrence of the jury. It would seem that this practice does not impair the right to trial by jury.<sup>86</sup>

7. *Compulsory nonsuit.* At common law nonsuits were wholly voluntary. The plaintiff might absent himself at the time of the rendition of the verdict, and in his absence no verdict could be rendered. The result was that the plaintiff would be nonsuited and the case would end. Inasmuch as the plaintiff was not thereby precluded from bringing a new suit, he was given a great opportunity to harass the defendant by bringing repeated actions against him and becoming nonsuit at the last moment before the jury has rendered its verdict.<sup>87</sup> Statutes have sometimes provided for compulsory nonsuit. A compulsory nonsuit differs from a directed verdict, in that there is not even a formal concurrence on the part of the jury. It differs also in that, like a voluntary nonsuit, it does not prejudice the plaintiff's right to bring a new action.<sup>88</sup> Although the compulsory nonsuit was unknown at the time of the adoption of our constitutions, it is nevertheless universally held not to impair the right to trial by jury.<sup>89</sup> It does not take away from the jury any question of disputed fact.

8. *Motion to strike out sham pleading.* If a party interposes a pleading which is clearly false in fact and which is interposed merely for the purpose of delay or vexation he has no right to go to the jury. Such a pleading is called a sham pleading. The opposite party may treat it as a nullity and enter judgment for

<sup>86</sup> *Van Ness v. Van Ness*, Fed. Cas. No. 16, 869; *Cahill v. Chicago, etc. Ry. Co.* 20 C. C. A. 184, 74 Fed. 285; *Cloquet Lumber Co. v. Burns*, 124 C. C. A. 600, 207 Fed. 40; *Curran v. Stein*, 110 Ky. 99; *Pardee v. Orvis*, 103 Pa. 451. The dictum of Harlan, J., in *Hodges v. Easton*, 106 U. S. 408, to the opposite effect is, it is submitted, erroneous.

<sup>87</sup> The right has generally been somewhat cut down by statute. In England the plaintiff cannot become nonsuit or discontinue his action if a step has been taken after the defendant has filed his statement of defense. R. S. C., Order 26, rule 1. In this country very generally the plaintiff may become nonsuit at any time until the case is finally submitted to the jury.

<sup>88</sup> *Mason v. Kansas City Belt Ry. Co.*, 226 Mo. 212, 26 L. R. A. (N. S.) 914.

<sup>89</sup> *Coughran v. Bigelow*, 164 U. S. 301; *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Perley v. Little*, 3 Me. 97; *Munn v. Pittsburg*, 40 Pa. 364.



himself, or he may apply to the court to strike it from the record.<sup>90</sup> In some jurisdictions it has been held, however, that to strike out as sham a negative pleading is to deny the right to trial by jury.<sup>91</sup> But this seems wrong. Although it is a rule of the common law that the general issue is not to be struck out as sham, because the defendant has a right to put the plaintiff to the proof of his claim in all cases, yet it would seem that the legislature has the power to change this rule. In a New Jersey case<sup>92</sup> the court says:

"If, therefore, the plea of the general issue is filed when the defendant has no defense, it tends only to illegal delay and comes within the definition of a sham plea. If it be said that if the general issue may be stricken out as a sham plea, or regarded by the plaintiff as a nullity, the defendant will be deprived of a trial by jury, the answer is that the practice in this country, as well as in England, of striking out false pleas, other than the general issue, whereby the defendant may be deprived of a trial, is well settled. It cannot be said that the party is deprived if he has nothing to try."

9. *Motion for judgment notwithstanding the verdict.* If the pleadings have raised an immaterial issue, and if the jury has brought in a verdict on that issue, it is clear that the court may arrest the judgment or enter judgment against the party who obtained the verdict; for since the issue is immaterial, the verdict is immaterial, and the court may give judgment on the pleadings. But suppose that the question arises not on the pleadings but on the evidence. Suppose that a motion is made at the trial for a compulsory nonsuit or the direction of a verdict, and that the court erroneously refuses to grant the motion and the verdict is rendered against the party who made the motion, what is the remedy? At common law the only remedy is a new trial.<sup>93</sup> But why should a new trial be given when the verdict could properly have been given only for the party who lost at the trial? In several juris-

<sup>90</sup> See 1 CHITTY, PLEADING (16 Am. ed.), \*567; *Phillips v. Bruce*, 6 M. & Sel. 134; *Merrington v. A'Becket*, 3 D. & R. 231. A statute providing that the defendant must file an affidavit of defense as a condition precedent to trial by jury is constitutional. *Fidelity, etc. Co. v. United States*, 187 U. S. 315.

<sup>91</sup> *Wayland v. Tysen*, 45 N. Y. 281.

<sup>92</sup> *Walter v. Walker*, 35 N. J. L. 262.

<sup>93</sup> But see *Skate v. Slaters*, 30 T. L. R. 290; *Astley v. Garnett*, 20 Brit. Col. R. 528; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109; *Muench v. Heinemann*, 119 Wis. 441.

dictions statutes have provided that in such a case as this, the trial court or the appellate court may enter judgment in favor of the party for whom the verdict should have been rendered. Is this practice unconstitutional? The Supreme Court of the United States by a bare majority seems to think it is.<sup>94</sup> Their decision however has met with a great deal of criticism<sup>95</sup> and the state courts have reached the opposite result.<sup>96</sup> On principle the state courts seem clearly right. There is no valid objection to doing after the trial what admittedly might and should have been done at the trial. There is no encroachment upon the proper province of the jury.

10. *Evidence on appeal.* Frequently verdicts and judgments have to be set aside because of the failure to prove some fact at the trial which could have been proved by such clear and incontrovertible evidence that the court would have been justified on such evidence in giving a peremptory instruction to the jury on that point. At common law the practice was to grant a complete new trial. If there has to be a new trial, the new trial should be confined to the consideration of that point alone. But if the point is not one on which a jury could have any doubt, there should be no necessity for submitting it to a jury. The English Rules allow the Court of Appeal to receive "further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner."<sup>97</sup> The New Jersey Practice Act, 1912, provides that

"Upon appeal, or on application for a new trial, the court in which the appeal or application shall be pending may, in its discretion, take additional evidence by affidavit or deposition, or by reference; provided, that the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certifi-

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<sup>94</sup> *Slocum v. New York Life Ins. Co.*, 228 U. S. 364.

<sup>95</sup> Thorndike, "Trial by Jury in United States Courts," 26 HARV. L. REV. 732; Thayer, "Judicial Administration," 63 U. of PA. L. REV. 585; Rep. Amer. Bar Assoc., 1913, 561. But see Schofield, "New Trials and the Seventh Amendment," 8 ILL. L. REV. 287, 381, 465 (supporting the *Slocum* Case on the ground of the second clause of the amendment).

<sup>96</sup> *Bothwell v. Boston El. Ry. Co.*, 215 Mass. 467; *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312; *Dalmas v. Kemble*, 215 Pa. 410.

<sup>97</sup> Order 58, rule 4.



cation, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent." <sup>98</sup>

In this practice there is no violation of the constitutional guaranty of trial by jury; no question is withdrawn from the jury upon which the parties have a right to insist upon the opinion of the jury.

Is the constitutional guaranty of trial by jury an obstacle in the path of procedural reform? It does prevent the determination of questions of fact by less than twelve persons; but that difficulty is one which has been easily removed by an amendment to the constitution when it has been felt desirable, and it has been very generally felt desirable in the case of inferior courts. It does prevent a verdict in which the jurors do not all concur; but this difficulty, if it is a difficulty, is also easily done away with by constitutional amendments when it is felt desirable. It does prevent trial by manifestly partial or clearly incompetent jurors; but that is as it should be. It does prevent the encroachment by the court on the province of the jury, as it prevents the encroachment by the jury on the province of the court; but that is as it should be, provided always that trial by jury is worth preserving in civil cases. But—and this is the fundamental point which the writer has tried to develop—it does not prevent the use of any methods of effecting the division of functions of court and jury. The old methods of enforcing the division which were in use before our constitutions were adopted are clearly not unconstitutional. Nor does it violate our constitutions to supplement or supersede those methods by other methods more readily calculated to effect the division of functions without undue formality or delay. The constitutional guaranty does not stand in the way of the accomplishment of the result, much to be desired, that there shall be no trial by a jury when there is no disputable question of fact to be tried, and no new trial when there is no disputable question of fact

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<sup>98</sup> Section 28. Cf. Kansas Code of Civil Procedure, § 580. See Rep. Amer. Bar Assoc., 1910, 645; Pound, "Some Principles of Procedural Reform," 4 ILL. L. REV. 338, 491, at page 505.

If a necessary allegation is omitted from a pleading, but the matter was actually litigated at the trial, it is proper for the trial court or the appellate court to allow an amendment to the pleading and to allow the verdict and judgment to stand. *Slaughter v. Goldberg, Bowen & Co.*, 20 Cal. App. Dec. 89; *Shuford v. Life Ins. Co.*, 167 N. C. 547; *Chaffee v. Rutland R. R. Co.*, 71 Vt. 384.

left undetermined. If the ancient institution of trial by jury is to survive, as our ancestors intended that it should, it must be capable of adaptation to the needs of the present and of the future. This means that it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.

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## LAW IN WAR TIME — 1917

WE have recently been reminded, and by a statesman-lawyer,<sup>1</sup> that because we cannot have, at the same moment, successful war and free democracy, we are obliged to surrender for the time being a great measure of that liberty which generations of lawyers have insisted on before a lengthening line of judges. We must remain true to our faith, but are told that in the presence of a sufficiently powerful autocracy, democracy cannot be maintained; it can live only by killing the autocracy. This is a hard saying, for it assumes the necessity of borrowing that weapon of a really strong tyranny most hateful to any democracy, — an imposed discipline; self-discipline is not enough.

The difference between self-denial and some discipline is not great, nor easy of statement, and probably most men now feel some instinct of abnegation. This REVIEW lately said editorially, "Every one is of course willing to give government a latitude in time of war different both quantitatively and in kind from its powers in time of peace." As to *quantum* of power, yes; the process is easy and historical, but a difference in kind is not only hard to swallow, but even to understand; for to a large minority, at the very least, the resulting status seems to suggest the question, not how much latitude we have given or should give government, but how much latitude government has left to us.

This last is the condition of mind, sure of production if not already observed, and resulting from war legislation; a style of law making already considerable in volume, and certain of increase. Such legislation, however, shows as yet small sign of any attempt to take from bench and bar their accustomed function of exposition, interpretation or condemnation, wherefore some review of our preparation for that task, and of what 1917 brought forth by way of performance, is the subject of this essay.

Historically considered, no body of men could be better fitted for hostile and destructive criticism of laws in aid of war than our bar and a bench recruited from it. By definition, a breach of peace

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<sup>1</sup> Mr. Elihu Root, in his address to the Conference of Bar Associations.

is a breach of law, yet war exists by act of Congress. Every system of law we have known presupposes and rests on the will of a huge peaceful community, reluctantly and tenderly dealing with its naughty children. All lawyers instinctively regard a state of war as the negation of law in its broader sense; yet such a profession must deal with these statutes born of necessity. Our ability to do this rightly and broadly, can only grow out of a profound belief in the necessity of union in discipline, and a keen preception of the real wickedness of the great Frederick's maxim, that the average citizen of a well-conducted state should not know that a war was in progress. If freemen do not acutely feel and righteously hate war conditions, the political disease of which they are the symptoms cannot be eradicated. But a righteous hate is a very different thing from whining complaint.

The people generally have shown in 1917, and in a most striking way, the educational result of about a generation of nation-wide statutes, from the Sherman Act, through interstate commerce legislation, the Food and Drug Statute, and the like, to the Child Labor Bill. In time of peace, increasing impatience with parochial state action, or the lack of it, has produced increasing regulation as wide as the extent of interests affected; for that reason, in part, it has appeared to the majority natural to demand national assistance and regulation regarding matters even dimly, perhaps, seen as sure to be affected by the dislocations of war. Whether without the spectacle afforded by nearly three years of conflict in Europe, such majority inclination would have existed, may be doubted; but that without the stimulation of national activities increasing by leaps and bounds for the past quarter century, the process would have been slower and more difficult, is not doubtful at all. Especially is it true, that without that preparation, the people would not and indeed could not have accepted national interference with individual (*i. e.*, non-corporate) production, distribution, and sales for private profit.

But there is always a minority of which our tradition is very considerate in each individual case. We can and do pass severe laws, but he is indeed an unfortunate offender, who cannot remain enlarged on bail, until the highest court discusses his offence as an academic puzzle, after time has dulled the edge of memory. The right of suit is very precious to many; every plaintiff can feel as his own the motto: "Serve God and take your own part," — and he



usually regards the two halves of the maxim as synonymous; but even the most selfish litigant over a matter of public interest meets with a certain toleration, for the American people entirely comprehend that the rights of the public have usually been threshed out at private expense in litigation instituted or invited by private citizens for their personal advantage, and most of us regard that method as both economical and expedient.

Then, too, minorities increase when the statutes begin to hurt; and they hurt both citizens and aliens, the latter a class which has existed longer and in greater numbers in the United States than anywhere else, — and as such wholly untouched by governmental activities; passports and strangers' taxes have been unknown, — anything like them is resented. In short, the inherited American attitude to government is that some must pay taxes (normally a very small part of the electorate), but so far as one's person is concerned, a man can have to do with government as much or as little as he pleases. Direct official interference with private life has been growing, but is still rare; we have been afraid to meddle with the ultimate individual citizen, even in such matters as sanitary regulations. Landlords who fail to provide water closets, and carriers omitting individual drinking cups, are proscribed by statute, but filthy tenants or careless passengers are untouched by law. Upon the whole it is a well-intentioned, but undisciplined public on which descend war laws hitherto unknown, — litigation over whose administrative enforcement would seem absolutely certain.

Quantitatively it would be quite useless to dwell on recent legislation, but the qualitative difference between the legislative output of the German war and all previous experiences is a study both legal and social.

The Conscription Act,<sup>2</sup> and the Questionnaire<sup>3</sup> devised thereunder after one experience with local boards choosing men for "Selective Service" under their own several interpretations of the statute, its object and meaning, show radical novelty. The act itself is the first effort in this country to do away with bounties, and the purchase of exemption by furnishing substitutes; while the questionnaire system (with almost no public notice of the point) marks a more complete departure from local home rule than any military effort in our history. The "local boards" were loyally

<sup>2</sup> May 18, 1917.

<sup>3</sup> P. M. G. O., Form 1001.

chosen from residents of each district, they did wonderfully well, yet produced results so persuasively divergent, that government dared, as it did not six months earlier, to compel uniformity of action by turning them into mouthpieces for the central authority.

These new departures have not directly produced litigation as yet; but regardless of history the constitutional power to pass any such statute has been challenged, and its administration assailed by both *habeas corpus* and bill in equity.

The theorizing of Dr. Hannis Taylor <sup>4</sup> to the effect that no American soldier can be sent overseas except by his own will, may be regarded as a negligible curiosity, but the act has been held constitutional in widely separated jurisdictions.<sup>5</sup> Some variants of the general question are novel; a local board is not an unlawful species of court;<sup>6</sup> one keeping a bawdy house within five miles of a camp cannot escape prosecution under section 13 as a person not subject to military authority;<sup>7</sup> requiring a man to show his registration card does not compel him to give evidence against himself in violation of the Fifth Amendment;<sup>8</sup> every man of statutory age is *ipso facto* within the purview of the act, which therefore affects him before registration;<sup>9</sup> and those whose words or writings tend to prevent registration or induce refusal to register, may be indicted for conspiracy;<sup>10</sup> while conscientious objectors whose language has similar purport must take their chances with a *petit jury*.<sup>11</sup> The alien non-declarant, though specifically exempt under the act, has furnished

<sup>4</sup> Dr. Taylor's Memorial is in CONG. RECORD, October 4, 1917. An excellent reply by former Attorney General George W. Wickersham, has been reprinted as a pamphlet from the Philadelphia Press of August 19, 1917.

<sup>5</sup> Most of the decisions as yet made are not in the reports; many of them, being charges to juries, will not appear. They are being published through the Department of Justice as "Bulletins of Interpretation of War Statutes," and will be referred to by number. The whole number before January 7, 1918, is thirty-two, all in District Courts, unless otherwise stated. The constitutionality of the statute has been upheld in *Angelus v. Sullivan* (C. C. A. 2d Bulletin 2); *Re Stephens* (Delaware, Bulletin 13); *The Jeffersonian* (S. D. Georgia, Bulletin 24); *United States v. Olson* (Washington, Bulletin 20). And since writing the text the Supreme Court has so held; the Chief Justice finding (as so often before) that the contention of unconstitutionality did not survive statement, *Re Granbard et al.*

<sup>6</sup> *Re Stephens, supra.*

<sup>7</sup> *Re Smith*, N. D. Georgia, Bulletin 17.

<sup>8</sup> *Re Olson, supra.*

<sup>9</sup> *Re Stone*, E. D. Pennsylvania, Bulletin 25.

<sup>10</sup> *Re Phillips*, S. D. New York, Bulletin 14.

<sup>11</sup> *Re Traina*, S. D. New York, Bulletin 18.



more litigation than any other single class. Owing to treaty obligations, such men have never been regarded as properly subject to compulsory military service;<sup>12</sup> under the present statute they must, like all other of the excepted classes claim exemption. Many have not done so, or failed so to do by the records of the local board before which they appeared; and after being held for service have either procured a *habeas* or filed a bill to enjoin the board members from certifying them.

The first procedure has resulted in a very doubtful ruling that the writ did not issue as of right during war, and that the matter was within the "domain of military authority";<sup>13</sup> and several decisions, thought to be correct, that such alien having had an opportunity for hearing, and having made no timely claim of exemption before the local board lost jurisdiction, must be remitted to executive action, — the law had been satisfied.<sup>14</sup>

Efforts to use equity, to enjoin local boards from acting in respect of plaintiffs calling themselves alien non-declarants, have been unsuccessful on the ground that injunctive relief could not be granted as against such governmental agencies.<sup>15</sup>

The Espionage Act<sup>16</sup> is regarded as a radical novelty in America, and the popular view is in the main correct, for it has given our law a new word, which as defined in section 1 of the statute covers acts long known as most injurious to national security, and never before visited in this country with statutory condemnation. Yet those sections which have as yet given rise to any litigation, when taken in conjunction with that part of the Conscription Act relating to obstructing recruiting or enlistment,<sup>17</sup> suggest the Sedition Act of 1798<sup>18</sup> in a manner possibly still alarming to lawyers of political proclivities, if they know any history.

Indictments for spoken words calculated to obstruct enlistment, or to cause or incite insubordination, mutiny, or disloyalty in the military or naval forces of the United States, will cover a multitude

<sup>12</sup> MOORE, INTERNATIONAL LAW DIGEST, vol. 4, 50 *et seq.*

<sup>13</sup> *Re Troiani*, E. D. Pennsylvania, Bulletin 8.

<sup>14</sup> *Re Hutfis*, W. D. New York, Bulletin 11; *Re Summertime*, E. D. Michigan, Bulletin 16; *Re Koopowitz*, S. D. New York, Bulletin 10; *Re Cubyluck*, E. D. New York, Bulletin 28.

<sup>15</sup> *Angelus v. Sullivan*, *supra*; *Re Bonifaci*, W. D. Washington, Bulletin 9.

<sup>16</sup> June 15, 1917.

<sup>17</sup> Section 3. *Cf.* Title I, § 3, and Title XII of Espionage Act.

<sup>18</sup> 1 STAT. 596.

of sins, when so large a proportion of our youth are in uniform, or nearly so. It has been thought that the criminality of such language rests solely on the statute,<sup>19</sup> a view open to doubt, to say the least; also that section 21 of the Federal Penal Code punishing the offense of preventing by intimidation another from taking office under the United States, covers the case of joint signers of a letter to county officials denouncing conscription and the local quota thereunder,<sup>20</sup> apparently because the recipients of the letter were or might be members of local boards; juries have been told that cursing the President or other officials is not *per se* criminal, but may be considered in ascertaining whether the "natural and legitimate" result of defendant's language was to wilfully obstruct recruiting,<sup>21</sup> and substantially similar instructions were given in the case of one (apparently a follower of Dr. Hannis Taylor) who *inter alia* had said: "I cannot see how the government can compel troops to go to France; if it was up to me I'd tell them to go to hell."<sup>22</sup> Advising men not to report for military service is clearly within the Espionage Act.<sup>23</sup>

Writing or print must usually go through the mails to obtain any considerable audience, and several publications have been debarred from postal privileges by the Postmaster General, and failed to obtain injunctive relief from the courts.<sup>24</sup> The ground of decision has not been solely that in the opinion of the court the newspaper or periodical violated the statute, but also that the Postmaster General had so found; and the courts interfere with such findings only when the case is very clear.

This statute has greatly enlarged our protective legislation in some matters having no very obvious relation to spying or any allied word. Title V gives powers long needed in respect of clearances of ships, which have usually been regarded as something collectors could not refuse;<sup>25</sup> Title VII gives embargo powers to the President, which should lay some constitutional ghosts that have

<sup>19</sup> *Re Wallace*, Iowa, Bulletin 4.

<sup>20</sup> *Re Baltzer*, South Dakota, Bulletin 3.

<sup>21</sup> *Re Doll*, South Dakota, Bulletin 5.

<sup>22</sup> *Re Krafft*, New Jersey, Bulletin 6.

<sup>23</sup> *Re Sugarman*, Minnesota, Bulletin 12.

<sup>24</sup> The *Jeffersonian*, *supra*; *Patten v. The Masses*, C. C. A. 2d Bulletin 7; see also Bulletin 26. *Re Pierce*, N. D. New York, Bulletin 15.

<sup>25</sup> *Hendricks v. Gonzalez*, 67 Fed. 351.



walked since the days of Jefferson, and by Title XI search warrants are authorized under many circumstances, — a right long withheld by congress to the detriment of the public in many ways. It is not unimportant to note, in respect of these general provisions, that the Espionage Act is not in terms temporary, and repeals the ineffective statute of somewhat similar purport passed in 1911.<sup>26</sup>

National legislation directly and along familiar lines strengthening the military arm is by no means exhausted,<sup>27</sup> but there has as yet been no judicial comment, so far as ascertainable, on the other new statutes. Congressional action has been supplemented by many state acts, of which the New York statute authorizing the suspension of liquor licenses in places near camps, munition factories, etc., has been tested, and upheld as not violating the constitution of the State.<sup>28</sup>

By some fortunate chance, what is the most important single disciplinary regulation concerning any army was recast in modern shape in 1916, after persistent neglect for over a century, *viz.*, the Articles of War.<sup>29</sup> The second section thereof, subjecting retainers and persons accompanying an army to the jurisdiction of court martial, has been upheld as applied to a seaman voluntarily serving on an army transport.<sup>30</sup>

There is nothing both novel and important in any litigation as yet yielding judicial rulings, and arising under the acts above noted which directly affect the uniformed forces; but the spirit in which the matters have been treated is refreshing. Our heritage is very legalistic; *Ex parte Merryman*,<sup>31</sup> with its picture of a United States soldier refusing the United States marshal entrance to a fort, lest he should serve a *habeas*, is not pleasant reading.<sup>32</sup> Nor is *Ex parte*

<sup>26</sup> Title I, § 9.

<sup>27</sup> The Repatriation Act (in respect of foreign enlistments) of October 5, 1917; the Explosives Act (providing for control of manufacture and sale thereof) of October 6, 1917; the act authorizing seizure of even partially enemy-owned ships, of May 12, 1917, and the Air-Craft Act of October 1, 1917.

<sup>28</sup> *People, ex rel. Doscher v. Sisson*; the opinion by Putnam, J., puts decision squarely on the duty and right of the states to "render loyal aid in the prosecution of war" to the national government. App. Div. 2d Dept. Bulletin 32.

<sup>29</sup> 39 STAT. 650.

<sup>30</sup> *Re Gerlach*, S. D. New York, Bulletin 31.

<sup>31</sup> TANEY, U. S. Cir. Ct. 246.

<sup>32</sup> I have personally known an officer who for the same reason, *i. e.*, to avoid service of *habeas*, never left Fort Lafayette, New York Harbor, for over a year and a half, when that enclosure was used for internment purposes during the Civil War.

*Milligan*,<sup>33</sup> with its aftermath of *Milligan v. Hovey*<sup>34</sup> and *McCall v. McDowell*,<sup>35</sup> very encouraging to any man charged with the suppression of ununiformed hostility. The doctrine of the *Milligan* case that "Martial law can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," received something of a shock in *Re D. F. Marais*,<sup>36</sup> but our decision is still law for us. Yet as far as we have gone, the courts in 1917 have read the acts with a real sympathy for their purpose, without that verbal criticism which their hasty construction too often renders easy, — and without any discernible jealousy of military or executive power.<sup>37</sup>

When one turns from laws for or directly affecting the military to such statutes as the Transportation Priority Act,<sup>38</sup> the Coastwise Trade Act,<sup>39</sup> the Trading with the Enemy Act,<sup>40</sup> the Food and Fuel Conservation Act,<sup>41</sup> and the Agricultural Seed Act,<sup>42</sup> there appears a kind of governmental effort absolutely new in American history, and concerning which no court has yet been called on to speak. On the subjects treated we have no social or political traditions that have not been violated, and few inherited legal suggestions.

That trading with the enemy was unlawful needed no declaratory statute,<sup>43</sup> but the effect of hostilities on enemy property within the country, especially when one had to deal with modern investment securities, was something greatly requiring regulation. Here we have traditions of gentleness, if not helplessness, that without statutory guidance would certainly not have answered modern requirements. Mere declaration of war did not justify confiscation in 1812,<sup>44</sup> and the statutes for seizure of hostile property passed

<sup>33</sup> 4 Wall. (U. S.) 2

<sup>34</sup> 3 Biss. U. S. Cir. Ct. 13.

<sup>35</sup> DEADY, U. S. Cir. Ct. 233.

<sup>36</sup> [1902] A. C. 109.

<sup>37</sup> One of the best written and most rancorous of recent exhibitions of this always existing feeling is by Prof. H. W. Ballentine of the University of Wisconsin: "Unconstitutional Claims of Military Authority," JOURN. OF. AM. INST. OF CRIMINAL LAW, vol. 5, 718, January, 1915.

<sup>38</sup> August 10, 1917.

<sup>39</sup> October 6, 1917.

<sup>40</sup> October 6, 1917.

<sup>41</sup> August 10, 1917.

<sup>42</sup> August 10, 1917.

<sup>43</sup> THE PRIZE CASES, 2 BLACK, (U. S.) 635.

<sup>44</sup> Brown v. United States, 8 Cranch, (U. S.) 110.



during the Civil War were construed for obvious reasons *in mitiori sensu*.<sup>45</sup>

The present being in the quaint language of *The Eliza*<sup>46</sup> a "solemn" or "perfect" war, all the people of one nation being arrayed against all those of another; congress has created a body of legislation to be justified and upheld only by the simple and fundamental doctrine that the power to perform an act includes by necessary inference the power to do it in any way or by any means not specifically prohibited, which classic *dictum* in its modern application assumes that waging a twentieth-century war means waging it with a people disciplined, that is guided and assisted in production, distribution, sale and consumption, as well as with an army and navy subsisting on the fruits of such discipline behind the lines.

Thus the instant driving force behind Marshall's familiar doctrine, which as usual is appealed to as the legal bulwark of our nationality,<sup>47</sup> is and must be a perception on the part of bench and bar that means change: tools are new, requirements enlarge, — but the really legal yardstick does not; because the law justifies a result, it concerns itself with means only incidentally.

We have not gone very far, the courts have been but little appealed to, the period of reaction has scarcely arrived. The facts, however, are to be faced; that as war measures, our jealously guarded coastwise trade has been opened to foreigners, the executive has been placed in charge of the necessities of life, with powers of requisition putting all previous extension of eminent domain in a far background, the transportation systems of the country are no longer *common* carriers, and instead of being affected by a public use, or being called public utilities, have become an instrument of government, while the Secretary of Agriculture has become a national seedsman.

As lawyers, we have no precedents in the narrow sense, but we have principles enunciated in days when national feeling and sentiment were in the making. The philosophical grasp, as well as the loyalty of bench and bar, will be tested as never before, especially by these efforts to discipline the nation behind the guns.

A good beginning seems to have been made, but the end is not

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<sup>45</sup> *E. g.*, *United States v. Dunnington*, 146 U. S. 338.

<sup>46</sup> 4 Dall. (U. S.) 40.

<sup>47</sup> Neterer, J., has already done so in *United States v. Olson*, *supra*.

yet, and thought on these war-time laws is the more necessary, because no one can doubt that even if the executive departments are not popularly deemed very successful managers of national house-keeping, their efforts under these statutes will suggest business, and therefore legal queries and possibilities that will bear much fruit hereafter.

Whether that fruit be good or bad, will to a considerable extent depend on how much thinking the bar does now.

*Charles M. Hough.*

UNITED STATES CIRCUIT COURT OF APPEALS,  
NEW YORK.



## INSOLVENCY AND SPECIFIC PERFORMANCE

THOUGH the fact of the insolvency of one of the parties to a suit in equity is generally conceded to have a very material bearing upon the question of the granting or refusing of relief, many courts express considerable doubt as to whether the defendant's inability to satisfy a judgment rendered against him is sufficient ground upon which equity may take jurisdiction to grant specific performance.

The adjudged cases may be placed roughly in three groups: (1) those taking the view that, if damages can be accurately estimated, the legal remedy should be considered adequate and specific performance refused though the defendant is insolvent so that damages may be uncollectible;<sup>1</sup> (2) those holding that insolvency alone is a sufficient basis on which equity may act, considering that the legal remedy is inadequate if it does not yield substantial results;<sup>2</sup> (3) and those taking the view that, though insolvency alone will not give jurisdiction, it may, nevertheless, when combined with other matters of equitable cognizance, "become a potent or even controlling factor in determining the fact of jurisdiction."<sup>3</sup>

<sup>1</sup> *McLaughlin v. Piatti*, 27 Cal. 451; *Hendry v. Whidden*, 48 Fla. 268, 37 So. 571; *Cincinnati, etc. R. R. Co. v. Washburn*, 25 Ind. 259; *Lasar v. Baldridge*, 32 Mo. App. 362; *Gillett v. Warren*, 10 N. Mex. 523, 62 Pac. 975.

<sup>2</sup> *Doloret v. Rothschild*, 1 Sim. & St. 590; *Dilburn v. Youngblood*, 85 Ala. 449, 5 So. 175; *Clark v. Flint*, 22 Pick. 231; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

<sup>3</sup> In several of the cases most often quoted for this proposition there either appears, in fact, no other ground upon which equity could act, or, the additional ground suggested is untenable. In *Livesley v. Johtnson*, 45 Ore. 30, 76 Pac. 13, 946, the court said that the agreement gave rise to a trust relationship, but no such situation appears in the case. One party advanced money for the cultivation and gathering of a crop of hops grown on the land of the other, a part of which crop was to be sold to the party making the advances. In *Livesley v. Heise*, 45 Ore. 148, 76 Pac. 952, arising under a similar contract, the court relying upon *Livesley v. Johtnson*, *supra*, said that "in addition to the idea of a joint venture" there was a "clear ground for equitable intervention to require specific performance to deliver the hops, which consists in the alleged fraudulent collusion of the parties defendant, entered into with a view on the part of A. Heise to avoid his obligations to the plaintiffs under the contract." It is difficult to see why failure to perform coupled with fraudulent intent should give equity jurisdiction any more than failure to perform for any other reason.

*Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229, also relying upon *Livesley v.*

When the goods which are the subject matter of the contract are not unique and the plaintiff's situation with reference to them is in no way special or peculiar, the legal remedy affording a recovery of a money judgment is ordinarily quite adequate. But when the defendant is insolvent,<sup>4</sup> or in such financial condition that as a practical matter the judgment so rendered would be uncollectible, it is hardly a sufficient answer to the party asking relief to tell him that the forms of legal procedure provided are perfect for determining with accuracy the damage which he has suffered, though the remedy thus provided will yield him no actual returns.<sup>5</sup> The jurisdiction of equity being founded upon the inadequacy of the legal remedy in the particular case before the court, what constitutes such inadequacy ought to be a matter of fact rather than of theory.

Though the recovery of damages is a complete and adequate remedy in the case of a bargain for goods of an ordinary kind, yet the legal remedy affords an adequate relief only when the damages themselves, and not merely a judgment for them, can actually be secured.<sup>6</sup> The proper test of the adequacy of the legal remedy in any case is, whether the plaintiff can take the sum of money recovered, and with it put himself in the same situation as if the contract had been kept.<sup>7</sup> Clearly, when goods are unique in character this cannot be done, as the very character of the goods makes it impossible to replace them with any sum of money; hence equity has jurisdiction

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Johnston, *supra*, fails to show any other ground for equitable relief. Complainant made large advances on a contract for the purchase of 2,500 cords of wood. The fact that unless specific performance was decreed the wood might be lost to both parties, merely shows the necessity of equitable relief because of insolvency, rather than any independent ground of equity jurisdiction.

<sup>4</sup> Insolvency in this connection should be taken to mean nothing more than inability to satisfy a judgment which might be rendered. In *Hogg v. McCuffin*, 67 W. Va. 456, 68 S. E. 41, the defendant appears only to be "execution-proof." But the mere allegation of insolvency, or the apprehension of it, should not induce the court to act. *Strang v. Richmond, etc. R. R. Co.*, 93 Fed. 71.

<sup>5</sup> *McLaughlin v. Piatti*, 27 Cal. 451; *United, etc. Co. v. Hoppock*, 28 N. J. Eq. 261; *Heilman v. Union Canal Co.*, 37 Pa. St. 100. POMEROY, EQUITY JURISPRUDENCE, vol. 6, § 749, note 30, says: "The inadequacy of the legal relief which is the basis of equitable remedies is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of collection of damages in the individual instance." See also FRY, SPECIFIC PERFORMANCE, § 65.

<sup>6</sup> *Glassbrenner v. Groulik*, 110 Wis. 402, 85 N. W. 962.

<sup>7</sup> *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229; *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189; *New England Box Co. v. Prentiss*, 75 N. H. 246, 72 Atl. 826; *Livesley v. Johnston*, 45 Ore. 30, 76 Pac. 13, 946.



and may grant relief. But if the defendant is insolvent, or a judgment against him cannot be satisfied, any legal remedy against the defendant is just as inadequate, no matter how perfect the procedure may be for the discovery of the exact amount due.

The goods being in no way unique or peculiar, is it a sufficient reason for giving specific performance to a buyer, who has advanced the purchase price, that he cannot recover from the seller, because of his insolvency, such a sum of money as will put him in the same position as if the contract had been kept? His remedy is not inadequate because he needs these particular goods, but only because he cannot with the money recoverable from the seller in a law action buy such goods in quality and amount as are called for by his contract.

It has been suggested <sup>8</sup> that one who has thus advanced money to a person now insolvent for which he was to receive goods, is in a position subjecting him to great hardship in that, unless specific performance is granted, he will get neither the goods for which he contracted nor the money which he has advanced; while there is no hardship upon the seller in compelling him to perform, since he would be unjustly enriched if allowed to keep the money without giving up the goods. Nor, it is said, is there any unfairness to the seller's creditors, since they will suffer no hardship if not permitted to share in the money which has been given for the goods; while they would be unjustly enriched at the buyer's expense if specific performance to him was not permitted, in that they would share in both the goods and the money. If this argument is sound there would seem to be no reason for making a distinction between a buyer and a seller, and the argument would apply with as much force in case of a sale of goods to the insolvent person as in the case of a contract for the purchase of goods where the purchase price has been paid.<sup>9</sup> If the buyer in such a situation is not compelled by equity to pay the full purchase price, the seller loses his goods

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<sup>8</sup> 18 HARV. L. REV. 454.

<sup>9</sup> A distinction should be drawn between the case of one who advances money on the credit of specific goods or with special reference to being protected from the seller's insolvency, and one who enters into contract relations without such considerations. In the first situation the complainant should be protected, *Hurley v. A. T. & S. F. Ry.*, 213 U. S. 126; while in the other case there is a reliance merely upon the general credit of the other party and no reason exists for giving the complainant relief different from that to which all other general creditors are entitled. *Columbia, etc. Co. v. World's Columbian Exposition*, 85 Ill. App. 369.

and does not get the purchase money; while the insolvent buyer secures goods for which he pays nothing and his general creditors are permitted to share in this addition to their debtor's property at the expense of the unfortunate seller.

If the insolvency of the defendant makes the remedy of the plaintiff inadequate when money has been advanced for which title to goods was to be transferred, it must be just as inadequate when goods are transferred to the defendant for which he was to pay money; for, even if money is all that a plaintiff asks, he should be allowed to get it in equity if he is able to show that he cannot recover through the law court the sum to which he is entitled.<sup>10</sup> All creditors of an insolvent debtor who have either advanced goods without getting the purchase price, or advanced the purchase price without getting the goods, are in exactly the same position. In each case and with reference to every creditor of an insolvent debtor, there exists the same situation: the individual creditor will be left with a remedy which will yield little or nothing and at any rate will not put him into the same position as if the contract had been performed, while the debtor and all of his other creditors through him are enriched to the extent of the money or goods which this particular creditor has parted with. Only a money sum is necessary as to either buyer or seller to give complete relief; but because of the defendant's insolvency, the sum of money necessary for complete relief cannot be recovered.

Thus, as to each particular creditor, when the case is viewed only from his view-point, there is a situation which should entitle him to equitable relief, but as relief is quite impossible for every one because of the fact which alone makes the legal remedy inadequate, *i. e.*, that there is not sufficient money to pay the judgments which might be secured, the situation is one where equity must refuse relief to one when such relief would necessarily be given to the prejudice of others who are in exactly similar positions and where obviously it cannot be given to all alike. In many cases where equity properly has jurisdiction and the plaintiff would otherwise be clearly entitled to specific performance, the equity court has refused such relief on the ground that the rights of innocent third persons might be injured,<sup>11</sup> that the rights of the public might be prejudiced,<sup>12</sup> or

<sup>10</sup> "Specific Performance for the Purchase Price," 1 IOWA LAW BULLETIN, 53.

<sup>11</sup> *Curran v. Holyoke, etc. Co.*, 116 Mass. 90.

<sup>12</sup> *Taylor v. F. E. C. Ry. Co.*, 54 Fla. 635, 45 So. 574; *Whalen v. B. & O. Ry. Co.*,



that a peculiar hardship might be brought upon the defendant,<sup>13</sup> or that the burden upon the defendant may be out of all proportion to the benefits to be derived by the complainant.<sup>14</sup> The equity of the individual complainant is counter-balanced by the equities of others, and the court will consider all interests when giving its relief.

Since each creditor can make out a case for relief exactly similar to that of the party now before the court, and as each has at some time contributed to the enlarging of the defendant's estate, it ought to make no difference whether one claimant got into his unfortunate position sooner or later than another. As equity can and does look ahead to see what effect its action may have upon others, whether they are before the court or not, it must be at once apparent that if an estate can pay out only fifty per cent, if the court proceeds to give specific performance to the creditors whose claims make up the last fifty per cent of the indebtedness, these creditors will be paid in full; while the creditors to whom the debtor incurred the first half of his obligations must give up their property and get nothing whatever in return. Whether we start with the first claims or the last claims and give specific performance because of insolvency, the result must be that the creditors at the other end of the line will get nothing. The logical carrying out of the rule must result not only in the situation where a creditor parts with his money and does not get the goods, or parts with his goods and does not get his money, but also in the still greater hardship upon some of the creditors who having parted with their goods or their money without getting money or goods in return will be able to secure nothing whatever upon any remedy, legal or equitable, which they may wish to pursue; while others similarly situated will have the obligations which are due them completely and specifically performed.

Though the jurisdiction of the court may be perfect, equity in

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108 Md. 11, 69 Atl. 390; *Harper v. Virginian Ry. Co.*, 76 W. Va. 788, 86 S. E. 919. *Heilman v. Union Canal Co.*, 37 Pa. St. 100, though usually cited for the proposition that insolvency alone is not a basis for equity jurisdiction, involved however the proposition of balance of hardship in that the defendant company was maintaining "an important public thoroughfare," which would be destroyed by granting the complainant's petition to enjoin the defendant's use of water.

<sup>13</sup> *Faine v. Brown*, cited 2 VES. SR. 307, (S. C.) AMES, CASES IN EQUITY, 397.

<sup>14</sup> *Clarke v. Rochester, etc. R. R. Co.*, 18 Barb. (N. Y.) 350; *Conger v. N. Y., etc. R. R. Co.*, 120 N. Y. 29, 23 N. E. 983.

many situations very properly refuses to exercise it, and on this basis specific performance should not be given to one creditor in his suit against an insolvent defendant when such relief would result to the prejudice of other creditors occupying similar positions and who are equally entitled to relief.<sup>15</sup>

The contract may, however, be of such a character that the rights or interests of third persons would in no way be affected by compelling performance to the complainant, as, for example, where the question involved is to make the defendant sell his goods or perform his obligations to the complainant rather than to allow him to deal with some one else to whom he is under no obligation,<sup>16</sup> or to observe a negative agreement, the breach of which would injure the complainant and is of no concern to any other person.<sup>17</sup> It may also happen that the complainant is the only creditor of the insolvent defendant, so that no third person can be injured by the giving of equitable relief. If the legal remedy in such a situation is inadequate, equity should give relief by way of specific performance. Thus, if the plaintiff is the only creditor and has advanced money to the defendant, and the defendant then squanders the money and has no other property available, a judgment against him would remain unsatisfied unless the very goods bargained to be sold might be levied upon to satisfy the judgment. If they would be sufficient and available for this purpose, then it would seem that the legal remedy would for all practical purposes be as adequate as the equitable one, since the plaintiff does not require these particular goods but only to be put into a position where he can secure similar goods.

However, it might happen in such a situation that the legal remedy would be inadequate in the case where money is advanced for goods, and might easily be inadequate where goods have been advanced without getting payment of the money, for the creditor may not be able to find the goods or the money which may be levied upon to satisfy any judgment which may be rendered. Furthermore, an equitable remedy might be more effective than a legal one in pre-

<sup>15</sup> *Roundtree v. McLain*, 4 Hempst. 245; *City Fire Ins. Co. v. Olmsted*, 33 Conn. 476; *Munger v. Albany, etc. Bank*, 85 N. Y. 580; *Chaffee v. Sprague*, 16 R. I. 189, 13 Atl. 121.

<sup>16</sup> *Texas Co. v. Central, etc. Co.*, 194 Fed. 1; *Great Lakes, etc. Co. v. Scranton Coal Co.*, 239 Fed. 603.

<sup>17</sup> *Zimmermann v. Gerzog*, 13 N. Y. App. Div. 210; *Petrolia Mfg. Co. v. Jenkins*, 51 N. Y. Supp. 1028; *Beeman Bros. v. Hexter*, 98 Iowa, 378, 67 N. W. 270.



venting the debtor from putting himself in a position where he cannot perform his obligation to pay a judgment.<sup>18</sup> So also the goods may be so located as to put too great a hardship upon a creditor to make his rights depend upon the seizure of the debtor's goods.<sup>19</sup> Likewise, the property bargained to be sold may be exempt from legal process,<sup>20</sup> or the plaintiff may not know what property the defendant has, nor where the property may be found, and hence the legal remedy might be worth but little, while the equitable remedy would give full and complete relief.

Even though there may be other creditors to whom the debtor owes small amounts the situation may be such that no practical question involving the settlement and distribution of the debtor's assets is raised. The debtor may belong to the class of those who cannot be forced into involuntary bankruptcy; and hence, if he does not raise the question, there may be no reason why equity should not give specific performance to the creditor asking relief who makes a showing of the necessity thereof in his special case.<sup>21</sup> His other indebtednesses may be for only trifling amounts, and as he cannot be forced into bankruptcy involuntarily he may pay such debts as he wishes and his other creditors cannot object to his so doing. Therefore, if he is compelled to perform his obligation to the complainant his other creditors are not injured any more than if he made such payment voluntarily. It is for the defendant to insist upon a distribution of his estate to all creditors if he so wishes, but there is nothing in the Bankruptcy Act which permits him to merely refuse to perform his obligations or pay his debts, unless a distribution of his assets takes place under the term of the Act. In such a case equity is not changing in any way the defendant's rights or obligations, but is merely furnishing a remedy for the complainant by which he may compel performance from a debtor who is in default. If the defendant does not wish to perform, or wishes to

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<sup>18</sup> *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229.

<sup>19</sup> *McNamara v. Home, etc. Co.*, 105 Fed. 202. Here the complainant seems to be the only creditor of a foreign corporation whose property within the state was barely enough to fulfil its contract with the complainant; while the property itself, cattle running at large on the range, was such that any attempt to attach or levy upon it would have been very burdensome and ineffective.

<sup>20</sup> *Faraday, etc. Co. v. Owens*, 26 Ky. Law Rep. 243, 80 S. W. 1171. Contract for the conveyance of a homestead. Vendor not allowed to set up the homestead character of the property in a suit for specific performance by the purchaser.

<sup>21</sup> *Parker v. Garrison*, 61 Ill. 250.

treat all of his creditors alike, he has the option of filing a petition in bankruptcy to accomplish this purpose. Since it lies with the defendant, and not his creditors, to say whether there shall be a *pro rata* distribution of the defendant's estate, the protection of the rights of other creditors does not require that equity should refuse the complainant the relief for which he asks.

From a practical standpoint the situation may be the same even though the debtor be not of the class exempt from involuntary bankruptcy. If the claims other than the complainants' are only for an inconsiderable amount, the practical difficulty of collecting a claim for five dollars or for five thousand dollars is very different; and the mere possibility of injury to these other claimants may not be sufficient or material enough to prevent equity from giving relief to one who very much needs it, at least, unless the parties concerned make known their objections. If the defendant is forced into bankruptcy within the proper time, the preference given through the equity court will be overcome the same as any preference which might be gained by any creditor in the law court. But the creditors for small amounts may prefer to trust to the general credit of their debtor and his ability to pay at a later time, and the possibility that they will enforce equal distribution of the debtor's estate may be so remote that this fact alone ought not to deter equity from giving aid to the party asking for and needing its relief.

That equity might very properly have taken jurisdiction for the purposes of effecting equality in the distribution of the property of insolvent debtors seems clear from a consideration of other situations where the principle of equality has been recognized and equity has taken care that all persons similarly situated should be treated in the same manner and that no one should gain a preference and no one be compelled to bear more than his share of the burden. Wherever it is at present possible to act upon this principle, equity will do so.<sup>22</sup> It is quite probable that the early enactment of bank-

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<sup>22</sup> GLENN, CREDITORS' RIGHTS AND REMEDIES, § 295; "... there is only one principle on which a Court of Chancery can act by way of liquidation. That principle may be invoked whenever, by operation of law or agreement, there exists a limited fund dedicated to the payment of debts, whether of one sort or another. In any such case, the actual or probable insufficiency of the fund completely to meet the purpose for which it was intended will induce the court to take jurisdiction over it, and actuate its disposition under the direction, or by the hands of, an officer of the court. That is a well established branch of the court's jurisdiction, however lacking may have



ruptcy and insolvency laws, the first one passed in 1542, the administration of which was originally given over to the Chancellor, may have prevented equity from developing jurisdiction in order to insure an equitable distribution of an insolvent debtor's property.

But the fact that equity may have been prevented from taking jurisdiction for this purpose has in no way prevented the recognition of the general principle that equality is equity, or have obscured this principle in reference to cases now taken care of through bankruptcy and insolvency statutes. Therefore, even though equity has not taken jurisdiction to promote equality among creditors, it should not, on the other hand, take any action to give preference to one creditor over another and thus work against the equitable idea of equality. An exception, which is apparent rather than real, is where equity is called upon to aid a legal process as, for instance, to subject goods to levy which cannot be reached at law; but it must be borne in mind that this relief is merely following and aiding the legal process rather than granting any remedy of its own, and in so far as equity is called upon to act in such cases it follows the law in that it applies to property, which could be made available in equity only, the same rules as were applied to property made available at law, *i. e.*, it was used only to get property and not to make a distribution of it.<sup>23</sup>

Since business could not wait upon the development of either law or equity, mercantile necessity brought out the bankruptcy legislation, thus forestalling, probably, the application of the principle of equality which equity has applied in many other situations. The marshalling of assets, the right of a creditor to bring a bill against the representative of a deceased debtor,<sup>24</sup> the administration of the assets of an insolvent corporation or limited partnership,<sup>25</sup> and cases of contribution in suretyship<sup>26</sup> are all further illustrations of the protection which equity gives to insure that all persons similarly situated be treated equally and fairly.

Though insolvency of a debtor as a basis of granting specific per-

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been the chancellors in the exposition of its basis. But that there is such a jurisdiction cannot be doubted."

<sup>23</sup> GLENN, *CREDITORS' RIGHTS AND REMEDIES*, § 16; "... the equity court was acting in the whole matter purely in aid of the legal right to payment evidenced by judgment. . . ."

<sup>24</sup> LANGDELL, *EQUITY JURISDICTION*, 125.

<sup>25</sup> GLENN, *CREDITORS' RIGHTS AND REMEDIES*, § 308.

<sup>26</sup> POMEROY, *EQUITY*, vol. 1, §§ 407, 411.

formance to one creditor in disregard of the rights of others similarly situated is undoubtedly against the spirit of the Bankruptcy Act,<sup>27</sup> such relief is also opposed to the fundamental principles upon which the equity court acts in all other situations where its relief is dependent upon the question whether it can be granted without doing harm to third persons: it is submitted that this general principle of equity would apply and prevent relief where the rights of other creditors would be prejudiced even in the absence of any special legislation upon the subject.

The conclusion to which we must then come, if insolvency is a basis for specific performance in any case, is that all persons to whom the insolvent owes obligations are entitled to specific performance, or to some sort of relief which is equitable in its nature. But where there are many creditors who are all practically in the same situation specific performance is obviously impossible, since all cannot be paid in full and there is no reason for preferring one creditor over the others or giving preference to one class of obligations merely because goods were to be given rather than money. In each case, though the legal remedy would under normal circumstances give adequate relief, this remedy is of but little value here because of the insolvency of the defendant. The relief which is needed is not specific performance of any particular obligation, but rather an equal distribution of assets to all persons having similar claims which cannot be paid in full. But, though the administration of this equitable principle has been largely taken over through bankruptcy and insolvency proceedings and the assumption of jurisdiction by the court of equity for this purpose has been forestalled, equity will at least see to it that by its action it does not prevent or hamper the action of the court which has been specially created to administer these equitable principles.

In cases involving threatened injury to property the courts seem to have had but little hesitation in allowing equitable relief where the defendant is insolvent, and in general have recognized the principle that the adequacy of the remedy is not a matter of the forms of procedure but of the actual results which the plaintiff may secure through the recovery and satisfaction of a judgment.<sup>28</sup> If

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<sup>27</sup> WILLISTON, SALES, §§ 144, 602.

<sup>28</sup> AMES, CASES IN EQUITY, 524, note 2, for collection of cases. See also POMEROY, EQUITY, vol. 5, § 497, and note 26.



the defendant is solvent and threatens injury to personal property having no special or peculiar value, the legal remedy ordinarily affords complete relief in that the plaintiff can take the sum of money recovered from the defendant and with it put himself in the same position he occupied before the wrong was done.<sup>29</sup> But if the defendant is insolvent the court of equity should grant whatever relief may be necessary in order to protect the plaintiff.<sup>30</sup> The test of the inadequacy of the legal remedy should be the same whether the case involves a contract or a tort, that is, what will be the position of the complainant after availing himself of the legal remedy? In either case, in order to be adequate, such a remedy should, in the case of a contract, put the complainant in practically the same situation as if the contract had been kept, and, in the case of a tort, as if the wrong had not been done. Equity should not be satisfied with any less relief.<sup>31</sup>

Though the remedy is just as inadequate in one class of cases as the other, in a case involving a tort no third person is injuriously affected or his rights prejudiced by the granting of the equitable relief; while in cases which arise out of contract, though the relief given to the plaintiff in the law court is just as inadequate as in a case involving a tort, yet it may often be the situation that the equity court cannot grant specific performance to the person applying for relief without bringing an injury upon or disregarding the rights of many other persons who stand in positions exactly similar.

<sup>29</sup> *Burgess v. Kattleman*, 41 Mo. 480; *Brown v. Reed*, 72 Neb. 167, 100 N. W. 143; *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384; *Kistler v. Weaver*, 135 N. C. 388, 47 S. E. 478; *Marshall v. Homier*, 13 Okla. 264, 74 Pac. 368.

<sup>30</sup> *West v. Smith*, 52 Cal. 322; *Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558; *Milan Steam Mills v. Hickey*, 59 N. H. 241.

<sup>31</sup> Cases often cited for the broad proposition that the legal remedy is not so inadequate that equity should take jurisdiction merely because it fails to produce the money, concern questions of taxation and are based upon entirely different principles. In *Crawford v. Bradford*, 23 Fla. 404, 2 So. 782, complainant sought to recover sums claimed to have been illegally collected by the defendant, who is insolvent. The proper action was *quo warranto* to test whether the defendant held office illegally. In other cases the question has been as to the power of equity to collect taxes when the legal remedy has not yielded results because no officer could be found to accept the office of collector. *Thompson v. Allen Co.*, 115 U. S. 550; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Safe-Deposit, etc. Co. v. Anniston*, 96 Fed. 661; *Preston v. Sturgis Milling Co.*, 183 Fed. 1; see also 32 L. R. A. (N. S.) 1020, note. In such cases the refusal of equity to grant relief is based on the fact that "taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is to apply to the legislature, which alone can grant relief." *Meriwether v. Garrett*, 102 U. S. 472.

Though the courts seem to have been much more willing to grant relief in cases involving threatened injury to property than in specific performance of contracts, the basis of jurisdiction is not different; but the nature of the case may have a strong bearing upon the question whether jurisdiction should or should not be exercised.

A class of cases where the granting of equitable relief is dependent upon the question of solvency or insolvency, but which is based upon an entirely different theory, is that in which an insolvent plaintiff asks specific performance. Though the question of insolvency is an important factor in determining whether relief should be given, the principle involved is in no way connected with the question of insolvency as a basis for specific performance. The question is purely one of mutuality of performance. Equity will either undertake to have the whole contract performed or else it will take no action whatever. The court will not aid an insolvent complainant to get property for which he bargained without at the same time getting the purchase money for the vendor. "Specific performance will not be given to one party unless specific performance by the other party is assured."<sup>32</sup>

A relief equitable in its nature<sup>33</sup> is often allowed against an insolvent defendant who has either misrepresented his financial condition or who, being insolvent, has bargained for goods without intending to pay for the same, or one whose financial condition is such that it may be inferred that he had no reasonable belief that he could pay and must, therefore, have intended to defraud the other party out of the goods or the price.<sup>34</sup> A similar situation exists where deposits have been received by an insolvent bank. In each case the remedy is based upon rescission for fraud, and not, as has been suggested,<sup>35</sup> upon the mere insolvency of the defendant. What constitutes the fraud is not material if the party asking relief has been led into the bargain by the fraudulent conduct of the other party. In such cases the time element may be very material, and the latest creditors may be given what would seem to be a preference; but the later creditors have the advantage only in so far as the time when the obligation was entered into may suggest the question of fraud, that is, the question as to whether the defendant had pur-

<sup>32</sup> Dean Ames in 3 COL. L. REV. 1.

<sup>33</sup> WILLISTON ON SALES, §§ 567, 647.

<sup>34</sup> *German National Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454. See also WILLISTON ON SALES, § 637.

<sup>35</sup> 18 HARV. L. REV. 454.



chased the goods or received the deposit while insolvent so that the question of insolvency may be used to show that at the time he could have had no reasonable expectation of paying and may therefore be considered to have intended to defraud the other party to the bargain. In other words, if he has purchased goods with an intention to defraud the other party out of them because, being insolvent, no recovery could be had against him, then relief may be had on the doctrine of rescission for fraud. The remedy by rescission, though based upon an equity doctrine, is a reason entirely apart and distinct from insolvency as a basis of equitable relief.

Agreements for the giving of security present a class of cases where relief by way of specific performance is given in equity against an insolvent defendant not necessarily because of insolvency, but rather because of the possibility of it. Such agreements are ordinarily specifically enforceable since the thing bargained for cannot be replaced with money damages. The plaintiff contracts for protection, and no adequate estimate can be made of the difference between a claim secured and one unsecured, for, when the security is needed, the plaintiff may not at that time be able to recover anything from the defendant. "It must always be problematical what the promisee's pecuniary injury is. The problem depends on the value of the security and the solvency of the debtor at the time when the debt is due."<sup>36</sup>

If specific performance of a contract to give security would be granted because of the fear of insolvency, it ought not to be refused if the situation the very possibility of which makes the legal remedy inadequate is already a certainty when the aid of equity is asked. If the contract would have been enforceable in the absence of insolvency, the court may very properly look to see whether the rights of third parties, usually other creditors, will be prejudiced by giving specific performance to the plaintiff when the defendant is insolvent. Here the plaintiff is not asking for a right which others similarly situated would not get, but is putting his case upon the ground that when he performed his part of the contract he was entitled not merely to a chose in action but to security: he has bargained to be a preferred or secured creditor and is therefore in a different class from the ordinary creditors who have advanced either money or goods without bargaining for such protection and solely in reliance

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<sup>36</sup> WILLISTON ON SALES, § 139.

upon the general solvency of the defendant.<sup>37</sup> It is too broad a statement to say that specific performance will necessarily be granted in every case involving a contract to give security, for though in most cases damages may be problematical to a sufficient degree to make the action of the equity court proper and necessary, yet there may undoubtedly be many situations where the legal remedy will be practically sufficient so that equity should not act because of the theoretical inadequacy of the legal remedy. In suits for specific performance of such agreements, therefore, the insolvency of the defendant would be not merely an important but really the determining factor in the exercise of jurisdiction.<sup>38</sup> The complainant who has thus advanced his money upon the credit of particular goods does not expect or intend to become a general creditor; but if specific performance is refused he will become such, with the result that he is forced into an entirely different bargain from that which he contemplated. If specific performance were not granted in such a case the creditors, who have not bargained for security, would be unjustly enriched at the expense of the lender and would improperly share in his property.

On a similar basis equity allows relief by way of set-off when the legal remedy is inadequate. Though the plaintiff may have contracted because of having a set-off as security and has not relied upon the general credit of the other party,<sup>39</sup> yet it is only when the fact of insolvency or other sufficient cause makes apparent the inadequacy of the recovery of a judgment in a law court that equity takes jurisdiction to grant relief.<sup>40</sup> Insolvency here appears as the

<sup>37</sup> *Columbia, etc. Co. v. World's Columbian Exposition*, 85 Ill. App. 369; *Sullivan v. Tuck*, 1 Md. Ch. 59.

<sup>38</sup> *Ex parte Masterman*, 4 L. J. BANKER. 54; *Shockley v. Davis*, 17 Ga. 177; *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Atl. 312.

<sup>39</sup> *Houston v. Maddux*, 179 Ill. 377, 53 N. E. 599: "To warrant the interference of equity, there must be circumstances from which it can be inferred that one debt was contracted on the faith of the other." *Porter v. Roseman*, 165 Ind. 255, 74 N. E. 1105: "In enforcing an equitable set-off the court proceeds upon the principle that one demand is, *pro tanto*, a satisfaction of the other, and that the real indebtedness is merely the balance." To the same effect, *Printy v. Cahill*, 235 Ill. 534, 85 N. E. 753.

<sup>40</sup> *Machado v. Borges*, 170 Cal. 501, 150 Pac. 351; *Hahn v. Gates*, 102 Ill. App. 385; *Cummins v. White*, 4 Blackf. (Ind.) 356; *Keightley v. Walls*, 24 Ind. 205; *Blackwell v. Oldham*, 34 Ky. 195 (4 Dana); *Patterson v. Woolridge*, 170 Ky. 748, 186 S. W. 639; *Wolff v. Jasspon*, 126 Mich. 11, 85 N. W. 260; *Gemmell v. Hueben*, 71 Mo. App. 291; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Reed v. Bank of Newburgh*, 1 Paige (N. Y.), 215; *Lindsay v. Jackson*, 2 Paige (N. Y.), 581; *Armstrong v. McKelvey*, 104 N. Y. 179, 10 N. E. 266; *Mitchell v. Holman*, 30 Ore. 280, 47 Pac. 616.



prime factor inducing equity to act in saving to the creditor the position to which he is entitled and thus preventing him from being placed along with the general creditors of the insolvent debtor.<sup>41</sup> To give specific performance of such an agreement is not failing to observe the principle of equality in equity, but is giving to a particular plaintiff that which he has specially secured to himself.

Where money is advanced for which a mortgage or security on after-acquired goods is to be given,<sup>42</sup> the protection of the rights of other creditors does not require the refusal of specific performance to the lender. Here is a situation which would ordinarily be enforceable inequity, and it does not become any the less so because of the insolvency of the defendant, and the same arguments which apply when there is an agreement to give security on goods now owned would apply with equal force if the goods were to be afterwards acquired. The one who has bargained for the special security ought not to be put along with the other creditors who have relied only upon the general credit of the other party any more in one case than in the other.

Sales dependent upon concurrent conditions, sometimes spoken of as "cash sales" or as "sales over the counter," present a situation where insolvency alone should induce equity to exercise its jurisdiction to grant specific performance. Here title is to be transferred only when the price is paid and, as in contracts involving security, neither party intends to rely upon the general credit or solvency of the other. If the seller in such a case has given over his goods but has not received the purchase price, the insolvency of the buyer ought not to throw this seller in with the general creditors, since an exact exchange was contemplated; the seller should either be allowed to recover back his goods or force the buyer to perform the conditions on which he received them. To force the seller to assume a position as a general creditor is putting him in a situation which he never agreed to occupy, and would be in effect making a new contract for him for the benefit of those, who, by their contracts or by the nature of their legal rights, are made to rely upon the buyer's general solvency, thus receiving an enrichment to which they are not entitled.

If the plaintiff, on the other hand, is the buyer and has paid over

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<sup>41</sup> *Crummett v. Littlefield*, 98 Me. 317, 56 Atl. 1053.

<sup>42</sup> *Holroyd v. Marshall*, 10 H. L. C. 191.

money to the defendant with the understanding that the payment of the money and the transfer of the title to goods were to be concurrent conditions, then the same situation arises; and whether the plaintiff has advanced money or goods, equity can give relief at a time when the legal remedy is inadequate. On the other hand, failure to give relief would result in a benefit to the general creditors by putting this plaintiff into a class with others whose rights rest upon an entirely different foundation. The plaintiff having entered into a bargain which is in no way dependent upon the general solvency of the defendant, the equity court should give him protection and should not allow his property to be taken or the other creditors to be unjustly enriched at his expense. The legal remedy being inadequate, and the plaintiff being in a class different from that of the general creditors, there is a direct obligation which equity can compel to be specifically enforced without prejudice to the rights of general creditors, at least so long as the defendant's estate may be said to be increased by the plaintiff's property so that the general creditors would be unjustly enriched if they were allowed to share therein.

Confusion may arise in failing to distinguish between sales actually based upon concurrent conditions and what are often also spoken of as cash sales, that is, sales where no period of credit is contemplated but the parties intend to pass title to the goods and to get at once a right of action for the purchase price. Here all other creditors are in the same situation and should be treated alike. This case does not differ from the case of sale on credit for a specified period, since in either case the parties intended to rely only upon the general solvency of the defendant.

When a buyer has advanced the whole or a portion of the purchase price on the security of particular goods, or goods to be purchased or produced which are then to be sold to him, he should be entitled to relief as in the cases where a loan has been made under an agreement for security or where goods have been bargained for subject to concurrent conditions. The vital question in each case is: Has the complainant dealt in reliance merely upon the general credit of the defendant or has he made such a bargain as should entitle him to the position of a special or secured creditor? When specific performance is given under such circumstances, no injury results to other creditors, if the original agreement was proper, since the



complainant is not in the same position and should not be classed with the general creditors. The exact position which a particular creditor has secured for himself is a question of fact dependent upon the reliance which has been placed upon the performance by the defendant. The complainant may or may not have relied upon the mere general credit and solvency of the defendant, and if he has not contracted, either expressly or impliedly, for any special protection, of course none should be given him; but it would be just as improper to refuse a complainant the protection for which he had bargained, as to prefer one creditor over another when all have relied only upon the general solvency of the defendant.

Whether the situation of the complainant was that of buyer or seller should, theoretically, make no difference, and any bargain for security clearly made out should be enforced; but, practically, the cases causing difficulty are those where money is advanced for the payment of goods. This difficulty is purely one of fact, to determine whether in the particular case reliance was placed merely upon the general credit and solvency of the seller or whether the basis of the advancement of the money was the security of the particular goods which were to be later transferred to the buyer, whether such goods are already owned by the seller or are yet to be produced or procured. If the goods are already owned by the seller and in condition for delivery, it may be very difficult, in the absence of express contract, to infer that the parties intended anything other than reliance upon the general credit of the seller for securing performance of the contract;<sup>43</sup> but where the buyer has advanced the whole or a portion of the purchase price for the express purpose of making possible the procuring or producing of the goods by the seller so that he may, with the goods thus secured, perform specifically his obligation to the buyer, it may easily be inferred that the buyer was intended by the bargain to hold some position with reference to such goods different from that of the general creditors

<sup>43</sup> In such a case as *Hendry v. Whidden*, 48 Fla. 268, 37 So. 571, where the complainant paid in advance the purchase price of a number of cattle, it did not appear that the money advanced was to be used for the purpose of procuring the cattle with which the defendant was to fulfill his contract to the complainant. If reliance was placed merely on the general credit of the defendant, then the complainant should not be entitled to specific performance unless the situation was such that there were either no other creditors or none whose rights would be materially affected by the granting of relief. See also, *McLaughlin v. Piatti*, 27 Cal. 451; *Cincinnati, etc. R.R. Co. v. Washburn*, 25 Ind. 259; *Gillett v. Warren*, 10 N. Mex. 523, 62 Pac. 975.

of the defendant. Realization of this fact has led the courts, in attempting to give proper protection to the buyer's position, to describe the relationship thus created between the parties as one of trust or pledge or mortgage.<sup>44</sup> However the rights of the parties may be worked out to give the complainant the relief to which he is entitled, the true situation seems to be merely one where equity has jurisdiction because of the inadequacy of the legal remedy brought about by the insolvency of the defendant, and where, because of the special bargain which the complainant has made, equity is in a position to exercise such jurisdiction without injuring in any way the rights of the general creditors.

It is submitted, therefore, that insolvency is a proper ground upon which equity may grant equitable relief by way of specific performance of a contract. The legal remedy giving judgment for a money sum cannot be considered adequate against an insolvent person, no matter how perfect it may be against a solvent defendant; and equity will give relief on the ground of the defendant's insolvency whenever this can be done without injury to third persons.<sup>45</sup> Since, however equity will not give relief to one person to the prejudice of others similarly situated, the cases involving contract relations where equitable relief is given against insolvent defendants are not numerous; but where, as is the usual situation in cases involving torts, the relief can be given to the plaintiff, without at the same time prejudicing the rights of others, the insolvency of the defendant bringing about an inadequacy of the legal remedy may be the sole ground upon which equity may be induced to exercise its jurisdiction.

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<sup>44</sup> *Hurley v. A. T. & S. F. Ry.*, 213 U. S. 126. Here money was advanced by a railroad company to a coal company in order to enable the latter to carry out its contract to furnish coal to the former, as the coal company was insolvent and unable to operate its mine. The court said, "The inevitable meaning of the new arrangement . . . was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made." See also, *Parker v. Garrison*, 61 Ill. 250; *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Livesley v. Johnston*, 45 Ore. 30, 76 Pac. 13, 946; *Livesley v. Heise*, 45 Ore. 148, 76 Pac. 952.

<sup>45</sup> In cases involving the Statute of Frauds the refusal of equity to grant specific performance has no bearing on the question of insolvency as a basis of jurisdiction, for, whether the legal remedy is inadequate because of the character of the property or the financial condition of the defendant, the proposition before the court is the observance and enforcement of the provisions of the statute rather than any question of the adequacy or inadequacy of the legal remedy. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391; *Townsend v. Fenton*, 32 Minn. 482, 21 N. W. 726.



Jurisdiction to grant relief and the exercise thereof are entirely different propositions: and though the inadequacy of the legal remedy against an insolvent debtor gives a proper basis upon which equity might in every case take jurisdiction, there still remains the question as to whether in the exercise of a reasonable discretion the jurisdiction should be exercised. This discretion is influenced or controlled here by the same rules which govern in other cases of the exercise of jurisdiction, and especially applicable is the principle that relief will not be given to a party complainant, even though he is otherwise entitled, when to do so would cause injury to others similarly situated or equally entitled to protection.

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## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> III

### II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

#### 2. *Taxes not Discriminating against Interstate Commerce* (*continued*)

##### A. TAXES ON PRIVILEGES (*concluded*)

##### (c) *State Decisions Subsequent to the Western Union Case*

PRIOR to 1910 the states had good grounds for assuming that they might impose such excises as they pleased on the franchises of domestic corporations<sup>2</sup> or on the privileges of foreign corporations to enter the state to carry on domestic commerce.<sup>3</sup> The prevailing judicial thought seemed to be that, since these were privileges that the state might withhold, it therefore followed as the night the day that they were privileges which, when granted, the state might tax as it willed. But in *Western Union Telegraph Co. v. Kansas*,<sup>4</sup> the Supreme Court held that Kansas could not require a foreign corporation, doing a combined local and interstate telegraph business within the state, to pay for the privilege of doing local business a fee which was measured by its total capital stock.

Owing to the fact that the judges who composed the majority were not fully agreed on the reasons for the decision, it was difficult to state the exact proposition of law for which the case stood. It was clear, however, that the case cracked the doctrine, previously prevailing, that the power of a state to exclude foreign corporations

<sup>1</sup> For preceding installments of this discussion, see 31 HARV. L. REV. 321-72 (January, 1918) and 31 HARV. L. REV. 572-618 (February, 1918).

<sup>2</sup> *State Tax on Railway Gross Receipts*, 15 Wall. (82 U. S.) 284 (1872); *Delaware Railroad Tax*, 18 Wall. (85 U. S.) 206 (1873); *Railroad Co. v. Maryland*, 21 Wall. (88 U. S.) 456 (1874); *Ashley v. Ryan*, 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894). See 31 HARV. L. REV. 576-81.

<sup>3</sup> *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891); *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903); *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903). See 31 HARV. L. REV. 579-80, 582-83.

<sup>4</sup> 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 584-94.



from intra-state commerce within its borders, carried with it absolute discretion in imposing taxes on those admitted to carry on such commerce. It was apparent, too, that the new departure was influenced by the character of the business in which the complaining corporation was engaged. Mr. Justice White, whose opinion proceeded mainly on an application of the due-process clause, stated that "the continued beneficial existence of the investment depends upon the right to use the property . . . for both interstate and local business."<sup>5</sup> If the local business is given up in order to avoid a tax measured by property outside of the state, "the property established for the purpose of doing local business becomes worthless and is in effect confiscated."<sup>6</sup> And Mr. Justice Harlan said that the "state knows that the Telegraph Company, in order to . . . make its telegraphic system effective, must do all kinds of telegraph business."<sup>7</sup>

Later in *Baltic Mining Co. v. Massachusetts*<sup>8</sup> Mr. Justice Day observed that in the Kansas cases "the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character."<sup>9</sup> The *Baltic* Case involved two corporations each of which was said to be "carrying on a purely local business, quite separate from its interstate transactions."<sup>10</sup> In this case the court sanctioned the imposition of a tax on a foreign corporation for the privilege of conducting local business, which tax, though measured by total capital stock, could not, under the terms of the statute, exceed \$2,000. It was impossible to tell from the opinion just what weight the court gave respectively to this provision for a maximum and to the fact that the local business was separate and distinct from the interstate business. But Mr. Justice Day thought it material to mention that the "local and domestic business is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business."<sup>11</sup>

<sup>5</sup> 216 U. S. 1, 50, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 587.

<sup>6</sup> *Ibid.*

<sup>7</sup> 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910). See 31 HARV. L. REV. 591.

<sup>8</sup> 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 594-96.

<sup>9</sup> 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595, note 89.

<sup>10</sup> 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). See 31 HARV. L. REV. 595-96, note 89.

<sup>11</sup> *Ibid.*

It is to be observed that the learned justice said "a tax," and did not restrict his comment to the particular tax in question. Hence, after the *Baltic Case*, a state had considerable warrant for the inference that taxes on the local business of foreign corporations might be measured by their total capital stock, if the local business was of a kind that might be easily separated from the interstate business, and was not, like the railroad and telegraph business, so tied up with the interstate business by joint use of the same physical facilities that the abandonment of the local business would not proportionately reduce operating costs. But since, in addition to the difference between the business involved in the *Massachusetts case* and that involved in the *Kansas case*, there was the further difference in the statutes with respect to the provision for a maximum, no state court could be certain that the Supreme Court would sanction the measure of total capital stock with no maximum limit, even when applied to a local business easily severable from an interstate business. The decisions of the Supreme Court left the question open, and the opinions of the justices did not fill the gap with any distinct announcement. This much, however, was clear. The *Baltic Case* did not overrule the *Western Union Case*. It recognized the authority of the earlier decisions, but distinguished the case before it on the two grounds that the tax and the business on which it was imposed both differed from those involved in the *Western Union Case* and those following it<sup>12</sup> in which the states were held to have exceeded their powers.

The *Western Union Case* and the *Baltic Case* gave the state courts much food for thought. From the difficulties which beset them, it is apparent that the Supreme Court had failed to make clear the precise extent to which the *Western Union Case* had qualified the doctrine of prior decisions, and the extent to which the *Baltic Case* limited the inferences which might be drawn from the *Western Union Case*. This obscurity was not cleared up during the period in which were decided the state cases to be reviewed. It is perhaps too much to say that even now the light shines bright. True, on December 10, 1917, the Supreme Court decided in *Looney*

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<sup>12</sup> *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910); *Atchison, T. & S. F. R. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912). See 31 HARV. L. REV. 587-94.



v. *Crane Co.*<sup>13</sup> that a foreign corporation making local and interstate sales within the state could not be required to pay for the privilege of conducting local business a fee measured by total capital stock with no maximum limit. The case was treated as within the doctrine of the *Western Union Case*, but it was recognized that special circumstances had excluded the *Baltic Case*<sup>14</sup> and others<sup>15</sup> from that doctrine. It may therefore be assumed that special circumstances may take other cases out of the doctrine of the *Western Union Case*. Prior to the *Looney Case* the opinions of the Supreme Court had emphasized that every decision of the question at issue must depend on its own facts.<sup>16</sup> The existence of a general rule was denied. The opinion in the *Looney Case*, however, seems to lay down a general rule that no tax may be measured by any elements of value on which a direct tax may not be imposed. But this general rule is not applied to taxes on the franchises of domestic corporations,<sup>17</sup> and its generality is therefore suspect. Not of course that the rule itself is subject to exceptions, but that special circumstances may exclude particular cases from coming within it. For a complete enumeration of such special circumstances we shall have to wait until the Supreme Court has run with precision the line between what falls within the doctrine, and what without. Meanwhile state courts may still seek to differentiate cases before them from the *Looney Case*. It seems unlikely, however, that the Supreme Court will deal kindly with any state tax on foreign corporations engaged partly in interstate commerce, if the tax is measured by total capital stock without having a fixed limit of a reasonable amount.

The state cases to be discussed are of course to be judged in the light of what the Supreme Court had declared before they were decided. The two courts which had the greatest difficulty were those of Montana and California. With every desire to follow the Supreme Court whithersoever it might lead, the supreme courts of

<sup>13</sup> 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917). See 31 HARV. L. REV. 600-18.

<sup>14</sup> Note 8, *supra*.

<sup>15</sup> *St. Louis S. W. Ry. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914); *Kansas City, F. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916); *Lusk v. Botkin*, 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916). See 31 HARV. L. REV. 594-600.

<sup>16</sup> See 31 HARV. L. REV. 595, 598, 600.

<sup>17</sup> *Kansas City, M. & B. R. Co. v. Stiles*, 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 HARV. L. REV. 599-600.

these two states found the path dimly lit. A review of their wanderings may perhaps shed some additional light on the controlling considerations which guided the Supreme Court, and may at the same time suggest how the Supreme Court might have indicated somewhat more clearly what those considerations were. It will appear that the chief cause of the distress under which the Montana and California courts labored was the failure to appreciate that the Supreme Court was deciding only the particular cases before it, and was, according to its professions, influenced by the characteristics of the business involved as well as by the provisions of the statutes. The fact that recently in the Looney Case the Supreme Court appears to be finding a yardstick which will apply indiscriminately to all kinds of business, does not require us to forget that previously the court did not fix its attention exclusively on the language of the statutes.

## I

The first case to come before the Montana court was *Chicago, M. & St. P. Ry. Co. v. Swindlehurst*,<sup>18</sup> which held invalid a requirement that foreign corporations should pay fees, graduated according to capital stock, for filing with the designated state officer copies of their charter, or of certificates for increase of their capital. The complainant was an interstate railroad, chartered by Wisconsin, which was desirous of purchasing the property of an interstate railroad chartered by Washington, and carrying on both local and interstate business in Montana. Neither the statute nor the business could be differentiated from those involved in the cases on the Kansas and Arkansas statutes in the Supreme Court. The only point of difference is thus stated and dismissed in the opinion of the Montana court by Brantly, C. J.:

"Some effort was made by counsel for appellant to maintain the contention that in each of the cases cited the question involved was whether the corporations which were already doing business in the state should be excluded therefrom; whereas in this case the question is whether a corporation shall be permitted to come into the state to engage in business. A reading of these cases, however, leads to the conclusion that this difference in the situation of the parties cannot affect the result."<sup>19</sup>

<sup>18</sup> 47 Mont. 119, 130 Pac. 966 (1913). <sup>19</sup> 47 Mont. 119, 126-27, 130 Pac. 966 (1913).



That this interpretation was warranted can hardly be denied. Yet it is also true that a state court less willing to accept the new doctrine of the Supreme Court might have taken the position that, since both Mr. Justice Harlan and Mr. Justice White laid stress on the fact that the Western Union Company and the Pullman Company had been in the state for a considerable time, carrying on all kinds of business, and had acquired property of a permanent nature, the cases excusing them from the Kansas and Arkansas taxes did not apply to a corporation which was outside the state, asking to be let in. So far as the actual decisions of the Supreme Court go, the doctrine of the Western Union Case has not yet been applied to a foreign corporation still on the threshold. In the Looney Case<sup>20</sup> the complainant had been doing business in the state for over ten years and had acquired two warehouses in the state. The Stiles Case<sup>21</sup> established that the Western Union doctrine does not apply to a domestic corporation created after the passage of the law objected to.

If the doctrine of the Western Union Case applies to a foreign corporation when first knocking at the door, it would seem that there must also be a doctrine that a state cannot exclude from local business a foreign corporation seeking to come in to do a combined local and interstate transportation business. For it would be absurd to permit a state to forbid local business, if it cannot charge what it pleases for permission to enter the state to engage in such business. It would seem that Mr. Justice Holmes must agree with this, for his dissent was based on the converse proposition that it was absurd to deny to a state the power to tax local business as it pleases, if the state may forbid such business.<sup>22</sup> If the Supreme Court follows the Montana court, it should go a step further and declare that a foreign corporation, seeking to engage in interstate transportation within a state, cannot be prevented from entering to carry on domestic commerce, if the conduct of such domestic commerce is essential to the satisfactory and economical conduct of interstate commerce.

The Montana statute involved in the Swindlehurst Case came before the Montana court again in *State v. Alderson*.<sup>23</sup> The complainant was the General Electric Company, and the business

<sup>20</sup> Note 13, *supra*.

<sup>22</sup> See 31 HARV. L. REV. 585-86.

<sup>21</sup> Note 17, *supra*.

<sup>23</sup> 49 Mont. 29, 140 Pac. 82 (1914).

which it sought to do in Montana was held to be a "strictly private, intra-state business." In the interim between the Swindlehurst Case and this case, the United States Supreme Court had decided the Baltic Case. The Alderson Case is not important for the actual point which it decides, for it is based, not on the distinction between the Western Union Case and the Baltic Case, but upon the fact that the General Electric Company did not enter for interstate commerce at all, and upon the rule of law that therefore its claim of exemption was foreclosed by *Paul v. Virginia*<sup>24</sup> and *Hooper v. California*.<sup>25</sup> The Baltic Case was referred to as possibly qualifying the rule of *Paul v. Virginia* to the extent that, though the state may entirely exclude a foreign corporation seeking to do only local business, it must not do so conditionally, if the condition imposed is bad *per se*.<sup>26</sup> After quoting from the opinion in the Baltic Case, Judge Holloway adds:

"Whatever may finally be determined to be the extent of state control over a foreign corporation situated as relator is, we are satisfied that the exaction demanded in this instance does not infringe upon any right of this relator which is guaranteed to it by the Constitution of the United States, and that the state may rightfully say: You may come into this state and engage in local, private business only on condition that you pay the fee required under section 165 above. *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Allen v. Pullman Co.*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Pullman Co. v. Adams*, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 877."<sup>27</sup>

From other language in the opinion, it seems that the Montana court thought that the Supreme Court meant in the Western Union Case to declare that an excise fee on a foreign corporation, doing interstate commerce of any kind within the state, was a property tax if measured by property, and that in the Baltic Case the Supreme Court receded from that position, and held that an

<sup>24</sup> 8 Wall. 168 (1869).

<sup>25</sup> 155 U. S. 648, 15 Sup. Ct. Rep. 207 (1895).

<sup>26</sup> Since the decision of *Looney v. Crane Co.*, note 13, *supra*, we know that this is the declared doctrine of the Supreme Court with reference to state taxation of a foreign corporation manufacturing goods in other states and making local and interstate sales within the state. It is possible, too, that the Supreme Court may in time extend its expanding doctrine to foreign corporations doing only intra-state commerce within the state. For the *Looney* Case purported to be based on the due-process clause as well as on the commerce clause. See 31 HARV. L. REV. 603, 613.

<sup>27</sup> 49 Mont. 29, 37, 140 Pac. 82 (1914).



excise tax measured by property would not be a property tax.<sup>28</sup> Speaking for the court, Judge Holloway says:

"We are unable to appreciate the distinction attempted to be made by the Supreme Court of the United States between the Kansas statute, considered in *Western Union Tel. Co. v. Kansas*, above, and held to impose a general tax upon all the property of the company, and the statute of Massachusetts, considered in *Baltic Mining Co. v. Massachusetts* . . . and held to be a mere excise; but, if we have accurately characterized our section 165 above, the latest pronouncement by that court justifies the existence of our statute and the method employed for determining the amount of the tax. It may be that our legislation is unwise in failing to fix a reasonable limit upon the amount to be exacted from any one corporation; but, if the authority is lodged in the state to exclude the relator altogether or to impose such terms to its admission here as may seem expedient, then the amount of the fee affords no tenable ground of opposition to the validity of the statute. If the amount demanded is more than the local, private business of relator will justify it paying, the tax can be avoided altogether by a renunciation of its intention to do such business. The state does not seek to compel it to engage in business here, nor does it attempt to collect this fee in the sense that property taxes or ordinary debts may be enforced. It merely says to the relator: You may engage in local, private business in Montana if you conform to the conditions imposed; otherwise you must stay out."<sup>29</sup>

It is possible, however, that the Montana court appreciated one of the distinctions between the *Western Union Case* and the *Baltic Case* without appreciating that it so appreciated it. For throughout the opinion it refers to the business of relator as private and intra-state. The reference to the fact that the business was private distinguishes it from the transportation business which employs the same facilities in intra-state and interstate commerce. On the other hand, there is evidence that the Montana court thought this distinction of no importance. For, in dealing with the contention of the complainant in the *Alderson Case* that the *Swindlehurst Case* had declared section 165 unconstitutional, and that, therefore,

<sup>28</sup> This seems to be a misconception. The Supreme Court did not differentiate the two cases on the ground that one involved a property tax, and the other an excise tax, but on the ground that one involved an invalid excise tax, and the other a valid one. The reasons given why the later Massachusetts excise was valid included the provision for a maximum, and the character of the particular business on which the tax was imposed.

<sup>29</sup> 49 Mont. 29, 34-35, 140 Pac. 82 (1914).

the secretary of the state was without authority to demand any fees thereunder, it conceded that its language in the earlier case was not apposite, since it seemed to imply that the fee could not be demanded of any foreign corporation, and it adds:

"To have been technically exact, we should have said in the Swindlehurst case that section 165 does not have any application to foreign corporations seeking to engage in interstate commerce in this state. This is our holding, and, thus stated, the statute is left intact to apply to foreign corporations over which this state has the right to exercise some degree of regulation or control." <sup>30</sup>

The Montana court therefore construes the words, "every foreign corporation," contained in section 165 so as to apply only to foreign corporations not engaged in interstate commerce, under the familiar principle that a statute will if possible be so construed as to render it constitutional. Thus the Montana statute is assumed to be inapplicable to any foreign corporation engaged in any kind of interstate commerce within the state. In this the Montana court foreshadowed the decision of the Supreme Court in *Looney v. Crane Co.*<sup>31</sup> But the Montana court did not base its belief on the failure of the Montana statute to set a maximum to the annual charge, as is evident from its declaration that "the amount of the fee affords no tenable ground of opposition to the validity of the statute."<sup>32</sup> So the Baltic Case is evidently given no effect with respect to corporations engaged in interstate commerce. There is therefore considerable evidence that the Montana court was correct in its assertion that it failed to appreciate the distinction between the Western Union Case and the Baltic Case.

The Montana supreme court was not the only one perplexed by the Western Union Case and those following it. In *H. K. Mulford Co. v. Curry*<sup>33</sup> the California supreme court had to deal with a statute requiring foreign corporations to pay a fee measured by total capital stock for filing with the secretary of state copies of certain documents, whose filing was a condition prerequisite to doing business in the state. The complaining corporation was a manufacturer and seller of medicines with its principal place of business in Philadelphia. It maintained a branch house in San

<sup>30</sup> 49 Mont. 29, 39, 140 Pac. 82 (1914).

<sup>32</sup> 49 Mont. 29, 34, 140 Pac. 82 (1914).

<sup>31</sup> Note 13, *supra*.

<sup>33</sup> 163 Cal. 276, 125 Pac. 236 (1912).



Francisco from which it filled orders from California and neighboring states, so that in California it was engaged in both intra-state and interstate commerce. The opinion of the court by Judge Henshaw states the doctrine of the Western Union and Pullman cases<sup>34</sup> without any reference to the kind of business in which the corporations there protesting were engaged, except that it was both intra-state and interstate commerce. He mentions the fact that the Supreme Court decisions were rendered by a bare majority of a sharply divided court, and says that the "decision of the case at bar was deliberately delayed to note whether any recession from the views expressed in those cases would follow from the change in the personnel of the court."<sup>35</sup> But instead of a recession, he adds, the doctrine was affirmed by an undivided court in *Atchison, Topeka and Santa Fe R. R. Co. v. O'Connor*.<sup>36</sup> And then he says of the case before him:

"The minutest investigation and the most careful consideration fail to disclose any ground upon which the case here at bar may be distinguished from those cited. The legal parallelism between this case and that of *Ludwig v. Western Union Telegraph Co.*, . . . , is perfect. Both corporations were engaged in *inter* as well as *intra*-state business. Both were so engaged before the passage of the excise law in question."<sup>37</sup>

Then follows a review of the Ludwig Case,<sup>38</sup> and the statement that the parallelism between it and the case at bar is so perfect "as to render futile any attempt to distinguish them, and thus to save the California laws."<sup>39</sup>

The opinion next proceeds to discuss the effect of the Supreme Court decisions on other applications of the state statute than the one involved in the case before the court. This is prefaced by a reference to the "further duty" of the court "in pointing out for future legislative action the limitations upon the power of the state in dealing with foreign corporations."<sup>40</sup> It is then set forth that the principle of the Western Union Case must apply to a domestic, as well as to a foreign, corporation engaged in combined intra-state and interstate commerce, since, if regulation which is unlawful when separately considered cannot be justified as the

<sup>34</sup> Notes 4 and 12, *supra*.

<sup>36</sup> Note 12, *supra*.

<sup>38</sup> Note 12, *supra*.

<sup>40</sup> 163 Cal. 276, 285, 125 Pac. 236 (1912).

<sup>35</sup> 163 Cal. 276, 282, 125 Pac. 236 (1912).

<sup>37</sup> 163 Cal. 276, 282-83, 125 Pac. 236 (1912).

<sup>39</sup> 163 Cal. 276, 284, 125 Pac. 236 (1912).

price of one privilege, it cannot be justified as the price of another. "The attention of the Legislature is thus directed to the fact that the law in question can apply only to domestic corporations nowhere engaged in interstate business, and to foreign corporations seeking to enter the state solely to do domestic business." <sup>41</sup>

Judge Henshaw next points out that in the *Western Union Case* and the *Pullman Case* the Kansas statute was held unconstitutional under the Fourteenth Amendment as well as under the commerce clause. From this he concludes that a state cannot tax a foreign corporation engaged solely in *domestic* commerce by any method which results practically in taxing property without the state, "and therefore beyond the jurisdiction of the taxing power of the state." <sup>42</sup> Thus the Supreme Court is taken to mean that under no circumstances can a state exact, even as the price of some privilege which it might withhold, any imposition which would be improper as a simple tax on property or on an occupation.

"These constitutional questions thus decided are, as we have pointed out, in no way correlated, but are entirely separate and distinct. It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law, and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was, in both instances, identically the same. Nor can relief be found in a refusal to call such a license fee a tax. A state court may call it a fee or an exaction or a regulation; but the Supreme Court of the United States will call it a tax if, in its effect, it partake of the nature of a tax." <sup>43</sup>

After this decision, the Supreme Court declared in *Baltic Mining Co. v. Massachusetts* <sup>44</sup> that foreign corporations engaged in certain kinds of business could be subjected to a limited annual excise measured by total capital stock for the privilege of engaging in domestic commerce, even though such corporations were also engaged in interstate commerce. Two years later in *Albert Pick*

<sup>41</sup> 163 Cal. 276, 286, 125 Pac. 236 (1912).

<sup>42</sup> 163 Cal. 276, 287, 125 Pac. 236 (1912).

<sup>43</sup> 163 Cal. 276, 288-89, 125 Pac. 236 (1912).

<sup>44</sup> Note 8, *supra*.



& Co. v. *Jordan*,<sup>45</sup> the California supreme court again passed on the California statute imposing on foreign corporations an annual excise measured by total capital stock. The complaining corporation manufactured ceramic articles in Chicago. It had a branch house in San Francisco, from which sales were made to purchasers in California and neighboring states. It was compelled by the California court to pay the annual excise measured by its total capital stock. Judge Henshaw was well aware that this decision violated the advice to the legislature given in his previous opinion in the *Mulford Case*,<sup>46</sup> though the judgment in that case related to the original charter fee, and not to the annual excise. The basis for the change of doctrine was the intervening decision of the Supreme Court in the *Baltic Case*.

Judge Henshaw reviews at length the Supreme Court decisions prior to the *Mulford Case*, and states that he and his colleagues had concluded from those decisions that "the Supreme Court meant and declared, for the indicated reasons, that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the total capital stock of such corporations was forever inhibited. . . ." <sup>47</sup> Reference is then made to the dissenting remark of Mr. Justice Holmes, expressing his curiosity as to what objection could be raised to a specific tax of the same amount as that reached under the computation required by the Kansas statute,<sup>48</sup> and answer is essayed as follows:

"We believed that the answer would be, as above indicated, that it was not the *amount* of the charge which determined the invalidity, but the fact that in its form the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights."<sup>49</sup>

"These, then, were some of the conclusions which we drew from the decisions of the Supreme Court, and which, with more or less completeness, we sought to declare in *Mulford Co. v. Curry*. One part of the

<sup>45</sup> 169 Cal. 1, 145 Pac. 506 (1915).

<sup>46</sup> Note 33, *supra*.

<sup>47</sup> 169 Cal. 1, 16, 145 Pac. 506 (1915).

<sup>48</sup> Quoted in 31 HARV. L. REV. 594.

<sup>49</sup> 169 Cal. 1, 16, 145 Pac. 506 (1915). Continuing, Judge Henshaw says: "Thus, if a man who is on his way to church to give a hundred dollars to charity is robbed of that hundred dollars by a highwayman, his financial condition is exactly the same as it would have been had he carried out his purpose. Yet it will not be said that this fact leaves him uninjured and without grievance."

judgment of the Supreme Court we conceived to be apodictic, and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the Constitution of the United States, and it was under this conviction that we sought in *Mulford Co. v. Curry* to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation.”<sup>50</sup>

But this understanding of the doctrine of the Supreme Court was succeeded by confusion after its decision in the *Baltic Case*. Judge Henshaw refers to the reasons given by the Massachusetts court for not applying the *Western Union* doctrine to the Massachusetts statute and the corporations complaining against it. These were (1) the fact that the Massachusetts statute, unlike that of Kansas, fixed a maximum to the annual imposition, and (2) the further fact that the corporations resisting the law of Kansas were common carriers, whose “local business could not be given up without impairing their capacity to transact their interstate business,”<sup>51</sup> while the Massachusetts statute did not apply to common carriers nor to corporations engaged solely in interstate commerce, “nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intra-state business was conducted in such close connection with the other that it could not be abandoned without serious impairment of the interstate business.”<sup>52</sup>

With evident amazement Judge Henshaw notes that the “Supreme Court of the United States adopts without reservation the determination of the Supreme Court of Massachusetts that this fee is an excise tax as distinguished from a property tax.”<sup>53</sup> He says, however, that “it by no means follows that, being an excise tax, this is conclusive that it is not levied upon property.”<sup>54</sup> He does not see how it is relieved from the “condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation.”<sup>55</sup> The limitation of the amount exacted in any one year seems to him immaterial, since, if “the principle upon which its tax is based is a sound one, it may to-morrow increase the amount

<sup>50</sup> 169 Cal. 1, 17, 145 Pac. 506 (1915).

<sup>51</sup> 169 Cal. 1, 18, 145 Pac. 506 (1915).

<sup>52</sup> 169 Cal. 1, 19, 145 Pac. 506 (1915).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> 169 Cal. 1, 20, 145 Pac. 506 (1915).



of the tax to any extent.”<sup>56</sup> Nor does Judge Henshaw appreciate the force of the distinction between the business of a common carrier and that of manufacturing and selling goods.

“It is true that in the earlier cases the corporations involved were common carriers, and the Supreme Court of the United States makes mention of that fact in the Dental Case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the Constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers — the instrumentalities by and through which commerce is conveyed — shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation.”<sup>57</sup>

The California court concedes that the deprivation of the local business of common carriers is “an injury and impairment of their business as a whole,”<sup>58</sup> but it insists that “this is equally true of every commercial corporation likewise engaged in interstate and domestic business.”<sup>59</sup> Of course in this the California court is mistaken, if, by “equally,” it means “to the same extent.” If the S. S. White Dental Manufacturing Company were taxed for its local business in Massachusetts so heavily that the local business was unprofitable, it might close its local branch, reduce thereby its expenses, and then make its Massachusetts sales through solicitors from its Philadelphia office, filling from the Philadelphia warehouses all orders obtained through such solicitors. Closing down the domestic business would increase the interstate business, and the interstate business would be immune from state interference. If the common carrier gives up local business, it cannot accommodate its would-be patrons by carrying them or their goods across state lines, for that would not meet their needs. Moreover, the abandonment of the local business of a common carrier will not be followed by any such proportionate reduction

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<sup>56</sup> 169 Cal. 1, 20, 145 Pac. 506 (1915).

<sup>57</sup> *Ibid.*

<sup>58</sup> 169 Cal. 1, 21, 145 Pac. 506 (1915).

<sup>59</sup> *Ibid.*

in operating costs as ensues from the closing of the local sales office of a foreign corporation engaged in manufacture and sales.

It is because of this failure to recognize the significance of the economic integration of domestic and interstate business which uses the same facilities for both, and needs nearly as extensive facilities for either as for both, that the California court says of the opinion of the Supreme Court in the *Baltic Case*:

"Again, we fail to perceive how every word of this might not equally well have been said in the *Western Union Telegraph Company Case*, thus forcing the irresistible conclusion that the Supreme Court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases."<sup>60</sup>

But Judge Henshaw assumes that this interpretation of the *Baltic Case* is incorrect, since he is "confronted in the same opinion with the declaration of the court that it has 'no disposition to limit the authority of those cases.'"<sup>61</sup> With becoming modesty and pleasing humor he adds:

"We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our Brethren of the Supreme Court of Montana are similarly afflicted."<sup>62</sup>

The intellectual difficulties of the California court were enhanced by their acceptance of the language of the Supreme Court in the *Western Union* and *Pullman* cases as a declaration of absolute and universal principles, when, in reality, that language had particular reference to the results of applying the particular statute before the court to the particular business of the particular complainants. It may well be that the judges of the Supreme Court must accept some of the responsibility for being misunderstood by their brethren in the state courts. Certainly the *dictum* of Mr. Justice Harlan in the *Western Union Case*, with reference to a domestic corporation soliciting orders for goods manufactured in other states,<sup>63</sup> would justify the assumption that he, and the

<sup>60</sup> 169 Cal. 1, 24, 145 Pac. 506 (1915).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* Judge Henshaw then quotes the excerpt cited above in note 29.

<sup>63</sup> Quoted in 31 HARV. L. REV. 591-92, note 71.



three, and possibly, four, judges who agreed with him, were announcing the doctrine that no imposition could be justified as the price of any privilege, unless the same imposition would be entirely proper as a simple property or occupation tax. This is also the inference to be drawn from the latest declaration of the Supreme Court in the Looney Case.<sup>64</sup> But in seeking to understand judicial opinions we must not confuse a *façon de parler* with a *ratio decidendi*. There was enough emphasis put upon the character of the business in the Western Union Case to invite any state court to appreciate that the broad declarations scattered through the opinions did not apply *ex proprio vigore* to other kinds of business or to modified forms of the Kansas statute. The Massachusetts court realized this and drew distinctions<sup>65</sup> which were later ratified by the Supreme Court in the Baltic Case.<sup>66</sup> That ratification made it clear that the mere flavor of total capital stock would not of necessity make an excise on foreign corporations unpalatable to the Supreme Court. But even then the Montana and California courts did not understand what was incubating. They were searching for a sign. They saw recent developments as doctrine and not as a way of adjustment. And as doctrine the decisions exemplified the work of Scriabine rather than of Mozart. The Stiles Case<sup>67</sup> and the Looney opinion, when heard together, make the dissonance of doctrine complete. After the Looney opinion, the courts of Montana and California must be pardoned, even if they cannot be exonerated. But the pardon, it is to be feared, will afford no more consolation to Judge Henshaw of the California court than did the fact that his "Brethren of the Supreme Court of Montana [were] similarly afflicted."<sup>68</sup>

## II

The supreme court of Idaho, however, did not suffer from the same affliction as its neighbors. In *Northern Pacific Railway Co. v. Gifford*,<sup>69</sup> handed down after the Supreme Court's decision in the Baltic Case, the Idaho court evinced its insight into what was going on. The Gifford Case involved a statute imposing on foreign

<sup>64</sup> Note 13, *supra*.

<sup>65</sup> Note 8, *supra*.

<sup>66</sup> 169 Cal. 1, 24, 145 Pac. 506 (1915). The passage is quoted on page 735, *supra*.

<sup>67</sup> 25 Idaho 196, 136 Pac. 1131 (1913).

<sup>68</sup> In the cases cited in note 76; *infra*.

<sup>69</sup> Note 17, *supra*.

as well as domestic corporations, for the privilege of doing local business within the state, an annual tax graded in accordance with the total capital stock and limited to \$150. The complainant was a foreign corporation running an interstate railroad which urged that its local business was done at a loss instead of a profit. The Idaho court ruled that the Idaho statute was "freer from objection than the Massachusetts statute" sustained in the *Baltic Case*, because the maximum imposition was so much less. Ailshie, C. J., after reviewing the state and federal cases, observed that the court was convinced "that the supreme court intended to determine the effect of the statute as it will apply in *actual practice*, rather than decide it upon the *theory* of any apprehended dangers which might flow from other similar legislation which might prove more exacting."<sup>70</sup> It was suggested that if the maximum fee under the Idaho statute had been \$50,000 instead of \$150, the Supreme Court "might hold that it unreasonably burdens interstate commerce, although the company has the alternative of abandoning its purely interstate business."<sup>71</sup> But the fee imposed in the present case was said to be "a trifle" and not susceptible of being a burden on interstate commerce. It was sanely observed that, if the domestic business was not worth paying a fee of \$150 annually, the corporation "will not suffer by abandoning that business and confining itself only to its interstate business and *such business as necessarily attaches and pertains to its interstate traffic*."<sup>72</sup> The suggestion that under the state constitution "the respondent corporation as a common carrier could not decline or refuse to carry on its domestic or intrastate business"<sup>73</sup> was answered by pointing out that the constitution also provides that common carriers are subject to legislative control, and that it would be absurd to penalize a corporation for not carrying on intrastate commerce, if by reason of its refusal to pay the tax imposed thereon it had been forbidden to engage in such commerce.

Further evidence that the Idaho court appreciated the considerations which had guided the Supreme Court appears in the following comment on a quotation from the opinion of Mr. Justice Day in the *Baltic Case*.

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<sup>70</sup> 25 Idaho 196, 209-10, 136 Pac. 1131 (1913).

<sup>71</sup> 25 Idaho 196, 210, 136 Pac. 1131 (1913).

<sup>72</sup> *Ibid.*

<sup>73</sup> 25 Idaho 196, 210-11, 136 Pac. 1131 (1913).



"The foregoing excerpt reminds one of the impression he has after reading the Kansas cases, namely, that the really controlling consideration with the great jurist who wrote the majority opinion of the court in those cases was the fact that the amount of the excise or license fee laid upon the corporations by the statute of Kansas was so exorbitant and unreasonable that the companies would not likely have been able to pay the same and would have as an alternative been obliged to abandon their local or intrastate business if the statute had been upheld, and that the Kansas Legislature was in fact trying to tax the whole property of the corporation, and so the court concluded that it amounted to really laying a tax upon all the property of the companies, whether within or beyond the state, and had the effect of both interfering with *interstate commerce* and *taking the property* of the company *without due process of law*. No such charge can be justly laid against the Idaho statute. . . . The fee charged is a trifle; the maximum that can be charged upon the largest corporation which may enter the state being only \$150." <sup>74</sup>

Thus the Idaho court saw that the question was one of substance rather than of form. Judge Ailshie did not, it is true, make specific reference to all the items that go to make up the substance. But since the corporation before the court was an interstate railroad, it would have been *obiter* in the particular case to discuss the question whether more favor might be shown to excises on corporations making sales than to those on corporations engaged in transportation. The maximum set by the Idaho statute was so small that the character of the business of the complaining corporation may well be disregarded. It is to be anticipated that, if the Idaho statute or a similar one comes before the Supreme Court, it will be applied to a transportation corporation as well as to a company engaged in selling merchandise. But the Supreme Court would certainly insist that the maximum must be considerably less than the \$50,000 mentioned by the Idaho court.

If any state should graduate its maximum in accordance with the amount of the total capital stock or of the total assets, we should approach a situation where the tax was in fact measured by total capital or total assets. Yet there is good sense in varying the maximum according to the size and business of the corporation on which the tax is imposed. It is hardly to be expected that the Supreme Court would object to an amendment to the Massachusetts statute

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<sup>74</sup> 25 Idaho 196, 207-08, 136 Pac. 1131 (1913).

sustained in the Baltic Case, by which the maximum was reduced for corporations having a smaller capital stock than that of the Baltic Mining Company or that of the S. S. White Dental Company. If a \$2,000 maximum removed the stain of a reference to the capital stock of corporations having \$2,500,000 and \$1,000,000 of authorized capital respectively, and \$10,776,000 and \$5,711,718.29 of assets, it is hard to see how new spots would accrue by making the maximum \$1,000 for corporations having \$2,500,000 of assets, and correspondingly less for those whose resources were smaller. A court which took the contrary position would be insisting that the states not only *may*, as in the Baltic Case, impose proportionately heavier burdens on small corporations than on large ones, but that they *must* do so. For such is the necessary result of a rigid limitation on the amount of the tax, no matter how large the corporation. Yet, if the maximum varies with the size of the corporation, the tax is apt to vary with the amount of extra-state property of the several corporations subjected thereto, and with the volume of their total business. The practical situation under such circumstances might be substantially identical with that produced by a tax measured by total capital, with no maximum, but with an insignificant rate of levy. Yet it seems probable that the Supreme Court would apply the statute with varying limits, provided all were reasonable, and would decline to apply the one which reached the same result by an insignificant rate of levy.

In spite of the well-founded objections to efforts on the part of courts to settle questions that are not before them, some tolerance might be pleaded for a hankering to propound a series of questions to the Supreme Court in the hope of obtaining definitive and specific answers. We know that, in determining the validity of excises on foreign corporations engaged partly in interstate commerce, some maximum is necessary to wash away the sins of a statute that casts glances at the corporations' total capital stock. But we do not know how high the state may make its maximum. And the Supreme Court will have to tell us as the specific cases come before it. It cannot well do so with the type of formula brought forward in the opinion in the Looney Case. No such conceptual dichotomy can minister satisfactorily to a complex situation in which so many of the elements are in reality mutually interblended. It is attractive to believe that statutes can be divided rigorously into good and



bad by a sharp line of demarcation. But this is to invoke artificial simplicity in the presence of actual complexity. The court is not entrusted with the function of passing judgment on statutes *in vacuo* or as theses nailed to the wall. Its task is the less exalted and more difficult one of deciding whether the result of applying a particular statute to the particular state of facts involved in the case at bar is consistent or inconsistent with the requirements of the Constitution. A statute on the printed page, a statute is, and it is nothing more. It is not of necessity either good or bad. The court does not pass directly on the constitutionality of statutes, but on the propriety or impropriety of action taken under them. The application of a statute to one situation may give rise to problems entirely different from those presented by its application to another. A maximum which saves a tax from imposing an appreciable burden on interstate commerce, when levied on one corporation, may not, when levied on another. It was a counsel of wisdom which the Supreme Court adopted when it declared that every case on the subject under consideration must depend upon its own facts. The seeming departure from that attitude in the Looney Case points to a way of approach that cannot claim the same commendation.

This is not to censure the actual decision in the Looney Case. There is much to be said for a flat declaration that the measure of total capital stock must be accompanied by a proper maximum limit to the annual imposition. There is sense in not undertaking to pass judgment on the propriety of each particular rate of levy. But it is confusing to be told that, if the measure of the tax includes elements which cannot be taxed directly, the existence of the federal system is impeached, so long as we know that such measures are upheld in excises on domestic corporations, and have reason to infer from the Baltic Case that they would be upheld in excises on a foreign corporation whose capital is not sufficiently large to bring it within the shelter of the maximum set to the state's demands.

The all-embracing utterances of the Supreme Court bristle with riddles. Unless the state courts seek for the implications of the Looney Case outside of the broad language of the opinion, they will find themselves beset with the same difficulties as those which puzzled the courts of Montana and California. But the decision of

the Idaho court in the Gifford Case <sup>75</sup> shows that those difficulties are not insurmountable. The supreme court of Massachusetts also was able to grasp that the Supreme Court was feeling its way for a practical adjustment, and that its catholic statements were put forth as instruments rather than as the all-inclusive final truths which by their terms they seemed to declare. The Massachusetts decisions in the Baltic and White Dental cases <sup>76</sup> indicated this. The two subsequent cases of *Marconi Wireless Telegraph Co. v. Commonwealth* <sup>77</sup> and *International Paper Co. v. Commonwealth* <sup>78</sup> confirm it. The Marconi Case involved the application to nine foreign corporations of the statute upheld and applied in the Baltic Case. The International Paper Case involved this statute and a later amendment imposing on foreign corporations an additional excise of one one-hundredth of one per cent of the par value of authorized capital stock in excess of ten million dollars, with no maximum limit set. It may well be that, in this latter case, the Massachusetts court has sanctioned an adjustment which will be upset by the Supreme Court. But this need not detract from our satisfaction that the Massachusetts court has viewed its task as one of finding an adjustment, rather than one of setting up categories which profess to be mutually exclusive, when in fact the line which marks their boundaries is fuzzy, and each category inevitably contains certain particulars which lie partly within the other also.

None of the corporations concerned in the Marconi Case were common carriers, unless the Marconi Wireless Telegraph Company should be so regarded. That corporation was held to be not within the purview of the statute, because it "transacted no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce."<sup>79</sup> A similar ruling was made as to the business of the Pocahontas Fuel Company. Though it had an office in Boston, this office was merely the headquarters for salesmen who solicited orders from customers, and sent all orders to New York where they must be accepted and approved before a sale takes place.

<sup>75</sup> Note 69, *supra*.

<sup>76</sup> *Baltic Mining Co. v. Commonwealth*, 207 Mass. 381, 93 N. E. 831 (1911); *S. S. White Dental Manufacturing Co. v. Commonwealth*, 212 Mass. 35, 98 N. E. 1056 (1912).

<sup>77</sup> 218 Mass. 558, 106 N. E. 310 (1914).

<sup>78</sup> 228 Mass. 101, 117 N. E. 246 (1917).

<sup>79</sup> 218 Mass. 558, 568, 106 N. E. 310 (1914).



The seven other corporations were all held subject to the tax. The Cheney Brothers Company used its Boston office for the storage and display of samples as well as headquarters for its sales force. The Lanston Monotype Company kept repair parts at its branch office in Boston, which were furnished to customers in Massachusetts. The test of amenability to the statute which the court applies will be apparent from the following quotation:

"These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the federal Constitution to interstate commerce against state excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the state merely for the sake of greater profit or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intra-state and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce." <sup>80</sup>

In an earlier part of the opinion <sup>81</sup> Chief Justice Rugg had pointed out that complainants were placing a false reliance on the statement from the opinion of the Supreme Court in the *Baltic Case*, to the effect that the local and domestic business of the corporations there in issue was "real and substantial." <sup>82</sup> That, he says, "is nothing more than a statement that a shadow cannot be made the basis of an excise tax. . . ."<sup>83</sup> But when the local and domestic business exists," he continues, "then an excise may be levied. There is nothing to indicate that a comparison between the

<sup>80</sup> 218 Mass. 558, 572, 106 N. E. 310 (1914).

<sup>81</sup> 218 Mass. 558, 566, 106 N. E. 310 (1914).

<sup>82</sup> 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913). The passage is quoted in 31 HARV. L. REV. 595-96, note 89.

<sup>83</sup> 218 Mass. 558, 566, 106 N. E. 310 (1914).

total business of the company and its local business was intended. Such a basis has never before been intimated.”<sup>84</sup> Some question must attach to this remark because of the succeeding statement that the contention of complainant is directly contrary to *Ficklen v. Shelby County*.<sup>85</sup> That case was based largely on the authority of *Maine v. Grand Trunk Ry. Co.*,<sup>86</sup> and the Maine Case was subsequently treated in *Galveston, H. & S. A. Ry. Co. v. Texas*,<sup>87</sup> as involving a statute imposing a tax which was partially in lieu of a property tax. Moreover, the Western Union Case casts considerable doubt upon the present standing of the Ficklen Case. The problem of occupation and property taxes will be treated later. The Ficklen Case went on the ground that the commerce clause set no limitations whatever to the taxation of domestic business, and that ground has certainly been since abandoned. Chief Justice Rugg may perhaps have some doubts as to the authority of the Ficklen Case, for after citing it, he says that if such a principle as contended for by complainants exists in reference to any facts, “it has no relation to any of the cases at bar.”<sup>88</sup>

“The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the state can fix its own terms so far as license fee is concerned.

“The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact that some foreign corporation may not be able to make profits enough to meet it does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise.”<sup>89</sup>

The remaining corporations came easily within the test thus laid down. The Northwestern Consolidated Milling Company

<sup>84</sup> 218 Mass. 558, 566, 106 N. E. 310 (1914).

<sup>85</sup> 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892).

<sup>86</sup> Note 3, *supra*.

<sup>87</sup> 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).

<sup>88</sup> 218 Mass. 558, 566, 106 N. E. 310 (1914). The doubt as to the authority of the Ficklen Case is enhanced by *Crew Levick Co. v. Commonwealth*, 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

<sup>89</sup> 218 Mass. 558, 566-67, 106 N. E. 310 (1914).



had seven agents at its Boston office, who solicited orders for flour from Massachusetts retailers, and then turned the orders over to Massachusetts wholesalers to fill. The fact that a natural result of filling such orders was to increase the complainant's interstate sales to the Massachusetts wholesalers was said to be immaterial. "It is too remote from the actual business of the plaintiff's salesmen to constitute that interstate commerce."<sup>90</sup> There were also some sales by plaintiff directly from its own local stock. The Copper Range Company was a holding company transacting no commerce of any kind. It merely received dividends from subsidiary corporations, and then paid dividends to its own stockholders. It was said that, though "the legal domicile of the plaintiff is in Michigan, its substantial home appears to be in this state, where its essential corporate faculties are exercised."<sup>91</sup> The Champion Copper Company owned a mine in Michigan. Its sales were made through its New York office. Boston was the seat of its financial management. In Boston were the offices of the president and treasurer. Five of its directors lived in Massachusetts, and the directors' meetings were held in that state. The court refers to the "interesting question" whether a corporation could manage all its interstate commerce in a state and still be exempt from a local excise, but holds that this is not the question at bar, for the "corporate activities conducted at Boston constitute a doing of business which has no direct relation to commerce."<sup>92</sup>

Another of the litigants, the White Company, an Ohio corporation manufacturing automobiles in Ohio and owning a garage in Boston, conceded that it was doing domestic business in Massachusetts, but it objected that the excise on foreign corporations was larger than when it was admitted to the state, and that it was therefore denied the equal protection of the laws. This claim was based on *Southern Railway Co. v. Greene*,<sup>93</sup> which held that a railroad company which had acquired a substantial amount of property of a permanent character within the state had become a "person within the jurisdiction" of the state, and so could not be discriminated against in favor of domestic corporations conducting the same kind of

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<sup>90</sup> 218 Mass. 558, 575-76, 106 N. E. 310 (1914).

<sup>91</sup> 218 Mass. 558, 577, 106 N. E. 310 (1914).

<sup>92</sup> 218 Mass. 558, 579, 106 N. E. 310 (1914).

<sup>93</sup> 216 U. S. 400, 30 Sup. Ct. Rep. 287 (1910).

business. The claim of the White Company is dismissed on the ground that its property is of a kind readily salable for other uses, and is not like railroad property which cannot be advantageously disposed of if the business is abandoned. This seems a sound distinction between the property involved in the principal case and that owned by the Southern Railway Company. But a simpler ground for dismissing complainant's contention would be that the Southern Railway Case involved discrimination between foreign and domestic corporations, and not merely an increase in taxation. The Supreme Court decisions warrant no doctrine that the equal-protection clause prevents a state from increasing its taxation on foreign corporations, provided it does not in so doing discriminate in favor of domestic corporations. The foundation for such claims, when any exists, is the obligation of contracts clause,<sup>94</sup> or the due-process clause as interpreted and applied in the concurring opinion of Mr. Justice White in the Western Union Case,<sup>95</sup> and later adduced by him in the Looney Case.<sup>96</sup>

### III

In none of the foregoing cases have the foreign corporations been engaged in manufacturing within the state. Their branches within the state were for the purpose of disposing of products made in other states. Such part of their business as was intra-state in character consisted of sales within the state of property previously introduced. In *International Paper Co. v. Commonwealth*,<sup>97</sup> however, the Massachusetts court had to deal with the rights of a foreign corporation engaged in manufacturing within the state. It did not appear what proportion of the product manufactured in Massachusetts was sold to purchasers in that state; but, of all sales to purchasers within the state, only fourteen per cent were from a Massachusetts mill. The remaining eighty-six per cent of sales to Massachusetts purchasers involved transportation from mills in other states. Of its twenty-three mills, only one appeared to be located within the state. Less than two per cent of its total assets of something over \$40,000,000 were in Massachusetts.

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<sup>94</sup> *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 27 Sup. Ct. Rep. 198 (1907).

<sup>95</sup> See 31 HARV. L. REV. 586-87.

<sup>96</sup> See 31 HARV. L. REV. 603, 613.

<sup>97</sup> 228 Mass. 101, 117 N. E. 246 (1917).



The tax to which the plaintiff objected was computed by taking one one-hundredth of its total authorized capital stock in excess of \$10,000,000, with no maximum limit. Relying on the cases which hold that manufacture is not commerce,<sup>98</sup> the court declared that permission to conduct such business might have been entirely withheld from a foreign corporation. It is plainly implied that the state is free to measure its excise on such a foreign corporation by any method it desires. Chief Justice Rugg quoted from *Pullman Co. v. Adams*<sup>99</sup> the statement that the "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce,"<sup>100</sup> and added that "this is true even though the re-

<sup>98</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. Rep. 249 (1895); *Kidd v. Pearson*, 128 U. S. 1, 20, 21, 22, 9 Sup. Ct. Rep. 6 (1888); *Cornell v. Coyne*, 192 U. S. 418, 428-29, 24 Sup. Ct. Rep. 383 (1904); *Hopkins v. United States*, 171 U. S. 578, 594, 19 Sup. Ct. Rep. 40 (1898); *Keystone Watch Co. v. Commonwealth*, 212 Mass. 50, 98 N. E. 1063 (1912).

The *Keystone Case* was decided by the Massachusetts court before the Supreme Court decided the *Baltic Case*. It applied to a Pennsylvania corporation manufacturing watches in Massachusetts, the statute upheld in the *Baltic Case*. The opinion reiterated the previous interpretation put upon the statute to the effect that it did not apply to foreign corporations "engaged in conducting some kind of interstate commerce for hire as its principal function with which intra-state business is so closely connected that it cannot be given up without serious detriment to the interstate commerce," giving as an illustration the "telephone or telegraph business." The corporation had a manufacturing plant in Massachusetts worth \$1,300,000, at which it employed about three hundred and seventy-five persons. Not more than two per cent of the output of this plant was sold to Massachusetts purchasers. Over ninety-five per cent was sold on orders solicited and accepted outside of Massachusetts. The court said that it was obvious "that the activities of the petitioner conducted within this Commonwealth are chiefly those of manufacture, and not of commerce." Continuing, the opinion observed:

"The maintenance of the petitioner's plant in Massachusetts is for a distinct department of its manufacture. Although manufacture contemplates commerce, that is a subsequent stage. Its manufacturing business is entirely separable from the commerce which follows and which is involved in the sale of the product. The petitioner, by reason of its several factories located in different states, does not thereby conduct a business so unified and interwoven as to be in a position similar to a telegraph or telephone company. Its factory here is separable in valuation as appears by the statement of facts. It is not a necessity for its interstate commerce nor necessarily maintained for use in connection with interstate commerce."

For a criticism of this way of looking at the relation between manufacture and commerce, see pages 747-756, *infra*. For Supreme Court decisions which qualify the *Knight* and *Hopkins* cases, *supra*, see *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. Rep. 276 (1905), and *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. Rep. 90 (1912).

<sup>99</sup> Note 3, *supra*.

<sup>100</sup> 228 Mass. 101, 115, 117 N. E. 246, 251 (1917). Quoted from 189 U. S. 420, 422.

ceipts from the local business do not equal the expenses chargeable against such receipts."<sup>101</sup> His reliance on *Pullman Co. v. Adams*<sup>102</sup> and *Allen v. Pullman Co.*<sup>103</sup> seems to indicate his conviction that the doctrine of those cases was unaffected by the Western Union Case.<sup>104</sup> Any such position is open to grave doubts. Certainly some foreign corporations engaged in domestic and interstate commerce within the state may complain of some taxes on the domestic business, though they are legally free to renounce that business. The language of the opinions in the Western Union Case, and of succeeding opinions expressing approval of that case, should have convinced the Massachusetts court that any foreign corporation may successfully object to any tax on its domestic business which substantially burdens its interstate business. It might have assumed that the Supreme Court would ascertain whether any tax on domestic business burdens interstate commerce by estimating the effect on interstate commerce of abandoning the domestic business. It may well be that the precedents in effect when the International Paper Case<sup>105</sup> was decided would not preclude this Massachusetts tax on this corporation. But this is not to say that the tax was valid by reason of the doctrine of *Pullman Co. v. Adams*<sup>106</sup> and *Allen v. Pullman Co.*,<sup>107</sup> for that doctrine had certainly been discountenanced by the doctrine of the Western Union Case.

The International Paper Case<sup>108</sup> raises the interesting question whether the state has more power over a foreign corporation engaged in manufacturing within the state than over one engaged in intrastate sales. It is true that manufacture is not legally commerce,<sup>109</sup> and that therefore it is not interstate commerce. But a foreign corporation may combine the business of manufacturing and interstate commerce, as it may combine domestic and interstate commerce. The abandonment of manufacturing may burden interstate commerce more than would the abandonment of a domestic business which is technically commerce. The state has no more power over the domestic manufacturing of foreign corporations than it has over their domestic sales or transportation. If its plenitude of power over the taxation of the exercise of corporate functions in the

<sup>101</sup> 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).

<sup>102</sup> Note 3, *supra*.

<sup>103</sup> Note 97, *supra*.

<sup>107</sup> *Ibid*.

<sup>109</sup> Cases cited in note 98, *supra*.

<sup>102</sup> Note 3, *supra*.

<sup>104</sup> Note 4, *supra*.

<sup>106</sup> Note 3, *supra*.

<sup>108</sup> Note 97, *supra*.



business of domestic sales and transportation does not permit it to encroach by indirection on interstate commerce, why should it be given greater latitude in the taxation of the exercise of those corporate functions in the business of manufacturing? The question in every case should be whether the abandonment of the functions upon which rests the power to tax would actually burden the functions which are immune from state interference.

It is plain that the abandonment of domestic sales does not burden the business of making interstate sales to any such degree as the abandonment of domestic transportation burdens the interstate transportation. We did not know until December 10, 1917, when *Looney v. Crane Co.*<sup>110</sup> was decided, whether the Supreme Court would regard any tax on foreign corporations making local sales within the state as an interference with their interstate business. Until that decision the *Baltic Case*<sup>111</sup> was the only one that touched the question; and, in that case, the tax, though measured by total capital stock, was limited in amount. It might have been supposed that the limitation in amount would have been regarded as unnecessary, in view of the comparatively slight economic integration of domestic and of interstate exchange. But, now that the reverse turns out to be the judgment of the Supreme Court, it is not to be expected that a different attitude will be taken towards taxation of foreign corporations engaged in manufacturing within the state, merely because manufacturing is not legally commerce. True, the opinion in the *Looney Case*<sup>112</sup> may seem to mark the recrudescence of the test of artificial legal distinctions and the abandonment of the intervening test of practical results. If this were so, the Supreme Court might make use of the legal distinction between manufacturing and commerce to impute to the state, arbitrary power over foreign corporations engaged in manufacture within its borders. But the more optimistic view to take of the *Looney Case* is that the Supreme Court had become convinced that it was wiser to discountenance the unqualified use of the measure of total capital stock in excises on foreign corporations engaged partly in interstate commerce, and to emphasize its aversion by language so strong that state courts would know that it would require the weightiest of practical considerations to overcome the presumption of illegitimacy which such a measure creates. Under this interpretation,

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<sup>110</sup> Note 13, *supra*.<sup>111</sup> Note 8, *supra*.<sup>112</sup> Note 13, *supra*.

practical considerations still control the decisions of the Supreme Court on the question under discussion. But now the practical considerations are not necessary to create the presumption of illegitimacy. The presumption stands unless it can be shown from the circumstances of the particular case that the apprehended interference with interstate commerce will not materialize. If this analysis of the attitude of the Supreme Court is well founded, it is not likely that the legal affinity or remoteness of commerce and manufacturing would influence the Supreme Court in deciding whether it would look more favorably on the Massachusetts tax on the International Paper Company than on the Texas tax on the Crane Company. To save the former from the excommunication visited on the latter, it would be necessary to show that there was substantially less economic integration between the various activities of the International Paper Company than between those of the Crane Company.

Just what view the Massachusetts court takes of this question is not wholly clear. Chief Justice Rugg says that the "local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner,"<sup>113</sup> and that they "have no inherent connection one with the other."<sup>114</sup> This might be taken to mean that the two kinds of business could be divorced from each other without serious loss to the interstate business. But against the inference that this is what the Chief Justice has in mind is the fact that he cites cases holding that Congress cannot control manufacture,<sup>115</sup> and that the states are not precluded from controlling it because of the intention of the manufacturer to put his product into the channels of interstate commerce.<sup>116</sup>

From a business standpoint there is certainly nothing "artificial" in combining the business of manufacturing with that of the sale of the product in interstate trade. The lack of any "inherent connection" between the two would not be apparent to a man of affairs unversed in legal niceties. Nothing is more natural than that a corporation which manufactures paper should also sell it. It is natural that many consumers will dwell in other states than the one

<sup>113</sup> 228 Mass. 101, 112, 117 N. E. 246, 250 (1917).

<sup>114</sup> *Ibid.*

<sup>115</sup> The Knight Case and the Hopkins Case, cited in note 98, *supra*.

<sup>116</sup> Cornell v. Coyne, note 98, *supra*; Kidd v. Pearson, note 98, *supra*.



in which the manufacture takes place. It is natural that the location of the mills should be influenced by the place where raw materials and motive power are best available. And the donor of the sources of pulp and power was not particularly mindful of state lines. The mills will seek the waterfalls. Yet under the Massachusetts doctrine the mills outside the state will increase the tax on the exercise of corporate functions within the state. If the tax is too great for the domestic manufacturing to bear, the corporation may leave the state and supply Massachusetts purchasers from its mills in other states.

It may be urged that this withdrawal from local manufacturing would impose no burden on interstate commerce. But suppose other states follow the lead of Massachusetts and impose on the exercise of corporate functions within their borders similar excessive burdens which make the corporation desist from manufacturing. How then will it supply its Massachusetts customers? The combined effect of such statutes in different states would impose serious burdens on interstate commerce. It would forbid unity of ownership and management of mills in different states. It might require that mills be less advantageously located. It would increase costs of production, by complicating the purchase of raw materials and their distribution among the mills in different states. If the state's taxing power over domestic manufacturing is unlimited, the states together may compel consumers to seek their supplies from foreign countries. It is difficult to believe that the Supreme Court would ever sustain state taxes on foreign corporations engaged in manufacturing within their borders and in other states and selling a large portion of the combined product in interstate trade, if such taxes actually resulted in substantial burdens on interstate commerce in the manufactured product.

At first glance *Kidd v. Pearson*<sup>117</sup> might seem authority for the proposition that no burden on manufacturing could by any possibility be a regulation of interstate commerce. That case allowed a state to forbid the manufacture of liquor even though the liquor was intended to be shipped out of the state. It is thus declared that a state may through its police power crush a necessary antecedent to interstate commerce. But this was before the *Western Union Case*.<sup>118</sup> A different view was taken in *West v. Kansas Natural Gas*

<sup>117</sup> Note 98, *supra*.

<sup>118</sup> Note 4, *supra*.

Co.<sup>119</sup> with regard to the attempt of Oklahoma to prevent the exportation of natural gas from the state. The power of the state over its highways and over the right of eminent domain was adduced in support of the statute, but Mr. Justice McKenna quoted with approval a statement from the Circuit Court of Appeals of the eighth circuit to the effect that "no state can by action or inaction, prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on."<sup>120</sup> Mr. Justice Holmes was among those who dissented, thus suggesting that the division of opinion related to the question whether the state could use its conceded powers to accomplish by indirection what it could not do directly. The logic of the *Western Union Case* clearly restrains state burdens on any kind of intra-state business which in plain fact amount to substantial regulations of interstate commerce. The legal separability of the subject taxed and the subject with reference to which the amount of the tax is determined is no longer controlling. The *Western Union Case* shifted the issue to one with respect to the facts as to the substantiality of the burden on the subject which is immune from the power of the state.

Viewing the situation as it was when the Massachusetts court decided the *International Paper Case*,<sup>121</sup> it is to be remembered that the United States Supreme Court had declared that it would look through form to substance and would judge each case according to its own facts. It might therefore have been anticipated that the Supreme Court would in each case regard the actual burden imposed by the tax in question on the interstate commerce in question. This would require it to take account of the rate of levy as well as of the measure to which that rate is applied. It was not, however, declared that this would be done. It was settled that the measure of total capital stock was proper for taxes on the franchises of domestic corporations, but improper for taxes on foreign corporations engaged in transportation. The law with respect to other foreign corporations was uncertain. It was clear that a reasonable maximum would cure the evil lurking in the measure of total capital stock, but the Supreme Court had yet to pass judgment on the use of such a measure with no limitation to the annual imposi-

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<sup>119</sup> 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

<sup>120</sup> 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

<sup>121</sup> Note 97, *supra*.



tion. The Massachusetts supreme court, however, took the position that the absence of a maximum is immaterial, at least in excises on foreign corporations engaged in local manufacturing. It declares specifically that, under the doctrine of *Pullman Co. v. Adams*,<sup>122</sup> it is not open to the International Paper Company to urge "that the excise is 'unduly great having reference to the real value' of the property of the petitioner within this Commonwealth, or to the amount of domestic business transacted here."<sup>123</sup> Another reason given why the contention was not open in the particular case is that the record does not show the amount of the domestic business conducted within the Commonwealth or the real value of the property located therein. But Chief Justice Rugg adds that, even "if it be assumed that that question is open to the petitioner and that it must be decided on this record, it cannot be said that the excise is excessive."<sup>124</sup> The tax of \$5,500 sustained in the case is said to be less than twice the annual exaction for certain classes of liquor licenses. The petitioner is said to have "extraordinarily large financial resources." And the justification for basing the amount of the tax on property, ninety-eight per cent of which is without the state, is thus expressed:

"It cannot be presumed that it may not be worth more to such a large corporation than it would be to a small one to be permitted to go into the local markets and compete for local business as a domestic manufacturer."<sup>125</sup>

Doubtless this is correct. But can it be presumed that it is worth fifty times as much for this corporation to manufacture paper within the state as it would be if it manufactured paper only within the state? Chief Justice Rugg continues:

"We know of no principle of law which requires the conclusion that a license fee of that amount is unduly or unreasonably great to a corporation of such large capital as the petitioner, for the privilege of admission to the local markets of this Commonwealth for the transaction of an intrastate business in the manufacture and sale of an undisclosed quantity of paper of undisclosed value and out of which an undisclosed profit is realized."<sup>126</sup>

<sup>122</sup> Note 3, *supra*.

<sup>123</sup> 228 Mass. 101, 115, 117 N. E. 246, 251 (1917).

<sup>124</sup> 228 Mass. 101, 116, 117 N. E. 246, 251 (1917).

<sup>125</sup> 228 Mass. 101, 116, 117 N. E. 246, 252 (1917).

<sup>126</sup> *Ibid*.

This may be true enough, so far as a specific tax of \$5,500 is concerned. Before the Looney Case <sup>127</sup> it might have been supposed to be true also with respect to a tax measured by total capital stock in excess of \$10,000,000 where the rate of levy is only one one-hundredth of one per cent. But if the rate were to be raised to five per cent or ten per cent — as, under the doctrine of the Massachusetts court, it might be — the practical question would be entirely different, and, it is submitted, the legal one should be also.

The Supreme Court had declared that every tax is to be judged by its actual effect on interstate commerce and had intimated that this effect is to be determined with reference to the results of paying the tax or of abandoning intra-state business to avoid such payment. To tax a foreign corporation engaged in domestic manufacturing, \$150,000 or \$300,000 a year because it has a lot of mills outside the state, where under the same statute it would be taxed nothing if it had no mill except one or more in the state worth less than \$10,000,000, would certainly burden the method of doing business which combines manufacturing in various states with sales among the several states. It is not unworthy of notice that this section of the Massachusetts statute, which applies only to corporations whose capital stock exceeds \$10,000,000, seems designed for the express purpose of reaching corporations with manufacturing plants in several states, since many, if not most, of the corporations having manufacturing plants only within the state will have a capital of less than \$10,000,000.

The Massachusetts court had every reason to assume that the Supreme Court had thoroughly accepted and digested the realistic attitude which it announced in *Western Union Telegraph Co. v. Kansas* <sup>128</sup> and the later cases <sup>129</sup> which were distinguished from that, and that therefore the Supreme Court would disallow a tax under this Massachusetts statute if the rate were increased to five or ten per cent. Before the Looney Case, the Massachusetts court might have expected that its decision in the International Paper Case would have been sustained by the Supreme Court, but it had ample warning that any decision sustaining the tax would have been put on more restricted grounds than those announced in the opinion of Chief Justice Rugg. Now that the opinion of Chief Justice White

<sup>127</sup> Note 13, *supra*.

<sup>128</sup> Note 4, *supra*.

<sup>129</sup> Cases cited in notes 8 and 15, *supra*.



in the Looney Case makes a general principle out of what had previously been merely a guide for forming a practical judgment in each specific case, it is not to be expected that the single fact that the complaining corporation manufactures as well as sells within the state will be regarded by the Supreme Court as sufficient to exclude the International Paper Case from the doctrine of the Looney Case. There is good reason to believe that the Supreme Court will insist that a reasonable maximum is a necessary ingredient in any statute making any reference to total capital stock in prescribing the amount of an excise on foreign corporations engaged partly in interstate commerce.

The Massachusetts court, however, was not alone in sustaining a tax on a foreign corporation engaged in domestic manufacturing, where the measure adopted was the total capital stock with no provision for a maximum. The supreme court of Tennessee in *Atlas Powder Co. v. Goodloe*<sup>130</sup> relied on the Baltic Case to support such a tax, without adverting in the opinion to the significance of the absence of any provision for a maximum in the Tennessee statute. The amount imposed was \$1,500 on an authorized capital stock of \$5,000,000. The Tennessee assets were \$305,945.11, and the assets in other states were \$6,000,000. There was manufacturing in Tennessee and in other states, sales in car-load lots from other states to Tennessee, and also sales from Tennessee to other states. Just what weight the court gives to the fact that there was domestic manufacturing is not clear. It is pointed out that neither of the two corporations complaining in the Baltic Case "owned a factory in Massachusetts, but each had a local warehouse where local sales were made."<sup>131</sup> The situation before the Tennessee court is referred to as follows:

"One important feature in the case at bar is that it [*sic*] is engaged in manufacturing black gunpowder at its factory at Ooltewah, in this State, and it also has six storage magazines where explosives are kept. It also has its places in this State in a number of cities where local sales are made. It occurs to us that any part of this local business is of such character as to render the complainant liable to the payment of this charter tax, or tax on its right to enter the State to do intra-state business. Certainly

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<sup>130</sup> 131 Tenn. 490, 175 S. W. 547 (1915).

<sup>131</sup> 131 Tenn. 490, 516, 175 S. W. 547 (1915).

the manufacturing business in this State and the operation of storage magazines are so far separated from the interstate sales of explosives that there can be but little difficulty in the conclusion that the right of the state to impose this tax is clear, and we so hold." <sup>132</sup>

This does not definitely declare that local manufacturing is more remote from interstate commerce than are local sales, yet it permits the inference that the Tennessee court had some such distinction in mind. On the other hand, earlier in the opinion, it was said that the complainants in both the Baltic Case and the principal case "could have omitted the local business if they saw proper, and thus separated the local business from the interstate commerce." <sup>133</sup> By contradistinction the Pullman Company and Western Union Telegraph Company were said to be "public service corporations" which "were bound to accept local business." <sup>134</sup> If this means that the doctrine of the Western Union Case is based on the fact that the complainant was under a legal duty not to abandon intra-state commerce, it is obviously incorrect. It is, moreover, inconsistent with the implication of an earlier statement of the Tennessee court to the effect that it was claimed on behalf of the companies involved in the Western Union and Pullman cases "that their business and facilities for doing business were so intermixed that a tax upon the company was necessarily a burden upon interstate business, and it was so held by a majority of the court." <sup>135</sup> This and other statements in the opinion make clear that the Tennessee court appreciated that it was on the ground of the economic, and not the legal, inseparability of local and interstate business that the Western Union Case was decided.

While both the Massachusetts court and the Tennessee court attach importance to the fact that the corporations whose complaints they rejected were engaged in manufacturing within the taxing state, the opinions give reason to infer that both courts might have reached the same decision had the local business been wholly mercantile. To the extent that they assumed that this was established by the decision of the Supreme Court in the Baltic Case, <sup>136</sup> they were in error. The Baltic Case left the question an open one, and the opinion, taken as a whole, contained nothing inconsistent with

<sup>132</sup> 131 Tenn. 490, 516-17, 175 S. W. 547 (1915).

<sup>133</sup> 131 Tenn. 490, 516, 175 S. W. 547 (1915).

<sup>135</sup> 131 Tenn. 490, 510, 175 S. W. 547 (1915).

<sup>134</sup> *Ibid.*

<sup>136</sup> Note 8, *supra*.



the subsequent decision in the Looney Case. The Looney Case,<sup>137</sup> of course, will require the reversal of the Massachusetts and Tennessee decisions, unless the Supreme Court should regard the distinction between manufacture and sales as sufficient to exclude these state decisions from the "controlling principle" announced in the opinion in the Looney Case.

A somewhat different phase of the problem is presented by *General Ry. Signal Co. v. Commonwealth*,<sup>138</sup> decided by the supreme court of appeals of Virginia on January 13, 1916. This case involved the power of the state over a foreign corporation engaged in performing a contract within the state which involved equipping a railroad with safety devices. It appears that the corporation in question based its complaint before the state corporation commission wholly on the ground that it was engaged entirely in interstate commerce, and was therefore beyond the taxing power of the state. The commission decided this point against the corporation, on the authority of *Browning v. Waycross*,<sup>139</sup> which sustained a municipal license tax of \$25 on agents or dealers "engaged in putting up or erecting lightning rods within the corporate limits." The Virginia court of appeals adopts the opinion of the state corporation commission on this point. In this it was clearly correct. Plainly the Signal Company did some business within the state which was not interstate commerce, and therefore it was not wholly immune from the taxing power of the state. As Chief Justice White observed in the Lightning Rod Case,<sup>140</sup> the construction work done within the state "involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated."<sup>141</sup> Whether the Chief Justice was wholly warranted in an earlier statement that "such business was wholly separate from interstate commerce"<sup>142</sup> is perhaps another question. The answer to it has some bearing on the measure which the state may adopt for determining the amount of its tax on this local business.

<sup>137</sup> Note 13, *supra*.

<sup>138</sup> 118 Va. 301, 87 S. E. 598 (1916).

<sup>139</sup> 233 U. S. 16, 34 Sup. Ct. Rep. 578 (1914).

<sup>140</sup> Note 139, *supra*.

<sup>141</sup> 233 U. S. 16, 22-23, 34 Sup. Ct. Rep. 578 (1914).

<sup>142</sup> 233 U. S. 16, 22, 34 Sup. Ct. Rep. 578 (1914).

This question was raised when the Signal Company appealed from the corporation commission to the state court, and insisted that, even if it were subject to taxation because engaged partly in intra-state commerce, the state was nevertheless imposing an unconstitutional burden on interstate commerce by basing the amount of the imposition on the total capital stock. The opinion of the Virginia court on this point is as follows:

"In support of this contention, which we think is without merit, the appellant relies upon cases involving the right of the state to impose a license tax upon public service corporations engaged in both interstate and intra-state commerce within the state, which announce the well-settled doctrine that a state cannot lay a tax upon interstate commerce in any form.

"These cases have no application to the present case. Here the defendant is a commercial corporation carrying on a purely local and domestic business quite separate from their [*sic*] interstate commerce transactions. Under such circumstances the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business. This question is disposed of by the case of *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, which holds that:

"Where a foreign corporation carries on a purely local business separate from its interstate business, the state may impose an excise tax upon it for the privilege of carrying on such business and measure the same by the authorized capital of the corporation."

"There is no error in the order appealed from, and it is affirmed."<sup>143</sup>

Thus the Virginia court disregards the fact in the *Baltic Mining Case* that the annual imposition under the Massachusetts statute could not exceed \$2,000. The statement by the Virginia court of the holding in the *Baltic Case* is a quotation from the headnote in the official edition of the Supreme Court reports. That headnote, however, was unwarranted by the opinion of the Supreme Court, since it was specifically pointed out that all the facts in the case were material, and one of the facts was the \$2,000 maximum. Whether the Supreme Court would uphold the Virginia court in sustaining the tax on the Signal Company should depend on the judgment it would pass on the degree of interrelation between the construction done by the corporation in Virginia and the interstate shipment to Virginia of the materials there to be affixed.

<sup>143</sup> 118 Va. 301, 312-13, 87 S. E. 598 (1916).



It is evident that, if Virginia is permitted to measure its tax by total capital stock, foreign corporations with large capital will be discriminated against in favor of their foreign and domestic competitors whose capital is less. The Virginia method of measurement might in many instances enable local concerns to underbid their larger rivals in other states. If the performance of the contract involved no interstate commerce, this favoritism would be impeccable, if *Horn Silver Mining Co. v. New York*<sup>144</sup> is still law. But where the materials to be affixed within the state would be brought by foreign contractors from without the state, the Horn Case would not be controlling. The case would then be within the "general principle" announced in the Looney Case. The legal separability of the activity taxed from the interstate commerce instrumental thereto would seem to afford no sensible ground for permitting an exaction which, "intrinsically and inherently considered," is beyond the power of the state.

No exception can be taken to the statement of the Virginia court, above quoted, that, if the local business is quite separate and distinct from the interstate commerce transactions, "the state has the right to prescribe the conditions upon which such a corporation may do its intra-state business, provided it lays no burden upon its interstate business." The "if" and the "provided" safeguard the statement from attack. But the application of the statement to each particular case requires consideration of the degree of economic separation between the local and the interstate business, and of the question whether the tax does lay a burden on interstate commerce.

Very likely the tax in the particular case was not unduly burdensome on interstate commerce. The authorized capital of the Signal Company was \$5,000,000, and the tax was \$1,000. The contracts which it was performing in Virginia called for the payment of \$214,040. It is not to be supposed that a foreign corporation would be deterred from seeking a \$200,000 contract by the imposition of a tax which is only one-half of one per cent of its gross return. But if the work to be done called for the payment of only \$5,000 or \$10,000, it is not likely that a foreign corporation with \$5,000,000 of authorized capital would submit a bid. The Virginia statute bars large foreign corporations from making small contracts to be per-

<sup>144</sup> 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See 31 HARV. L. REV. 613.

formed within the state. To the extent to which such corporations would perform those contracts by shipping materials in interstate commerce, the loss thereof prevents interstate commerce from taking place.

It may readily be perceived that it would be unduly vexatious, both to litigants and to the Supreme Court, to take to that high tribunal every dispute which might arise under the Virginia statute. The confusion and uncertainty which would arise if each case depended on its own facts is only too apparent. Such considerations doubtless influenced the writer of the Looney opinion in adducing "general principles" in support of the decision, rather than deciding the particular case on its particular facts. The possibility of evil with which the Virginia statute is pregnant seems sufficient to warrant the establishment of a general rule that an unbridled measure of total capital stock is vicious in all cases where it is applied to a foreign corporation which to an appreciable degree combines interstate commerce with its other activities within the state. In many instances the evil would not be averted by limiting the tax to \$2,000 or to \$1,000.

To a considerable extent analogous evils are possible in similar taxes on foreign corporations whose construction work within the state might be wholly unrelated to any interstate transportation. Foreign corporations of any considerable magnitude would have to be assured of a fairly large volume of business within the state before they could wisely make a contract for work therein. Excises on foreign corporations, measured, not by the amount of work done within the state, but by the wealth of the corporation doing it, must in plain fact tend to elevate state lines into hurdles to impede the course of interstate business. The Supreme Court's reference to the due-process clause, in addition to the commerce clause, in the *Western Union* and *Looney* cases, may well be an entering wedge to the overruling of *Horn Silver Mining Co. v. New York*<sup>145</sup> and to the declaration that the local business of foreign corporations, whether connected with interstate business or not, must be taxed according to the amount of the business, and not according to the resources of the corporation doing it.

Wherever a state bases the amount of its tax on values which lie beyond its borders, it is emulating the example of the hard man

<sup>145</sup> Note 144, *supra*.



of the parable, and seeking to reap where it sowed not, and gather where it has not strawed. Its constitutional right to do this was long ago sanctioned by the declaration of Chief Justice Marshall that the power to tax involves the power to destroy. It has taken Marshall's successors near a hundred years to break the spell of his apothegm. But now that this has been accomplished, the way is open to face anew the problem of the limits of state taxation, and to abandon artificial criteria in favor of distinctions that hug the facts. This has been done in passing judgment on taxes on foreign corporations engaged partly in interstate commerce. And it has been strongly hinted that similar results will be reached under the due-process clause, and that therefore foreign corporations engaged solely in intra-state business will be relieved from taxes which are disproportionate to the business taxed. The conditions under which business is done by foreign corporations today are substantially different from those of the period when sanction was first given to the doctrine that the state has unlimited taxing power over foreign corporations not engaged in interstate commerce. The nation-wide organization of industry and commerce, and the enormous capital of the corporations whose business spans the continent, make the measure of total capital stock a most inequitable one for each state in which some fraction of that business is done. The actual menace may not be great, since large corporations may, by creating subsidiaries for operation in each of the several states, see to it that existing laws do not multiply exactions on the same economic interest. But this way of escape gives further evidence of the ineptitude of the measure of total capital stock for taxes on foreign corporations. It would be a sensible doctrine that the states must measure their taxes by property or business which they protect, and not by wealth which has its *situs* elsewhere. There is indeed more reason to restrain a state from taking toll from property or business within the boundaries of its neighbors, than to forbid it to reap a benefit from the interstate commerce which takes place within the area where its authority obtains.

#### IV

In all of the cases thus far considered, the excise taxes on foreign corporations have been measured by some or all of their capital

stock. But the West Virginia statute involved in *Baldwin Tool Works v. Blue*<sup>146</sup> measured the excise on foreign corporations by their total receipts within the state, including those from interstate, as well as from intra-state, commerce. From a reference to the bill, it appeared that the case involved several corporations, but the opinion does not give their names or the kind of business in which they were engaged, with the exception of one domestic corporation which was a holding company. It is evident from other language in the opinion that some of the other corporations were foreign to West Virginia. It is evident too that some of these foreign corporations were engaged in business in other states as well as in West Virginia, for the court states and rejects a contention made with reference to the provision in the statute for ascertaining the annual income of such corporations which shall be deemed to have been earned within the state. The material provisions of the statute are as follows:

"Every corporation . . . now or hereafter organized under the laws of this state, or under the laws of any other state or government and engaged in any business whatsoever in the state of West Virginia, shall pay an annual special excise tax for the privilege of carrying on or doing business in the state of West Virginia, equivalent to one-half of one per centum upon the entire net income of such company, received by it from all sources during the year, on business transacted and capital invested in this state, as hereinafter set forth. . . ."<sup>147</sup>

"It is the intention of this chapter to assess the tax imposed thereby on the net income as defined therein of the corporations . . . arising from business transacted and capital invested in this state. Every such company having capital invested in its business in this state only, shall pay the tax upon its entire net income ascertained as herein provided; and every such company, except an insurance company, engaged in business and having capital invested and transacting business both in and out of the state, shall pay the tax upon that part of its entire net income which bears the same proportion to its whole net income that the assessed value for purposes of taxation of its assets and property within the state bears to the total assessed value of all of its assets and property in the jurisdictions where it is located."<sup>148</sup>

The complainants objected to any reference to property in, or receipts from, other states in determining the receipts deemed to have been earned within the state. The court's answer is brief:

<sup>146</sup> 240 Fed. 202 (1916). <sup>147</sup> 240 Fed. 202, 204 (1916). <sup>148</sup> 240 Fed. 202, 204-05 (1916).



"A careful consideration of the provisions of the statute as respects this question leads us to the conclusion that the method employed for ascertaining the amount of the tax which the corporation is required to pay is perhaps as fair, as a general rule, as any scheme that could be devised for that purpose. Undoubtedly the state of West Virginia has the right to base its tax upon the return of the entire net income in the respective states, and to apportion the amount of the income thus ascertained as a means of ascertaining the net income subject to taxation by the state."<sup>149</sup>

The authorities cited do not support the proposition. The *Baltic Case*<sup>150</sup> did not involve any reference to receipts. *United States Express Co. v. Minnesota*<sup>151</sup> used receipts as an aid in valuing property and not in assessing an excise tax. *Maine v. Grand Trunk Railway Co.*,<sup>152</sup> it is true, involved an excise tax on a foreign corporation, but the court later reinterpreted it and placed it on the ground that the tax in question was in the nature of a property tax.<sup>153</sup> The cases permitting the valuation of property within a state to take account of receipts from interstate commerce will be dealt with in a succeeding section of this discussion. They rest on grounds which do not apply to excise or occupation taxes.

There is no doubt that a state tax directly on receipts from interstate commerce is invalid.<sup>154</sup> And a tax on railroads "equal to" a percentage of receipts has been held to be as vicious as a tax levied on receipts *eo nomine*.<sup>155</sup> It must therefore be open to serious question whether the Supreme Court will allow a state to include in the measure of a tax on the privilege of a foreign corporation to engage in domestic business, any receipts which are from interstate commerce.<sup>156</sup> It has been explicitly held that

<sup>149</sup> 240 Fed. 202, 206 (1916).

<sup>150</sup> Note 8, *supra*.

<sup>151</sup> 223 U. S. 335, 32 Sup. Ct. Rep. 328 (1912).

<sup>152</sup> Note 3, *supra*.

<sup>153</sup> *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 226, 28 Sup. Ct. Rep. 638 (1908).

<sup>154</sup> *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887).

<sup>155</sup> *Galveston, H. & S. A. Ry. Co. v. Texas*, note 153, *supra*.

<sup>156</sup> In the *Galveston Case*, note 153, *supra*, Mr. Justice Holmes observed that the tax in question "is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" This hint of the possibility of disguising the tax by calling it an "occupation tax" seems to have animated the Texas legislature to amend the statute and dub the tax an "occupation tax." There was enough in a name to persuade the court of civil

such a measure cannot be applied to a so-called "revenue tax" on a railroad corporation.<sup>157</sup> On the other hand in *Ficklen v. Shelby*

appeals of Texas to hold in *State v. Houston Belt & Terminal Ry. Co.* (Tex. App.), 166 S. W. 83 (1914), that the tax, being not on interstate receipts but on an occupation, and only measured by receipts, was not a regulation of interstate commerce. This case was criticized in a note in 28 HARV. L. REV. 93. It was reversed by the supreme court of Texas in *Houston Belt & Terminal Ry. Co. v. State* (Texas), 192 S. W. 1054 (1917). The Texas supreme court found that that tax could not be sustained as one on "going value" as property of the complainant, since "the assessment of its property for *ad valorem* taxation under the general laws included the value which it had as property of a going concern."

The law with regard to taxes on occupations is still unsettled. *Ficklen v. Shelby* County Taxing District, notes 85, *supra*, and 158, *infra*, has not yet been overruled, though the reasoning on which it was decided has been shaken by later opinions of the Supreme Court. In *Commonwealth v. Crew Levick Co.*, 256 Pa. St. 508, 100 Atl. 952 (1917), it was held without discussion that a mercantile tax may be measured by the whole volume of business, including receipts from foreign commerce. The decision of the Pennsylvania court was reversed by the United States Supreme Court in *Crew Levick Co. v. Commonwealth*, 245 U. S. 292, 38 Sup. Ct. Rep. 126. The opinion of the court endeavored to distinguish the *Ficklen* Case, on the ground that the Pennsylvania tax in question was not "an occupation tax, except as it is imposed upon the very carrying on of the business of exporting merchandise." It was, however, stated that the *Ficklen* Case "is near the border line" and "has been deemed exceptional." The authority of the *Ficklen* Case is narrowly limited, if not directly shaken, by this latest decision on the subject, though this decision leaves it still possible for the Supreme Court to permit taxes on taxable occupations to be measured in part by receipts not themselves directly taxable. Yet on the whole the court's attitude towards the *Ficklen* Case seems to be that of *de mortuis nihil nisi bonum*. In *Postal Telegraph Cable Co. v. City of Mobile*, 179 Fed. 955 (1909), an injunction was granted against the enforcement of an ordinance imposing a flat fee of \$1,000 on each telegraph company doing business in the city, while in *Postal Telegraph Co. v. City of Portland*, 228 Fed. 254 (1915), a tax of \$75 per quarter for the privilege of doing local business in the city was sustained. The complainant alleged that the intra-state receipts did not equal the expenses properly chargeable to intra-state business, but the court answered that the question of the reasonableness of a tax was largely legislative in character. In *Postal Telegraph Cable Co. of Norfolk v. Norfolk*, 118 Va. 455, 87 S. E. 555 (1916), the Virginia court sustained a tax of \$500 per year plus \$1 per pole and \$1 for every hundred feet of conduit. In *State v. Northern Express Co.*, 76 Wash. 636, 136 Pac. 1160 (1913), however, a tax measured by gross receipts within the state including receipts from interstate commerce was held invalid. The chief reason given was that the company under the constitution of the state was not free to renounce its local business. For a different attitude towards such a provision in a state constitution, see *Northern Pacific Railway Co. v. Gifford*, note 69, *supra*.

It is to be anticipated that before long the Supreme Court will be called upon to tell to what extent the doctrine of the *Western Union* Case applies to taxes on occupations and to declare whether or not *Ficklen v. Shelby* County Taxing District, *supra*, is still law. The problem is complicated by the fact that many municipal or-

<sup>157</sup> *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. Rep. 218 (1912).



*County Taxing District*<sup>158</sup> it was held that commission dealers who desired to do a combined intra-state and interstate business could be required to pay a percentage of receipts from all kinds of business. If this case can still stand, it must be either (1) because the state has more power to take toll from interstate commerce through taxes on occupations than through taxes on corporate privileges, which is unthinkable, or (2) because of a controlling distinction between the character of the commission business and that of the transportation business. A commission merchant, unlike a railroad, may abandon intra-state business without serious results to the per-transaction costs of the interstate business. To a lesser degree the same is true of a foreign corporation engaged in local sales. If it gives up this business to escape burdensome taxation, it may reduce operating costs by curtailing office and warehouse expenses, and it may still furnish customers from stock in other states. But the abandonment of mining or manufacturing in the state will seriously affect the interstate business of the company.

It is worthy of note that in two of the cases following the *Western Union Case*<sup>159</sup> the Supreme Court has called attention to the practical distinction between excise taxes measured by property or capital stock and those measured by receipts.<sup>160</sup> When the tax

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dinances impose specific taxes, or measure their exactions by the number of miles of wire or the number of poles within the municipal limits, though these facilities are used for interstate as well as for local commerce. It seems to be settled that the fact that the local business is unremunerative does not render it immune from taxation. *Williams v. Talladega*, 226 U. S. 404, 416-17, 33 Sup. Ct. Rep. 116 (1912). This case involved a specific tax of \$100. The tax was held invalid because the ordinance made its payment a prerequisite to doing any business whatever, but the court declared that it would have been valid if imposed only on local business exclusive of that done for the federal government. It is also to be anticipated that specific taxes on occupations must either be negligible in amount, or must bear some reasonable relation to the value of the business subject to taxation. Some of these occupation taxes can doubtless be saved by being regarded as taxes on intangible property. In this case they may be measured in part by receipts from interstate commerce. *Adams Express Co. v. Kentucky*, note 166, *infra*.

<sup>158</sup> Note 85, *supra*.

<sup>159</sup> Note 4, *supra*.

<sup>160</sup> *St. Louis S. W. R. Co. v. Arkansas*, 235 U. S. 350, 363-64, 35 Sup. Ct. Rep. 99 (1914): "The tax, as will be observed, is not in any wise based upon the receipts of the company from interstate commerce, either taken alone or in connection with the receipts from its intra-state business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done, we are

is measured by property or by capital stock, it is not increased by an increase in the volume of interstate commerce. When the tax is measured by receipts, it is increased by an increase in the volume of interstate commerce. The economic result of this increase of taxation dependent upon an increase of interstate commerce is to increase *pro tanto* the cost to the corporation of conducting interstate commerce. This is exactly the kind of burden which the states are forbidden to impose directly and which the Western Union Case forbids them to impose by indirection. The only practical difference between the direct and the indirect approach to the receipts would seem to be that, to block the indirect approach, it might be required to appear that the abandonment of the enterprise on which the tax is levied would materially injure the enterprises which afford the receipts by which the amount of the tax is in part determined.

From the aspect of the effect on interstate commerce of a withdrawal from local business in order to escape the tax on that business, mining and manufacturing are more closely akin to transportation than is the business of local sales. Interstate sales of West Virginia products must cease if West Virginia mills and mines close down. The abandonment of the domestic business would involve a serious diminution in the value of the property devoted to such business in the state, since its earning power is enhanced by the fact that the business of shipping across state lines is united with the business of mining and manufacturing. Much of the business of the country is most economically conducted by corporations which combine manufacturing with shipping across state lines. No state tax should be allowed which would require corporations, in order to escape from burdens on interstate commerce, to divorce the ownership and management of different kinds of business which cannot be practically or economically separated in fact.

The requirement of such separation, or the alternative of submission to a tax which is a burden on interstate commerce, cannot be regarded solely from the standpoint of the corporation which

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relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers, . . ."

See also the passage quoted from *Kansas City, F. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 335, 36 Sup. Ct. Rep. 261 (1916), in 31 HARV. L. REV. 598.



unites the business of interstate sales with that of manufacturing. It must be regarded also from the standpoint of the consumers in other states, since the effect of burdening the interstate commerce of the corporations would be to increase the cost to consumers. The combination of these different businesses may, it is true, give interstate corporations power for evil as well as for good. But the prevention of the evil is for Congress and not for the states. And if interstate corporations do not bear their fair share of the tax burden, this too is for Congress to remedy rather than for the states.

If the interests of the corporations were all that were in issue, West Virginia might urge with force some of the distinctions between mining and manufacturing on the one hand, and transportation on the other. As the transportation business is necessarily conducted, the same property is used for both interstate and domestic commerce, but the receipts can be attributed respectively to each kind of commerce. In the case of mining and manufacturing companies which ship their products across state lines, the property itself, with the exception of that part devoted to office purposes, is employed only for local business. Moreover, since all receipts come from sales, the company, by making no sales within the state, may so conduct its business that there are no receipts from local business, even though such business contributes mainly to the earnings. The state might therefore urge that the corporation, since it chooses to combine local business in such a way that no receipts are allocated to the local business, cannot complain that the only method of measuring an excise tax by receipts must necessarily include within the measure receipts from interstate commerce.

There would be great force in this contention, if the state, in losing the power to measure the excise by receipts, were debarred from any legitimate revenue. But the result of denying to the state the power to measure its excise tax on local business by reference to receipts is still to leave open to the state the adoption of a measure which regards as a basis the proportion of capital stock represented by property within the state,<sup>161</sup> or which regards the total capital stock, provided there is a satisfactory limit set

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<sup>161</sup> *St. Louis S. W. R. Co. v. Arkansas*, note 160, *supra*.

to the maximum imposition.<sup>162</sup> And excises on corporations engaged in mining and manufacturing might also be measured by the actual value of the products extracted or created within the state. This power of the state was specifically sanctioned in *Missouri K. & T. Ry. Co. v. Meyer*.<sup>163</sup> The complaining interstate railroad in that case protested against an Oklahoma excise on persons or corporations engaged in mining within the state, on the ground that the coal mined by said railroad was not sold but was used by it for its locomotives engaged in interstate commerce. In dismissing the contention the court said:

"The coal produced from mines by the plaintiff first has its *situs*, and the production occurs, wholly within the state. If the tax should be regarded as levied upon property, it would not be objectionable on account of its use in interstate commerce. But if it was levied upon the production of the coal, it cannot be held invalid as a restraint or burden upon interstate commerce, because it attaches in advance of any use of the coal in such commerce, and it is too indirect in its effect thereon."<sup>164</sup>

Certainly the mining operations were taxable. The same is true of manufacturing operations within the state. If the state measures its exaction by the fruits of the mining or manufacturing, without seeking to tap the profits attributable to the commercial transactions of making sales for delivery in other states, no objections can be raised. But the state goes beyond this when it adopts the measure of total receipts. Though the books of a

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<sup>162</sup> *Baltic Mining Co. v. Massachusetts*, note 8, *supra*; *Lusk v. Botkin*, note 15, *supra*.

<sup>163</sup> 204 Fed. 140 (1913).

<sup>164</sup> 204 Fed. 140, 144 (1913). Another point in the decision is interesting in view of the situation created by the recent assumption of federal control over the railroads. Some of the mines from which the coal was taken were owned by Indian tribes. The railroad leased the same, paying royalties for their use and conducting its operations under the supervision and direction of the Secretary of the Interior. Judge Cottrell observed that, "if this tax were an *ad valorem* tax upon the coal produced from the mines, it would be valid because the exemption adhering to it in the mines would terminate on its removal, upon the general principle that taxation of property is valid after the status which exempts it no longer exists." But the tax was said to be not upon property but upon the pursuit of mining. "If the tax be sustained," continued the court, "it seems clear it might be extended by legislation to the limit of depriving the leases of all value, and of frustrating the exercise of the federal power." The question to be settled was said to be "whether the tax is sufficiently direct in its bearing upon the leases to bring it into conflict with such agency." Without adducing specific argument, the court found the bearing of the tax on the federal agency to be sufficiently direct to require its collection to be enjoined.



corporation may not indicate what is made from mining or manufacturing, and what from the succeeding sales, the two stages are separable; and some estimate may be made of the proportion of the total returns to be allocated to the extractive or creative process. This estimate had to be made in *Missouri K. & T. Ry. Co. v. Meyer*,<sup>165</sup> where the producer was also the consumer. When a corporation unites the business of mining or manufacturing with that of making sales in other states, the activities without the state must usually enable it to get more for its product than what that product would bring if sold at the mill or mine. Unless some deduction is made from the receipts from sales to purchasers in other states, the state in which manufacture takes place is taking toll from interstate commerce.<sup>166</sup>

<sup>165</sup> Note 163, *supra*.

<sup>166</sup> In considering whether taxes on franchises of foreign corporations may be measured in whole or in part by receipts from interstate commerce, a distinction must be drawn between a franchise to act as a corporation, and what is commonly termed a "special franchise" to occupy the public streets, which is possessed by corporations engaged in some form of transportation or communication. Such so-called special franchises are property. *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 33 Sup. Ct. Rep. 988 (1913); *Boise Artesian H. & C. Water Co. v. Boise City*, 230 U. S. 84, 33 Sup. Ct. Rep. 997 (1913). It would seem, therefore, that in assessing their value for purposes of taxation, account may be taken, under the doctrine of *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912), of the total receipts to which their enjoyment gives rise, including receipts from interstate commerce. Such has been the decision of several state courts. *Phillipsburg Horse Car R. Co. v. State Board of Assessors*, 82 N. J. L. 49, 81 Atl. 1121 (1911); *State v. Wells, Fargo & Co.*, 38 Nev. 505, 150 Pac. 836 (1915); *Illinois Cent. R. Co. v. Mississippi Railroad Commission* (D. C. S. D. Miss.) 229 Fed. 248 (1914), *semble*; *People v. State Board of Tax Com'rs*, 125 N. Y. Supp. 895 (1910); *People ex rel. Commercial Cable Co. v. State Board of Tax Com'rs*, 166 N. Y. Supp. 62 (1917); *People ex rel. N. Y. C. & H. R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547 (1912), *semble*. These two last cases hold also that the propriety of determining the receipts deemed to be the product of the special franchise by taking a proportion of receipts earned in various states, depends on the facts in each case. See note 180, *infra*.

The validity of an assessment on these special franchises as property is conditioned of course on the fact that their value is not included in the assessment of other property taxes levied on the corporation. *King County, Washington v. Northern Pacific Ry. Co.*, 196 Fed. 323 (1912). See also note 156, *supra*.

State statutes which by their terms seem to impose franchise taxes may be interpreted by the Supreme Court as levying, not "a true franchise tax," but "merely a property tax upon intangible property." *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527 (1897), discussed in *Louisville & N. R. Co. v. Greene*, 244 U. S. 522, 544-45, 37 Sup. Ct. Rep. 683 (1917). This last case, and also *Illinois Central R. Co. v. Greene*, 244 U. S. 555, 37 Sup. Ct. Rep. 697 (1917), consider interesting questions respecting the proper method of determining what proportion of the

The questions raised by the West Virginia statute are most inadequately dealt with in Judge Pritchard's opinion in *Baldwin Tool Works v. Blue*.<sup>167</sup> The point in issue was not whether it was "fair" to the corporation to pay a tax measured by its receipts, but whether such a tax was a regulation of interstate commerce. Many taxes which are fair enough, so far as the taxpayer is concerned, are regulations of interstate commerce, and are therefore to be imposed, if at all, by Congress rather than by the states. But there is strong ground to believe that the measure adopted by West Virginia for the tax on corporations doing business in several states was far from fair.

A foreign corporation doing business only in West Virginia could base its objection to the excise under consideration only on the commerce clause. But a corporation doing business in several states might have other grounds on which successful resistance might be placed. It might urge that within the doctrine of Mr. Justice White's opinion in the *Western Union Case*, West Virginia was in effect taxing property and business beyond the jurisdiction and thus denying it due process of law. It is to be noted that the West Virginia statute declares that "it is the intention of this chapter to assess the tax imposed thereby on the net income . . . arising from business transacted and capital invested in this state."<sup>168</sup> It thus disavows the intention to assess the tax on business not transacted in the state. But in the case of corporations doing business in several states, the statute bases the amount of the tax, not on the income from business actually done within the state, but on a proportion of the total income derived from business in all the states. This proportion is ascertained by applying to that total, the ratio between (1) the assessed value, for purposes of taxation, of the assets and property of the corporation within the state, and (2) the total assessed value of all its assets and property in all the states in which it does business.

The suitability of this ratio for determining what proportion of the receipts from business in all the states arises from business within West Virginia depends upon two assumptions: (1) that the

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total intangible property of a railroad running through several states is to be regarded as located within the taxing state.

<sup>167</sup> Note 146, *supra*.

<sup>168</sup> 240 Fed. 202, 204 (1916). Quoted on page 761, *supra*.



assessed value for purposes of taxation in each state is the same proportion of the actual value of the property in that state; (2) that the earnings from business within each state bear the same ratio to the total earnings in all the states as the actual value of property within the state bears to the actual value of property in all the states.

In the case of certain corporations the first assumption will be found to be opposed to the facts. This is because in some other states the assessment values are not identical with the actual values. In some states, personal property employed in manufacturing is exempt from taxation. In Massachusetts, as Chief Justice Rugg points out in the *International Paper Case*,<sup>169</sup> a domestic corporation is not taxed locally for its personal property, but such property "is taken into account in ascertaining the value of its franchise upon which it pays an excise tax."<sup>170</sup> The result of such discrepancies between actual and assessed values in other states, while assessments in West Virginia correspond to actual values, is to allow West Virginia to extract additional revenue from the corporation because some other state, for the encouragement of manufacture, exempts certain property, or substitutes some other mode of taxation for *ad valorem* taxes on property.

The assumption that earnings in each state are proportioned to the value of property in that state is likewise unwarranted. This would not necessarily be true if all earnings were the result of the use of property. The property in West Virginia might be unproductive in any given year without reducing in that year its assessed value. An increase in the productivity of property in other states, without a corresponding increase in the productivity of property in West Virginia, would increase the amount of the tax in West Virginia. Since, if West Virginia were allowed to measure its taxation by a proportion of the total earnings in all the states, other states might *a fortiori* measure their taxes by the actual earnings in those states, the receipts taken as the measure of taxation in all the states might be greater than the total actual earnings.

A further vice in the assumption under consideration is that not all the earnings in all the states are the product of the use of property. The earnings from other states may be the fruit of

<sup>169</sup> Note 97, *supra*.

<sup>170</sup> 228 Mass. 101, 114, 117 N. E. 246 (1917).

business unconnected with the use of property. That business may consist entirely of interstate sales. A leasehold interest and a clerical force may be all that is necessary to carry it on. The receipts from such business would be added to the total of which West Virginia fixes a proportion as the measure of its tax, but the absence of any considerable amount of property in states other than West Virginia would make the ratio between property in West Virginia and that in all the states a most inadequate one for the determination of what proportion of the total receipts shall be deemed to be earned from business in West Virginia.

It is clear, therefore, that the ratio applied by West Virginia to total receipts in all the states is little adapted to the professed end of ascertaining the receipts properly attributable to business in West Virginia. Its application to corporations doing business in several states, under the conditions suggested in the three foregoing paragraphs, would result in a more serious burden on interstate commerce than would the selection of the receipts actually derived from business in West Virginia. It would tax such corporations more severely than corporations doing business only in West Virginia, and would therefore penalize the interstate organization of business.

Unless the Supreme Court has abandoned its canon that every decision on the subject under consideration is to be based on the facts of the particular case, such facts in respect to the business and property and taxation of any foreign corporation as indicate that the West Virginia ratio does not serve its professed end, would be material in determining whether the tax was a regulation of interstate commerce or a taking of property without due process of law. And if the Supreme Court has discarded its realistic outlook, it has done so in favor of a rigid formula that any tax which would be invalid, if levied directly on what it is measured by, is invalid although levied on something else properly subject to taxation.

There are no authoritative precedents on the propriety of West Virginia's method of determining the receipts from business within the state for the purpose of measuring the amount of an excise tax, because the recent decisions<sup>171</sup> have denied to the states the power to measure excise taxes by receipts which include receipts

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<sup>171</sup> Cases cited in notes 153 and 157, *supra*.



from interstate commerce. The only cases in which reference to receipts which include receipts from interstate commerce has been allowed in determining the amount of a tax imposed by the state, are those in which the state is seeking to value property within the state.<sup>172</sup> In those decisions we find that the court sustains the application of a ratio to a total only when the result may fairly be presumed to measure the actual value of that part of the total which is in the taxing state.

In *Fargo v. Hart*,<sup>173</sup> the state of Indiana sought to value the Indiana property of an interstate express company by taking that part of the total value of property in all the states which the mileage over which the company did business in Indiana bore to the total mileage over which the company did business in all the states. On the complaint of the company, the state was not allowed, in fixing the total to which the ratio was to be applied, to include assets of the express company not used in the express business, and which were therefore not properly distributable throughout all the states on a mileage basis. The inclusion of such assets in this total was held to be not merely a case of over-valuation, but an assessment made upon unconstitutional principles and a taxation of property beyond the jurisdiction of the state, and the imposition of an unconstitutional burden on commerce among the states. The following quotation from the opinion of the court shows the principle underlying the decision:

"It is obvious however that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the State, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one State equal in value to all the rest of the line through another, the latter State could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the State under a pretense. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. v. Backus*, 154 U. S. 421, 431; *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 23. The same principle applies to personal property which the State would not have the right

<sup>172</sup> *United States Express Co. v. Minnesota*, note 166, *supra*, and cases cited therein.

<sup>173</sup> 193 U. S. 490, 24 Sup. Ct. Rep. 498 (1904).

to tax directly. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 227; S. C., 166 U. S. 185, 222, 223."<sup>174</sup>

The case of *Fargo v. Hart*<sup>175</sup> was quoted with approval in *Meyer v. Wells Fargo & Co.*<sup>176</sup> That decision involved an excise tax measured by a proportion of gross receipts. A corporation doing business in several states was required to pay a tax "equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business."<sup>177</sup> There was, however, in the statute a proviso for fixing a different proportion, if it "more fairly represents the proportion which the gross receipts of any such public service corporation for any year within this state bear to its total gross receipts."<sup>178</sup> This proviso was not before the court for consideration, because the reference to receipts was held entirely invalid; but, in considering the possible contention that the tax was to be regarded as a property tax, the court made the following comment:

"The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo v. Hart*, 193 U. S. 490. In that case the tax was proportioned to mileage, and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside."<sup>179</sup>

In these two decisions the vice in the method of determining what part of the total property or business was within the state, lay in the selection of an excessive total rather than in the selection of an excessive ratio. Manifestly, however, an excessive ratio would have the same vice as an excessive total.<sup>180</sup>

<sup>174</sup> 193 U. S. 490, 499-500, 24 Sup. Ct. Rep. 498 (1904).

<sup>175</sup> Note 173, *supra*.

<sup>176</sup> Note 157, *supra*.

<sup>177</sup> 223 U. S. 298, 299, 32 Sup. Ct. Rep. 328 (1912).

<sup>178</sup> 223 U. S. 298, 299-300, 32 Sup. Ct. Rep. 328 (1912).

<sup>179</sup> 223 U. S. 298, 300, 32 Sup. Ct. Rep. 328 (1912).

<sup>180</sup> A number of cases hold that the taxpayer is not entitled to insist on the application of the mileage ratio to determine what proportion of its total earnings are to be



It may therefore be taken as established that the application of the unit rule for the purpose of determining what part of a total of taxable value in several states may be regarded as within the jurisdiction of the taxing state, is valid only where the relation of the ratio to the total is such that the result may fairly be presumed to represent the taxable value within the state. A complainant is entitled to a diminution of the total or of the ratio, upon proof that the total includes values not properly apportionable in all the states by the ratio selected, or upon proof that the ratio is not a proper method of apportioning the total.

Moreover, it is important to note that, in valuing property, the unit rule is legitimate only where the total property may properly be regarded as a unit. In the case of railroad and telegraph companies, the unit is a unit of physically connected property. In respect to the express business the unit has been declared to be one of "use and management."<sup>181</sup> This is the farthest that the

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taken as the measure of the value of a special franchise to use the highways of the state, when such special franchise is taxed as property. In *People ex rel. N. Y. C. & H. R. R. Co. v. Priest*, 206 N. Y. 274, 300, 99 N. E. 547 (1912), the New York court of appeals said:

"Any comparison of track or passenger mileage necessarily spreads the earnings over the mileage, without taking into account the value of a franchise at a particular place to increase the earnings of the system of road with which it is connected. A particular franchise is frequently of important value in connection with a railroad system as a means of obtaining and retaining business."

In *People ex rel. Commercial Cable Co. v. State Board of Tax Com'rs*, 166 N. Y. Supp. 62 (1917), the relator thought its franchise in the city of New York should be valued by applying to total earnings the ratio of the mileage in the city to the total mileage, including that of its trans-oceanic cables, but the court thought otherwise. In dismissing the contention, Judge Pendleton said:

"Where the mileage of the telegraph lines, within the city, is small as compared with the total mileage, but the terminal property in the city is the means of reaching the central point, from which business emanates and to which it converges, a comparison of the mileage of the special franchise with the total mileage cannot in the nature of things be an accurate basis for determining what proportion of the total net earnings should be allocated to the terminal property."

It is plain that in many cases a mileage ratio or a ratio of assessed value of property will be inept for determining what proportion of total receipts earned in several states shall be taken as the earnings within one of those states. The mileage or the property in one state may be more or less productive than the same amount of mileage or property in another state. It seems clear from the decisions, that neither the state nor the taxpayer can insist on some arbitrary ratio which can be shown to be in fact ill-adapted to the professed purpose in hand. See *West Shore R. Co. v. State Board of Assessors*, 82 N. J. L. 37, 81 Alt. 351 (1916).

<sup>181</sup> *Adams Express Co. v. Ohio*, 165 U. S. 194, 222, 17 Sup. Ct. Rep. 305 (1897).

court has gone in sustaining the application of the unit rule to the valuation of property. It would be going still farther to apply the unit rule to a corporation not doing the same kind of business in all the states in which it operates. The cases which require a modification of the unit rule in valuing property, require at the least an analogous modification in valuing a privilege granted to a corporation by one state which is essentially different in respect to the kind of business and its income-producing power than are the privileges granted to the same corporation in other states.

## V

From the foregoing review, it appears that, in the interim between the Baltic Case<sup>182</sup> and the Looney Case,<sup>183</sup> the power of a state to measure excises on foreign corporations by their total capital stock has been considered by the courts of Montana,<sup>184</sup> California,<sup>185</sup> Massachusetts,<sup>186</sup> Tennessee,<sup>187</sup> and Virginia.<sup>188</sup> Only the Montana court saw any impropriety in applying this measure to corporations combining some form of interstate commerce, other than transportation or communication, with the local business which made the corporation subject to the taxing power of the state.<sup>189</sup> By

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<sup>182</sup> Note 8, *supra*.

<sup>183</sup> Note 13, *supra*.

<sup>184</sup> In *State v. Alderson*, note 23, *supra*.

<sup>185</sup> In *Albert Pick & Co. v. Jordan*, note 45, *supra*.

<sup>186</sup> In *International Paper Co. v. Commonwealth*, note 97, *supra*.

<sup>187</sup> In *Atlas Power Co. v. Goodloe*, note 130, *supra*.

<sup>188</sup> In *General Ry. Signal Co. v. Commonwealth*, note 138, *supra*.

<sup>189</sup> The decision of the federal district court of the northern district of Texas in *Crane Co. v. Looney*, 218 Fed. 260 (1914), does not appear to except that court from the above statement. The opinion indicates that the court would have made the Crane Co. pay the Texas tax if it had been based simply on total capital stock, without the inclusion of its surplus and other assets in excess of its authorized capital. In distinguishing the Baltic Case, Judge Meek made no mention of the maximum contained in the Massachusetts statute. The distinction made is as follows:

"The case of the Baltic Mining Company, cited *supra*, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more



way of advice to the legislature, the Montana court declared that the statute of that state could not be applied to any foreign corporation engaged in any kind of interstate commerce. It intimated also that it would not help matters to amend the statute and set a reasonable maximum to the annual imposition. In this it clearly misconceived the decision of the Supreme Court in the *Baltic Case*. The courts of California, Massachusetts, Tennessee, and Virginia went to the opposite extreme, and declared that no maximum was necessary. The supreme court of Idaho<sup>190</sup> took the middle position. In upholding the tax which came before it, it gave as a reason the fact that the Idaho statute provided that no corporation should be required to pay more than \$150. It implied that if the maximum were not kept reasonably low, the statute would be invalid.

The California case involved a corporation whose business within the state consisted of local and interstate sales of products manufactured in other states. The similarity between this business and that of the Crane Company in *Looney v. Crane Co.*<sup>191</sup> makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court. Whether a similar fate would befall the judgments of the Massachusetts, Tennessee, and Virginia courts would depend upon whether the Supreme Court could be persuaded that excises on foreign corporations engaged in non-commercial activities within the state may be measured in ways that are vain when chosen for corporations engaged exclusively in what the law calls commerce.

The West Virginia statute which came before the federal district court in *Baldwin Tool Works v. Blue*<sup>192</sup> adopted the measure of receipts rather than of capital stock. It professed to look only to receipts derived from business done within the state. It did not, however, exclude receipts from interstate commerce carried

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or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged."

The United States Supreme Court in sustaining the lower court gave no indication that it sanctioned any such distinction, or that it would have decided differently had the Texas statute excluded from consideration all assets in excess of the authorized capital. See 31 HARV. L. REV. 603-04, 614-15.

<sup>190</sup> In *Northern Pacific Railway Co. v. Gifford*, note 69, *supra*.

<sup>191</sup> Note 13, *supra*.

<sup>192</sup> Note 146, *supra*.

on within the state. Such receipts are not taxable directly. They may, however, be made the basis for the valuation of property within the state,<sup>193</sup> or for the assessment of taxes wholly<sup>194</sup> or partially<sup>195</sup> in lieu of taxes on property. On the question whether they may be made the measure of taxes on a privilege extended to a foreign corporation, the Supreme Court has not explicitly declared itself subsequent to its abandonment of its earlier doctrine that privileges within the power of the state to withhold may be taxed as the state may please.

*Looney v. Crane Co.*,<sup>196</sup> however, made it clear that a state must show good cause why it should be allowed to measure any tax, other than a property tax, by elements that cannot be levied on directly. The only cause that has been accepted as sufficient for taxes on foreign corporations is the inclusion in the statute of a reasonable maximum.<sup>197</sup> Such a provision really makes the tax a specific one, with a sliding discount in favor of corporations of little capital. Only in the case of such smaller corporations is the tax measured by their total capital stock. If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it. The sanction given by the Supreme Court to the Massachusetts statute applied in the *Baltic Case*<sup>198</sup> is grounded on considerations which have no bearing on taxes measured by receipts from interstate commerce, or on taxes measured by total capital stock and imposed on corporations whose interstate commerce is conducted in connection with local manufacturing rather than with local sales.

The *Looney Case*<sup>199</sup> indicates that the Supreme Court is working towards a more definite rule than any which could be inferred from its earlier decisions following the *Western Union Case*.<sup>200</sup> That definite rule promises to be one to the effect that only by setting a reasonable limit to its annual imposition may a state measure taxes on foreign corporations engaged partly in interstate

<sup>193</sup> *Adams Express Co. v. Ohio*, note 181, *supra*. On rehearing, 166 U. S. 185, 17 Sup. Ct. 664 (1897).

<sup>194</sup> *United States Express Co. v. Minnesota*, note 166, *supra*.

<sup>195</sup> *Maine v. Grand Trunk Railway Co.*, note 3, *supra*, as interpreted in *Galveston, H. & S. A. Ry. Co. v. Texas*, note 153, *supra*.

<sup>197</sup> *Baltic Mining Co. v. Massachusetts*, note 8, *supra*.

<sup>199</sup> Note 13, *supra*.

<sup>196</sup> Note 13, *supra*.

<sup>198</sup> Note 8, *supra*.

<sup>200</sup> Note 4, *supra*.



commerce, by any elements that are immune from a direct levy. The only indefiniteness lurking in this definite rule arises from the question of what limits will be regarded as reasonable, and the further question whether the limits may be graduated in accordance with the size of the corporation. There is good reason to believe that the statutes sustained and applied by the federal court in West Virginia, and by the state courts of California, Massachusetts, Tennessee, and Virginia, will be discountenanced by the United States Supreme Court. The states have had clear warning of the risks they run in imposing on foreign corporations excises that seek by indirection to reach the fruits of interstate commerce or to enjoy an increment by reason of property or business in other states.

The possibility that the Supreme Court will disapprove of the state decisions under review suggests interesting questions with respect to the practical operation of our federal system. Until some perservering litigant carries its case from the state court to the federal Supreme Court, the states may continue to do what the Supreme Court would restrain. The law that many foreign corporations live by may be quite different from the law that the Supreme Court would declare. It would be interesting to know how many foreign corporations have paid their taxes under the statutes of California, Massachusetts, Tennessee, Texas, Virginia, and West Virginia, without appealing to the courts for relief. It would be interesting to know how many successful objectors to taxation escape from legitimate demands of the states, because the legitimate demand is inseparable from what is declared invalid. Our method of testing the conformity of state legislation to the requirements of the federal Constitution is often cumbrous in its operation. Successful resistance to state laws often costs more than acquiescence. The expense of settling questions of general public concern has to be borne by individual litigants. The system works well enough for those who are interested only in the evolution of constitutional doctrine. But it is not unthinkable that some day we may devise improvements that will meet the objections which might be raised by those who are concerned primarily with results.

*(To be continued)*

*Thomas Reed Powell.*

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CARELESS SPACES ON NEGOTIABLE INSTRUMENTS. — Is there any duty of care whatever as to the issue of negotiable instruments? Does any liability properly rest upon a person who signs a bill, note, or check, which is complete as to date, time, parties, and amount, but is so carelessly made out that a swindler subsequently raises the amount by simply inserting additional words or figures in the open spaces?

The English law on this question has passed by degrees from liability to total absence of liability. The first decision was the well-known *Young v. Grote*.<sup>1</sup> The special facts of that case had considerable influence upon the development of the doctrine. Young placed his signature upon some checks which were otherwise blank and left them with his wife to use during his absence. She had her husband's clerk fill out one of these in her presence and sent him to cash it. The clerk had written "Fifty Pounds," as she directed, but intentionally began the words in the middle of the line, leaving a large space to the left, which he filled in when out of her sight, so that the check read, "Three Hundred Fifty Pounds." A similar fraud was carried out as to the marginal figures. The bankers on whom the check was drawn could of course detect nothing wrong, and cashed it for £350. The clerk absconded with the excess. It was held that while a bank which pays a raised check must ordinarily bear the loss,<sup>2</sup> the depositor must here suffer because of the negligence of his agent, the wife.

This decision has been rested on three distinct grounds: First, it is said that negligence does not enter into the case at all, but "that the

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<sup>1</sup> 4 Bing. 253 (1827).

<sup>2</sup> *Hall v. Fuller*, 5 B. & C. 750 (1826).



customer had by signing a blank check given authority to any person in whose hands it was to fill up the check in whatever way the blank permitted."<sup>3</sup> This explanation arose out of the special circumstances of the case and is clearly wrong. The authority to fill up the blanks was exhausted when the amount had been written in as the wife directed. A complete check was then in existence. The clerk's subsequent act was not an abuse of authority, but an alteration without any authority at all.<sup>4</sup> Secondly, the case may be rested on the broad ground that one who carelessly signs a negotiable instrument is liable for the injury suffered because of his carelessness by any person who takes the instrument in good faith. There is a general duty of care not to give the opportunity for non-apparent alterations. On this view, the doctrine of *Young v. Grote* would extend to bills and notes as well as to checks, and would apply in favor of a *bonâ fide* purchaser of the instrument as well as a bank which paid it. This broad view was definitely rejected by the House of Lords in 1896.<sup>5</sup> A third ground was still left for the case, that although there is no general duty of care as to all negotiable instruments in favor of all takers, there is a special contractual duty owed by a depositor to his bank with respect to checks. By virtue of the banking contract the bank undertakes to honor the depositor's checks on presentation, and in return the depositor undertakes to use ordinary caution to avoid giving facilities for fraud. He is bound not to draw his checks in some unusual way which will make alteration easy and mislead the bank. Such a contractual duty was recognized by the Supreme Court of Victoria,<sup>6</sup> but its decision was reversed by the High Court of Australia<sup>7</sup> and by the Privy Council in 1906,<sup>8</sup> which wholly repudiated *Young v. Grote*. This decision was sharply criticized in England,<sup>9</sup> and since the Privy Council does not bind English courts, there was still a possibility that *Young v. Grote* might be followed as

<sup>3</sup> Parke, B., in *Roberts v. Tucker*, 16 Q. B. Rep. 560, 580 (1851); but the report may be inaccurate. See 23 L. QUART. REV. 394. Bigham, J., in *Union Credit v. Mersey*, [1890] 2 Q. B. 205, 211 said: "The case, therefore, is just the same as if Young (the plaintiff) had handed the blank cheque direct to his clerk to fill it up for the amount that might be required for wages, and the clerk, in abuse of his authority, had filled the cheque up for double the amount. . . ." See also Pollock, C. B., in *Barker v. Sterne*, 9 Ex. 684, 686 (1854).

<sup>4</sup> In other words, *Young v. Grote* is entirely different from the situation governed by section 20 of the English Bill of Exchange Act and section 14 of the Negotiable Instruments Law. This is clearly pointed out in *National Exch. Bank v. Lester*, 194 N. Y. 461, 464, 87 N. E. 779 (1909).

<sup>5</sup> *Scholfield v. Londesborough*, [1896] A. C. 514. The defendant was an acceptor of a bill of exchange who signed without drawing a line through the blank spaces left by the drawer. The drawer afterwards raised the amount by inserting words, and negotiated to a *bonâ fide* purchaser for value, who was denied recovery. The case might possibly have been decided the same way on the facts, even if there is a duty of care. It was pointed out that a drawee (or indorser) might reasonably hesitate to correct an instrument drawn by some one else. Censorship was perhaps not part of his duty. If so there was no negligence and no liability. The same considerations apply to an indorser. The *Societe-Generale v. The Metropolitan Bank*, 21 W. R. 335 (1873). The House of Lords, however, instead of finding that there was no breach of duty, denied the duty of care altogether, except possibly between banker and customer.

<sup>6</sup> *Marshall v. Colonial Bank of Australia, Ltd.*, 29 Vict. L. R. 804 (1904).

<sup>7</sup> 1 Commonwealth L. R. 632 (1904).

<sup>8</sup> [1906] A. C. 559.

<sup>9</sup> Thomas Beven, "Young v. Grote," 23 L. QUART. REV. 390 (1907).

between banker and depositor.<sup>10</sup> The case has, however, just received its quietus from the Court of Appeal in *MacMillan v. London Joint Stock Bank, Ltd.*<sup>11</sup> Consequently, English law now gives a decisive negative to our opening questions, and recognizes no duty of care whatever as to the execution of negotiable instruments.

Although the doctrine of *Young v. Grote* has thus been driven out of the common-law courts of the British Empire,<sup>12</sup> the exile has been welcomed by many American judges. On the broad view of a general duty of care as to all negotiable instruments, the cases recognizing such a duty are very numerous, although there is a slight preponderance of jurisdictions against the duty.<sup>13</sup> The narrow view of a special duty owed by a depositor to his bank as to checks has hardly been discussed. What little authority there is, imposes the obligation on the depositor, even though no general duty of care exists.<sup>14</sup> A strong analogy is found in the analogous decisions which require him to be

<sup>10</sup> It had already been held that there was no duty of care owed to a warehouseman by a bailor in filling out delivery orders. *Union Credit Co. v. Mersey*, [1899] 2 Q. B. 205.

<sup>11</sup> [1917] 2 K. B. 439, affirming [1917] 1 K. B. 363. See Recent Cases, page 798. The drawer might have been held responsible although *Young v. Grote* is not law, on the ground that by issuing a check with no words of amount, he gave his clerk power to fill it up to any amount. B. E. A. § 20; N. I. L. § 14. (The question might of course arise whether the words "holder in due course" would protect a bank which has paid a check so issued and wrongfully filled up.) The court, however, held that there was no such power to fill up the total blank in the space provided for words of amount because the check was already complete, £2. 0. 0. having been written in the space provided for figures before the drawer signed. The court had to admit that Bowen, L. J., had held a bill of exchange incomplete and charged the drawer under similar circumstances. *Garrard v. Lewis*, 10 Q. B. D. 30 (1882). The history of bills and notes shows that marginal figures are no part of the body of the instrument. The American cases are in accord with *Garrard v. Lewis*. *Schryver v. Hawkes*, 22 Ohio St. 308 (1872); *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 27 (1883); *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907 (1901); *Prim v. Hammel*, 134 Ala. 652, 32 So. 1006 (1902). The alteration of marginal figures is not material. *Smith v. Smith*, 1 R. I. 398 (1850); *contra Moss v. Maddux*, 108 Tenn. 405, 67 S. W. 855 (1901). The Court of Appeals distinguished *Garrard v. Lewis*, saying that marginal figures are an essential part of a check as commonly used, because of the practice of bankers in case of a discrepancy between figures and words on checks either to pay the smaller amount or refuse payment. While the American cases cited involve either notes or bills, it is very doubtful if our courts would regard marginal figures on checks as distinguishable, especially as the banking practice mentioned seems not to exist in this country.

<sup>12</sup> A duty of care is recognized in Scotland. 23 L. QUART. REV. 403, note; 2 DANIEL NEG. INS. (6 ed.), § 1409.

<sup>13</sup> For liability: *Winter v. Pool*, 104 Ala. 480, 16 So. 543 (1894); *Yocum v. Smith*, 63 Ill. 321 (1872); *Hackett v. First National Bank*, 114 Ky. 193, 70 S. W. 664 (1902); *Isnard v. Torres*, 10 La. Ann. 103 (1855); *Humphrey v. Herrick*, 72 Nebr. 878, 101 N. W. 1016, 102 N. W. 1010 (1904); *Garrard v. Haddan*, 67 Pa. St. 82 (1870).

Against liability: *Fordyce v. Kosminski*, 49 Ark. 40, 3 S. W. 892 (1886); *Knoxville v. Clark*, 51 Iowa, 264, 1 N. W. 491 (1879); *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378 (1889); *Greenfield v. Stowell*, 123 Mass. 196 (1877); *Holmes v. Trumper*, 22 Mich. 427 (1870); *Simmons v. Atkinson*, 69 Miss. 862 (1892); *National Bank v. Lester*, 194 N. Y. 461, 87 N. E. 779 (1909) reversing 119 App. Div. 786 (1907); *Jones v. Hardin*, 58 Fed. 140 (C. C. A., 8th Circuit, Ark., 1893).

<sup>14</sup> *Otis v. First National Bank*, 163 Cal. 31, 124 Pac. 704 (1912); *National Bank v. Nolting*, 94 Va. 263, 266, 26 S. E. 826 (1897), *semble*; *Timbel v. Garfield*, 121 App. Div. 870, 106 N. Y. Supp. 497 (1907); *Trust Co. v. Conklin*, 65 Misc. 1, 119 N. Y. Supp. 367 (1909), *semble*. — New York denies any general duty of care, see note 13; *Land v. Northwestern*, 196 Pa. St. 230, 234, 46 Atl. 420 (1900), *semble*.



careful in other respects. He has been held responsible if he mails the check to a person of the same name as the payee at another address;<sup>15</sup> if he fails to examine vouchers returned by the bank and discover forgeries;<sup>16</sup> or, if he neglects to notify the bank within a reasonable time after he does discover something wrong.<sup>17</sup> Evidently, the doctrine of *Young v. Grole* is still very much alive in the American cases.

The Negotiable Instruments Law apparently leaves the controversy just where it was before.<sup>18</sup> The question ought to be settled one way or the other, and the recent English decision makes the time ripe for a discussion as to what is the proper solution of this problem of negligence.

First, is there a general duty of care as to all negotiable instruments? If so, "the person putting in circulation a bill of exchange does by the law merchant owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations to it."<sup>19</sup> Such a view is only an application of the general principle that a man must use reasonable caution not to cause harm to those who may obviously be injured by his acts. If I set my Ford running through Wall Street without a driver and smash into a limousine, I must pay. Why should I be allowed to turn an unfit note loose in the money market, and deprive an innocent purchaser of his property without any responsibility? All the elements of normal tort liability seem present: A serious injury to a person who did not cause it and could not avoid it; causal connection; culpability according to the standard of reasonable care; absence of justification.

The serious objections to this view fall into three main groups: (a) The injury is caused by the intentional act of a third person, while the forms of carelessness for which liability is imposed operate through inanimate nature or animals, or at most through the instinctive or heedless conduct of others. A deliberate act, especially if fraudulent and criminal, breaks the chain of causation, so that the signer's carelessness is not the proximate cause of the injury. The person so intervening "acts as a non-conductor" and "insulates" the negligence. He is the one who is liable to the person injured.<sup>20</sup> Or to put the matter another way, there is no duty to avoid crime and fraud. One need not go through life anticipating dishonesty and scanning every instrument with a detective's eye. We may assume men will act lawfully. The man who carelessly allows his handkerchief to hang out of his pocket can get it back from a *bonâ fide* purchaser from the thief. The protection against forgery is not the vigilance of the parties but the criminal law.

This argument undoubtedly has real strength because it harmonizes with a well-established judicial attitude. As Justice Holmes says, "The general tendency has been to look no further back than the last

<sup>15</sup> *Weisberger v. Barberton*, 84 Ohio St. 21, 95 N. E. 379 (1911); cf. *Mead v. Young*, 4 T. R. 28 (1790).

<sup>16</sup> *Leather v. Morgan*, 117 U. S. 96 (1886).

<sup>17</sup> *Dana v. National Bank*, 132 Mass. 156 (1882). By statute, in many states the depositor is required to notify the bank of the forgery within a year after he receives the voucher. It is significant that there is no duty to notify the bank in English law. *Kepitigalla v. National Bank*, [1909] 2 K. B. 1010.

<sup>18</sup> Section 124 is so construed by the N. Y. cases in note 14.

<sup>19</sup> *Blackburn, J.*, in *Swan v. North British*, 2 H. & C. 175, 183 (1863).

<sup>20</sup> FRANCIS WHARTON, *TREATISE ON NEGLIGENCE* (1874), § 134.

wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act."<sup>21</sup> For instance, a landlord who carelessly leaves windows open is not liable for goods stolen from his tenant.<sup>22</sup> The same reluctance to impose liability for carelessness which makes crime easy appears in many other cases.<sup>23</sup>

And yet fraud and crime are facts in this world which can be foreseen and guarded against just like other facts. They are occasional and violent, but so are washouts and the escape of high-tension currents. Under some circumstances intentional unlawful acts are events which the average reasonable man would take care to avoid because of the injury threatened to others clearly within range. The criminal character of these acts then becomes immaterial for purposes of the law of negligence. There is a duty not to cause injury in this way any more than by non-human methods. For example, the owners of an amusement park must exercise reasonable care to protect their colored patrons from race riots.<sup>24</sup> In situations where the defendant's duty to the plaintiff is imposed by contract or statute, so that the difficulty of working out a duty of care is avoided, intervening crime does not break the chain of causation.<sup>25</sup> This is particularly true in the law of bills and notes. Thus if the maker leaves the amount of a note wholly blank and an agent fills it up in violation of instructions, the embezzlement does not prevent a *bonâ fide* purchaser from recovering;<sup>26</sup> so, if a note payable to bearer is stolen and gets into circulation.<sup>27</sup> In these cases the existence of safeguards in the criminal law does not preclude additional civil remedies, any more than the recipient of stolen goods is immune from trover.

As for the handkerchief analogy it is simply a difference of degree. One may not owe a duty to all the possible purchasers of stolen chattels to guard chattels which are ordinarily safe in his own possession, but negotiable instruments which by their very nature are intended to pass beyond his control into a world where fraud is easy, and unfortunately not rare, are a very different matter, and a duty is properly owed by the man who intends his instrument to circulate and be purchased to protect those purchasers in return for the assistance they give his credit. He and not they should suffer by a crime which they cannot detect, but which he by the exercise of reasonable care could have prevented.<sup>28</sup>

<sup>21</sup> Clifford v. Atlantic, 146 Mass. 47, 49, 15 N. E. 84 (1888).

<sup>22</sup> Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300 (1901).

<sup>23</sup> Henderson v. Dade, 100 Ga. 568, 28 S. E. 251 (dangerous convict); Carini v. Beaven, 219 Mass. 117, 106 N. E. 589 (immoral priest); Hullinger v. Worrell, 83 Ill. 220 (prisoner with intent to assault); Cole v. German, 124 Fed. 116 (trespasser); Mars v. D. & H., 54 Hun (N. Y.) 625 (meddler with untended locomotive).

<sup>24</sup> Indianapolis v. Dawson, 31 Ind. App. 605, 68 N. E. 909; see also Lane v. Atlantic, 111 Mass. 136 (meddler with untended wagon); Dannenhower v. Western Union, 218 Pa. St. 216, 67 Atl. 207 (meddler with live wire); Harrison v. Pittsburg, 45 Ohio St. 11, 12 N. E. 451 (theft of dynamite).

<sup>25</sup> Bloom v. Franklin, 97 Ind. 478 (insurance, battery); Bondrett v. Hentigg, Holt N. P. 149 (insurance, thieves after wreck); Currier v. McKee, 99 Me. 364, 59 Atl. 442 (civil damage statute, battery).

<sup>26</sup> Van Duzer v. Howe, 21 N. Y. 531 (1860). Cf. State v. Matthews, 44 Kan. 596, 25 Pac. 36 (1890).

<sup>27</sup> Peacock v. Rhodes, Doug. 633 (1781); Miller v. Race, 1 Burr. 452 (1758).

<sup>28</sup> For further criticism of the crime objection see Beven in 23 L. QUART. REV. 404-05; EWART ON ESTOPPEL, 48 ff.; 2 WIGMORE, CASES ON TORTS, 871.



(b) A second objection is, that written instruments are an exception to the general principle of negligence, by the rule of *Derry v. Peek*.<sup>29</sup> If directors can issue a prospectus to the world of investors without any duty of care whatever, it would be unfair to hold the unskillful draftsman of a promissory note. To induce the expenditure of money by a writing is not actionable, — physical damage to person or property is necessary. The courts have not discussed the bearing of *Derry v. Peek* upon the broad view of *Young v. Grote*, but it would seem that the same result as to a duty of care should exist in both situations.

One way out of this difficulty is to say that *Young v. Grote* really rests on estoppel and not directly on negligence,<sup>30</sup> bad faith being unnecessary in estoppel as contrasted with deceit.<sup>31</sup> This distinction in the consequences of misrepresentation is certainly anomalous and unsatisfactory,<sup>32</sup> even if we accept the estoppel view.

A better way (estoppel or no estoppel) is to declare *Derry v. Peek* wrong. The decision has been severely criticized.<sup>33</sup> One state at least has refused to follow it.<sup>34</sup> Even in England it is showing signs of wear and tear,<sup>35</sup> and the law as to directors was long ago changed by a statute<sup>36</sup> which enacted a legislative principle of liability for negligence analogous to the broader view of *Young v. Grote*.

(c) Finally, there is the objection of business convenience. There is no limit to the precautions which might have to be taken, as to paper, ink, protectographs, etc.<sup>37</sup> Much negotiable paper is executed by parties who have not in any just sense ordinary business capacity.<sup>38</sup> Drawees and those requested to be accommodation indorsers would have to return instruments unsigned if not safely drawn, and this would complicate commercial transactions, causing delay and controversy. The reply is obvious; only the caution of a reasonable man under the circumstances is required. Drawers and makers cannot object when they issue business instruments if they are obliged to issue them in a business way or take the consequences. As for acceptors and indorsers, what conduct is reasonable? Should they draw lines through the open spaces — an easy operation — or may they reasonably refrain from censorship?<sup>39</sup>

<sup>29</sup> 14 A. C. 337 (1889).

<sup>30</sup> EWART ON ESTOPPEL, *passim*.

<sup>31</sup> *Ibid.*, 84, 85, 224, 226; Lord Esher in *Tomkinson v. Balkis*, [1891] 2 Q. B. 614, 620.

<sup>32</sup> EWART ON ESTOPPEL, 227 ff. Ewart recognizes the artificiality of evading *Derry v. Peek* by estoppel, 236.

<sup>33</sup> Jeremiah Smith, "Liability for Negligent Language," 14 HARV. L. REV. 184; Samuel Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415; SIR FREDERICK POLLOCK, THE LAW OF FRAUD IN BRITISH INDIA, 46 ff.

<sup>34</sup> *Cunningham v. Pease*, 74 N. H. 435, 69 Atl. 120; *Conway v. Pease*, 76 N. H. 319, 82 Atl. 1068.

<sup>35</sup> *Nocton v. Lord Ashburton* [1914] A. C. 932, 945, 951, per Haldane, L. C. Pollock remarks, "Lord Haldane would have liked to get rid of *Derry v. Peek* altogether, if he had been free to do so; and courts not bound by that authority may possibly take occasion to develop his argument more fully than he did himself." 31 L. QUART. REV. 95.

<sup>36</sup> The Directors' Liability Act (1890), 53 & 54 VICT. c. 64.

<sup>37</sup> Halsbury in *Scholfield v. Londesborough*, [1896] A. C. 514, 531.

<sup>38</sup> *Knoxville v. Clark*, 51 Iowa, 264, 273, 1 N. W. 491 (1879).

<sup>39</sup> An acceptor was held liable in *Helwege v. Hibernia*, 28 La. Ann. 520 (1876); not liable in *Scholfield v. Londesborough*, *supra*. An indorser was held liable in *Isnard v. Torres*, 10 La. Ann. 103 (1885); not liable in *National Bank v. Lester*, 194 N. Y. 461, 87

It is a question of fact, no more difficult to decide than the many others that arise in negligence cases. Many of the decisions which dwell on the injustice of liability in the particular case ought to have held that there was no breach of the duty of care, instead of going out of their way to deny altogether the duty which properly exists.

A second problem still confronts us. If a general duty of care exists, the relation of depositor to bank is within its scope, but should jurisdictions which deny the broad ground of *Young v. Grote* adopt the narrower ground? There can be no doubt that the depositor owes some duty to his banker not to mislead him.<sup>40</sup> But the English courts deny it is a breach of this duty to afford another person an opportunity to mislead, and talk once more about proximate cause. Why, they ask, is there not a similar duty in all other contracts where duties depend on written communications, *e. g.*, between drawer and acceptor, in non-negotiable warehouse orders, etc.?

In view of the speed with which a bank must honor checks when they are presented at the paying teller's window, it is only right that the depositor should do all in his power to make it safe for the bank to use this speed. A purchaser of a negotiable instrument can take it or not at his option, and has plenty of time to inquire. A bank refuses payment at its peril.<sup>41</sup>

In this special situation some of the difficulties as to the general duty of care are lacking. There is no question, to whom is the duty owed, no need of working out a floating obligation to all possible victims of crime. The analogy of *Derry v. Peek* does not apply, for the liability is not necessarily in tort. And the arguments of business convenience strongly favor the liability. Consequently, the narrower ground of *Young v. Grote* is even stronger than the broader ground of negligence.

One final aspect of the problem must be set forth. If there is a general duty of care, why is the negligent defendant held in contract? Two answers are possible. We can say that he is estopped because of his negligence to set up the defense of alteration in a suit on the instrument.<sup>42</sup> This view is open to objection, in that there is no actual misrepresentation; and if one says that negligence creates estoppel, is not this really saying that negligence creates the liability?<sup>43</sup> Another explanation is that forms of action are becoming much less important, and that under the declaration in contract upon the instrument the cause of action for negligence may subsequently be established as if the declaration had been amended to meet the defense of alteration.

This difficulty does not arise between bank and depositor, for then the duty arises from a relation and may be considered as contractual, and besides, the bank which sets up the breach is usually defendant, so that the defense of lack of care is allowed without any need for the

N. E. 779; *Worrall v. Gheen*, 39 Pa. St. 388 (1861). The Pennsylvania case is significant because a general duty exists. In *Leas v. Wallas*, 101 Pa. St. 57 (1882), a maker who left only a small space was held not negligent.

<sup>40</sup> *MacMillan v. London, etc.* [1917] 2 K. B. 450, 458.

<sup>41</sup> *Trust Co. v. Conklin*, 65 Misc. 1, 4, 119 N. Y. Supp. 367 (1909).

<sup>42</sup> EWART ON ESTOPPEL, *passim*, ably supports this view.

<sup>43</sup> Beven rejects estoppel, 23 L. QUART. REV. 391 ff.



court to analyze its nature, — whether the plaintiff is estopped; or whether the defendant has a cross-claim, and recovery is denied to avoid circuity of action.

**TAXATION OF FOREIGN BANK DEPOSITS AT DOMICILE OF OWNER.** — A state may tax all persons subject to its jurisdiction, as well as all property within its borders. It may therefore impose a personal tax upon a person domiciled in the state;<sup>1</sup> and until recently it was generally held that such a tax could be based upon the value of all his movable property, even though it included chattels situated abroad.<sup>2</sup> This power was often rested upon the fiction that movable property is situated at the domicile of the owner, *mobilia sequuntur personam*,<sup>3</sup> but the true nature of the tax, as in reality a personal tax, was well recognized; "the proceeding is personal only."<sup>4</sup> In some states foreign chattels were not included in the tax laid upon a resident, but this was because the court found such to be the legislative will.<sup>5</sup>

While a resident was thus often taxed on the value of his foreign chattels, it is universally agreed that the value of foreign land can never enter into taxation.<sup>6</sup> The immovable nature of land and the impossibility of conceiving of it as "attached to the person," sufficiently justify the distinction in this respect between land and chattels, but the absence of a logical distinction finally influenced the Supreme Court of the United States to hold that a state cannot, in accordance with due process of law, tax its own corporation upon the value of its chattels permanently situated outside the state.<sup>7</sup> It was soon decided that the doctrine of this case does not apply to a chattel having no taxable *situs* elsewhere, like a vessel<sup>8</sup> or a freight car<sup>9</sup> which, though having no *situs* within the owner's domicile, is never permanently enough in any other state to be taxed there; and by the very terms of the decision itself, the doctrine does not apply to intangible property.<sup>10</sup> The ground of distinction between cases where a tax upon the owner could, and where it could not, take into account personal property not situated within the state of his domicile, evidently was that in the one class of cases the property was not findable and taxable elsewhere, and in the other class of cases it could be found and was taxable.

<sup>1</sup> The Delaware Railroad Tax, 18 Wall. 206.

<sup>2</sup> Bemis v. Boston, 14 All. 366; Commonwealth v. Pennsylvania Coal Co., 197 Pa. 551.

<sup>3</sup> "Part of his general estate attached to his person." Bradley, J., in Coe v. Errol, 116 U. S. 517.

<sup>4</sup> Agnew, J., in McKeen v. Northampton, 49 Pa. 519. The opinion proceeds: "Though different kinds of property are specified as the subjects of taxation, it is not as a proceeding *in rem*, but only as affording the means and measure of taxation. The tax is assessed personally."

<sup>5</sup> Hoyt v. Commissioners of Taxes, 23 N. Y. 224.

<sup>6</sup> Bittinger's Estate, 129 Pa. 338, 18 Atl. 132.

<sup>7</sup> Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; Fuller, C. J., and Holmes, J., dissenting.

<sup>8</sup> Southern Pacific Co. v. Kentucky, 222 U. S. 63.

<sup>9</sup> New York Central R. R. v. Miller, 202 U. S. 584.

<sup>10</sup> "There is an obvious distinction between the tangible and intangible property . . . the latter . . . may be taxed at the domicil of the owner," *per* Brown, J., in Union Transit Co. v. Kentucky, 199 U. S. 194, 205.

Meanwhile a doctrine had received the sanction of the Supreme Court, that intangible property employed in business in a state has a taxable *situs* there. In a series of cases it was held that money deposited in a bank, securities, and credits employed in business in a state not that of the owner's domicile were taxable in the state in which they were employed, having there what has often been called a "business *situs*." <sup>11</sup> Mr. Justice Holmes, indeed, went so far in the case of *Blackstone v. Miller* <sup>12</sup> as to describe money on deposit as for taxing purposes the same thing as a chattel. <sup>13</sup> It may fairly be said, as a result of these cases, that a bank deposit made in a state in the course of and for the use of a business carried on within the state is taxable by the state because it has an actual *situs* there.

A recent decision of the Supreme Court in the case of *Fidelity & Columbia Trust Co. v. Louisville* <sup>14</sup> has, however, held that the state of domicile of the owner of the deposit might levy a tax upon it, though admitting that the state in which the deposit was made might also tax it. Mr. Justice Holmes said of the decision in *Union Refrigerator Transit Co. v. Kentucky*, *supra*, that "this court has not attempted to press the principle so far."

As a result of this decision it would seem that under no circumstances will the doctrine of *Union Refrigerator Transit Co. v. Kentucky* be applied to a tax on intangible property, whether the property has a business *situs* or is for any other reason under the taxable control of a state other than that of the owner's domicile.

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STOCK DIVIDENDS AS INCOME. — "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly according to the circumstances and the time in which it is used." Mr. Justice Holmes thus commented on the fact that a word does not necessarily have the same meaning when used in a statute and in the Constitution. The Supreme Court of the United States was passing on the much-disputed question of whether a stock dividend declared by a corporation on the occasion of transferring a surplus to its capital account is income to the stockholders. This time the question came up, in the case of *Towne v. Eisner*, <sup>1</sup> under the Income Tax Act of 1913. <sup>2</sup> That act provided for a tax to be "levied . . . upon the entire net income arising or accruing from all sources . . . to every citizen of the United States." The court held that a stock dividend representing a

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<sup>11</sup> *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395.

<sup>12</sup> 188 U. S. 189.

<sup>13</sup> "There is no doubt that the courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. . . . We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view."

<sup>14</sup> 38 Sup. Ct. Rep. 40. See Recent Cases, page 806.

<sup>1</sup> 38 Sup. Ct. Rep. 158.

<sup>2</sup> 38 U. S. STAT. 114, 116, 167; COMP. STAT. (1913), § 6319.



surplus earned by the corporation before January 1, 1913, and declared after the passage of the act, was not income to the stockholders within the meaning of the act.

It may be assumed at the outset that the fact that the dividend represented a surplus earned before the passage of the act is not important, and that the court would have held the same had the surplus been earned after the adoption of the act. Nothing in the reasoning of the court turns on that point, and it has been held that income earned before the act was passed but received after the passage is taxable.<sup>3</sup> The question, therefore, presented by the decision is the broad one of whether a stock dividend representing the surplus earnings of a corporation is income to the stockholders for the purpose of taxation under the act in question.

The question of the status of a stock dividend as income has most frequently arisen in connection with the distribution of trust property between a life tenant and remainderman, when the settlor has provided that the income from stock left in trust should be paid to the former for life, and thereafter the *corpus* of the stock be turned over to the latter. The determining factor in these cases is, of course, the intention of the settlor, and if the language of the trust indicates what his intention with regard to stock dividends was, that will be decisive. It is the cases, however, where the only expressed intention is contained in the word "income," that cause the trouble, and on this question a number of different rules have arisen in different jurisdictions. It has been held that a stock dividend is never income, and hence never goes to the life tenant;<sup>4</sup> that it is always income;<sup>5</sup> or that it is income so far as it is declared out of surplus earned during the life estate, and belonging to the life tenant, but capital so far as it is declared out of surplus earned before the creation of the trust, and belonging to the remainderman.<sup>6</sup> It would seem that the last is the best rule, for the settlor can hardly

<sup>3</sup> *Edwards v. Keith*, 231 Fed. 110; *Southern Pac. Co. v. Lowe*, 238 Fed. 847; *Brushaber v. Union Pac. R. R.*, 240 U. S. 1.

In *Trefry v. Putnam*, 116 N. E. 904, 911, 912, the Massachusetts supreme court held, *inter alia*, that both a stock and a cash dividend were taxable when declared after the passage of a statute similar to the federal Income Tax Act, although the surplus was earned before the passage of the statute. But see *Lynch v. Turrish*, 236 Fed. 653. That case can be distinguished in that the dividends were paid out of an increase in the value of capital, and not earnings, prior to January 1, 1913.

<sup>4</sup> Such is the Massachusetts rule. Cash dividends are income and go to the life tenant, and stock dividends are capital and go to the remainderman. Nothing turns on when the surplus was earned. *Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; see *Leland v. Hayden*, 102 Mass. 542.

<sup>5</sup> Such is the so-called "New York and Kentucky Rule." Both stock and cash dividends go to the life tenant as income, regardless of when the fund out of which they were declared was earned. *Lowry v. Farmers Loan & Trust Co.*, 172 N. Y. 137, 64 N. E. 796; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778. But New York a few years ago adopted the Pennsylvania rule of apportionment. *In re Osborn*, 209 N. Y. 450, 103 N. E. 723, 823.

<sup>6</sup> Such is the so-called Pennsylvania rule, in force in the majority of jurisdictions of this country. Stock and cash dividends are treated alike, and are apportioned between life tenant and remainderman. *Earps' Appeal*, 28 Pa. 368.

In England, ordinary dividends, cash or stock, are income, and extraordinary dividends, capital. *In re Barton's Trust*, L. R. 5 Eq. 238.

For a discussion of the law in this country see 16 HARV. L. REV. 54. See also 2 PERRY, TRUSTS, §§ 544, 545; 1 MORAWETZ, PRIVATE CORP., § 468.

be said to have intended to make his gift to the life tenant depend on the policy of the corporation either to divide its earnings as cash, or to reinvest them as capital in the hope of increased earnings in the future; and, therefore, if the corporation decides on the latter policy, it is fair that the life tenant should be compensated by receiving stock equal in value to the surplus earned during the life tenancy. The United States Supreme Court has held, however, in a case arising in the District of Columbia,<sup>7</sup> that a stock dividend is not income, but belongs to the remainderman.

Admitting, however, that the better rule may be that a stock dividend is income as between life tenant and remainderman, that is neither decisive nor of very great weight on the question whether it is income for the purpose of taxation. The two cases raise entirely different problems. Where trust property is being distributed it is a question of what is fair between two donees who each have an interest in the stock, and of what was the intention of the settlor. Where the Income Tax Act is being interpreted it is a question of depriving a person of property, and of determining the intent of the legislature to make such deprivation. It is a settled rule of construction that a statute imposing a tax is to be interpreted strictly, that the tax must be provided for in clear, unequivocal language, and that all doubts must be construed in favor of the person taxed.<sup>8</sup> Under such a rule the word "income" must not be given a large, loose meaning.

From this point of view, the decision of the Supreme Court in *Towne v. Eisner*,<sup>9</sup> that a stock dividend representing surplus earnings transferred to capital is not income to the stockholder, is clearly correct. In so deciding, the court reversed the decision of the Circuit Court of Appeals,<sup>10</sup> and held contrary to the Massachusetts supreme court on the same question arising under a similar statute.<sup>11</sup> The reasoning of the Circuit Court of Appeals and of the Massachusetts court is essentially the same. Each court lays stress on the point that, after the issue of the stock dividend, the stockholder has something which he did not have before, that the relation between him and the corporation has changed to his advantage, and that, so far as concerns the accumulation of profits, he now has a permanent interest in the enterprise, whereas before he had merely a right to share in the profits dependent on the discretion of the directors. The federal court argues:<sup>12</sup> "The objection seems impressive that the transaction in no wise affected what the stockholder already had except to give him additional pieces of paper evidencing his ownership. He does, however, have something different before and after receiving the stock. What was before a mere chance that he might receive his share of the surplus in cash dividends and a vague right to secure them if the directors withheld them in a way and to an extent to indicate bad faith is now converted into a permanent interest in the capitalized surplus."

<sup>7</sup> *Gibbons v. Mahon*, 136 U. S. 549.

<sup>8</sup> *Mutual Benefit Life Ins. Co. v. Herold*, 198 Fed. 199, 201, citing *Spreckels Sugar Co. v. McLain*, 192 U. S. 397, 416; *Benziger v. United States*, 192 U. S. 38; *United States v. Wigglesworth*, 2 Story, 369.

<sup>9</sup> *Supra*, note 1.

<sup>11</sup> *Trefry v. Putnam*, 116 N. E. 904, 911.

<sup>10</sup> *Towne v. Eisner*, 242 Fed. 702.

<sup>12</sup> 242 Fed. 702, 706.



Let us examine this argument. Before the declaration of the dividend there was no income to the stockholder. The undivided earnings of the corporation were not income to him, for the accumulation of a surplus does not of itself entitle the stockholder to dividends, that being within the discretion of the directors.<sup>13</sup> The stockholder has only an indirect interest in the corporate property.<sup>14</sup> The fact that the stock rose in value was not income. It merely meant that the chance of receiving income in the form of dividends was becoming more valuable.<sup>15</sup> The issue of a cash dividend would be income for the stockholder, for by the issue his indirect interest in the corporate property would be changed into a direct control over property of his own. No such change takes place when a stock dividend is declared. The corporation parts with no property; it merely changes the label on part of its property for purposes of bookkeeping. The stockholder receives no property; his interest in the corporate assets is identical with what it was before the issue, although evidenced by more shares of stock. This interest is no more vested in the stockholder, no more certain, than before. The corporation has, with one exception, the same control over the property as before, and can exercise the same discretion in the use of the property as before. That exception, as pointed out by the Massachusetts court and the Circuit Court of Appeals, is that dividends may no longer be declared from this fund, for it has become capital. But this change in the powers of the directors is not income to the stockholder, and it actually precludes the possibility of his getting income from the corporation as far as that fund is concerned. The declaration of the stock dividend has perpetuated the corporated control over the property. Such is the reasoning of the United States Supreme Court in the principal case.<sup>16</sup> The Massachusetts court and the Circuit Court of Appeals seem to have failed to grasp the real nature of a stock dividend.<sup>17</sup>

The federal Income Tax Act, passed in 1916,<sup>18</sup> provides expressly that stock dividends payable out of corporate earnings should be taxed as income. The effect of the decision of the Circuit Court of Appeals<sup>19</sup>

<sup>13</sup> *New York, etc. Ry. v. Nickals*, 119 U. S. 296; *MORAWETZ, PRIVATE CORP.*, § 276.

<sup>14</sup> *Humphrey v. McKissock*, 140 U. S. 304.

<sup>15</sup> The mere rise in value of stock when there has been no distribution of earnings in the form of dividends is generally held not to be income for the life tenant. *Boardman v. Mansfield*, 79 Conn. 634, 66 Atl. 169; *Tubb v. Fowler*, 118 Tenn. 325, 99 S. W. 988. *A fortiori*, it should not be income for taxation.

<sup>16</sup> *Supra*, note 1.

<sup>17</sup> It is interesting to note that both in Massachusetts and in the federal courts the rule as regards the distribution of trust property is that a stock dividend is not income for the life tenant. *Supra*, notes 4 and 7. The Massachusetts court refused to be bound by the rule, on the ground that it was construing the Massachusetts constitution, and therefore ought to give the word "income" a liberal interpretation. *Trefry v. Putnam*, 116 N. E. 904, 910, 912. The court, however, was first of all construing the statute imposing the tax, where a strict interpretation was in order. The Circuit Court of Appeals distinguished the trust case from the one before it on the ground that in the former the rule was based on convenience of administration of the trust, thus ignoring the principal basis for the decision in the trust case, that a stock dividend was not in fact income. *Supra*, note 7. Moreover, the argument of convenience may be directed only against the rule of apportionment between life tenant and remainderman, and has no weight in deciding between the two remaining alternatives of giving the whole stock dividend to the life tenant or to the remainderman.

<sup>18</sup> *COMP. STAT.* (1916) § 6336 b

<sup>19</sup> *Supra*, note 11.

was to hold such a provision constitutional under the Sixteenth Amendment.<sup>20</sup> In reversing the decision, the Supreme Court merely held that a stock dividend was not income within the meaning of the statute, so that the constitutional question is yet to be decided. The reasoning of the Supreme Court, that a stock dividend is not income, is just as applicable to the constitutional question as it was to the interpretation of the statute. There is, however, a vital difference between the two issues. Not only must the language of the Constitution be given a liberal interpretation as opposed to the strict and narrow construction given the same language in a statute imposing a tax, but there exists also the well-defined policy, often expressed by the courts,<sup>21</sup> although sometimes not followed,<sup>22</sup> that a statute shall not be declared unconstitutional unless it is so beyond a reasonable doubt.<sup>23</sup> Where a coördinate branch of the government has put one interpretation on the Constitution, that interpretation should be upheld by the courts if it is within reason. There is no question but that, when a corporation accumulates a surplus, the stockholder is enriched thereby, although he may have no direct control over those earnings, for the market value of his stock has been increased. If a cash dividend is then declared, the stockholder receives an income which is taxable, and the value of his stock falls in proportion to the amount of the dividend. If a stock dividend is declared, the value of the outstanding stock, the old plus the new, is about the same as it was before the issue. Is it reasonable for Congress to say that by this issue the stockholder, who has been enriched by the prosperity of the corporation, has received an income? Can the tax on the stock dividend be upheld as a tax, in effect, on the rise in value of the securities due to the accumulation of the surplus?<sup>24</sup> That is the question on which the Supreme Court must pass.

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**RIGHT TO DISCONTINUE EMINENT DOMAIN PROCEEDINGS.** — There is in every state, in the federal law, and in England some statutory<sup>1</sup> provision controlling the exercise of the power of eminent domain.<sup>2</sup> However, the statutes very generally fail to go into detail, so a very considerable body of eminent domain law must come from the courts.

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<sup>20</sup> "The Congress shall have the power to levy and collect taxes on incomes, from whatever sources derived, without apportionment among the several states, and without regard to any census enumeration."

<sup>21</sup> See the cases cited in THAYER, *LEGAL ESSAYS*, 13-19.

<sup>22</sup> See a Note in the January number of this REVIEW, 31 HARV. L. REV. 475, and an address, cited therein, by Roscoe Pound, *TRANSACTIONS, MARYLAND BAR ASSOCIATION* (1909), 301.

<sup>23</sup> THAYER, *LEGAL ESSAYS*, 20-33; COOLEY, *CONST. LIMITATIONS*, 253-57.

<sup>24</sup> It must always be kept in mind that if property is sold at a profit, that is, if the stockholder realizes on this rise in value of his securities by selling them, that profit is taxable as income. *COMP. STAT.* (1916) § 6336 *b* [c].

<sup>1</sup> Statute is used throughout this discussion in its broad sense, *i. e.*, as designating the written law as contradistinguished to unwritten law.

<sup>2</sup> STIMSON, *AMERICAN STATUTORY LAW*, §§ 90-97 and §§ 1140-49; NICHOLS, *EMINENT DOMAIN* (2 ed.), § 204; *The Lands Consolidation Act*, 8 VICT. c. 18 (1845).



Owing to the peculiar relation between the parties to an eminent domain proceeding the results have not been uniform. An interesting example of this situation is to be found where the question is at what time do the rights of the parties vest, or, as raised in the recent case of *York Shore Water Co. v. Cord*,<sup>3</sup> when is it too late for the condemnor to discontinue or abandon, without being held for the full assessed value of the property which he has taken some steps to condemn. It is settled in the United States, in the absence of an express statute to the contrary, that the proceedings may be discontinued at any time before confirmation of assessment, or judgment on a verdict.<sup>4</sup> But in some states this right to discontinue is conditional on the condemnor reimbursing the owner for any expense that he may have incurred and paying court costs.<sup>5</sup> On the other hand, it is settled that after the taking is once completed there can be no recovery of the money paid as compensation.<sup>6</sup> Between these two extremes the authorities are conflicting in their results, and, even where the same result is reached, the courts frequently differ in their reasons.<sup>7</sup> By the weight of authority in the United States the condemnor may discontinue or abandon even after confirmation or judgment, and the indication is that abandonment or discontinuance may be at any time before compensation is actually paid or secured, and before possession of the property is taken.<sup>8</sup>

<sup>3</sup> 102 Atl. 321 (Me.) See RECENT CASES, page 800.

<sup>4</sup> LEWIS, EMINENT DOMAIN (3 ed.), § 954. *Denver & New Orleans R. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582; *Graff v. Baltimore*, 10 Md. 544; *Andrus v. Bay Creek Ry. Co.*, 60 N. J. L. 10, 36 Atl. 826; *Milwaukee, etc. R. R. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113.

<sup>5</sup> *Pine Bluff, etc. Ry. Co. v. Kelly*, 78 Ark. 83, 93 S. W. 562; *Mellichor v. Iowa City*, 116 Iowa, 390, 90 N. W. 81; *Matter of Water Commissioners of Jersey City*, 31 N. J. L. 72; *Matter of Waverly Water Works*, 85 N. Y. 478; *Moravian Seminary v. Bethlehem*, 153 Pa. St. 583, 26 Atl. 237.

<sup>6</sup> NICHOLS, EMINENT DOMAIN (2 ed.), § 417. *Shannahan v. City of Waterbury*, 63 Conn. 420, 28 Atl. 611; *Wood v. Trustees of State Hospital*, 164 Pa. St. 159, 30 Atl. 237.

<sup>7</sup> LEWIS, EMINENT DOMAIN (3 ed.), § 955; NICHOLS, EMINENT DOMAIN (2 ed.), § 417; MILLS, LAW OF EMINENT DOMAIN (2 ed.), § 312. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *O'Neill v. Freeholders of Hudson Co.*, 41 N. J. L. 161; *Chicago v. Barbican*, 80 Ill. 482; *Matter of Rhinebeck R. R. Co.*, 67 N. Y. 242. The New Jersey court goes on the theory that the condemnor should be permitted to have the price finally ascertained and have a reasonable time thereafter to accept or reject. The Illinois court adheres strictly to the provision that compensation shall be paid for property taken, and says no right to compensation exists until property is taken. The New York court considers the original assessment a sufficient basis for condemnor's election and says that if it elects to go on it is bound thereby. In England there can be no discontinuance after notice to treat. LLOYD, LAW OF COMPENSATION (6 ed.), chap. III. *Rex v. Hungerford Market Co.*, 4 B. & Ad. 327. But the rule is not so strict if condemnors are government commissioners. *Reg. v. Commissioners*, 19 L. J. Q. B. 497. The theory of the English courts is that a contract is made when notice to treat is given.

<sup>8</sup> *Denver & New Orleans R. R. Co. v. Lamborn*, *supra*; *Chicago v. Barbican*, *supra*; *Manion v. Louisville St. L. & T. Co.*, 90 Ky. 491, 14 S. W. 532; *Graff v. Baltimore*, *supra*; *Hunt v. Whitney*, 45 Mass. 603; *Williams v. N. O., M. & T. R. R. Co.*, 60 Miss. 689; *Silvester v. St. Louis*, 164 Mo. 601, 65 S. W. 278; *O'Neill v. Freeholders of Hudson Co.*, *supra*; *State v. Cincinnati & Indiana R. R. Co.*, 17 Ohio St. 103; *Stacey v. Vermont Cen. R. R. Co.*, 27 Vt. 39; *Port Angeles Pac. R. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, *supra*. See 20 HARV. L. REV. 574. *Contra*, *Furbish v. County Commissioners*, 93 Me. 117, 44 Atl. 364; *Drath v. B. & M. R. R. Co.*, 15 Neb. 367, 18 N. W. 717; *Matter of Rhinebeck & Conn. R. R. Co.*,

The usual statutory provision is in effect that no private property shall be taken for a public purpose without just compensation.<sup>9</sup> The nature of the power to take and of the requirement for compensation is material to a determination of when rights arise out of condemnation. The power of eminent domain is inherent in sovereignty.<sup>10</sup> The requirement that just compensation shall be made is a statutory limitation on that power.<sup>11</sup> Next, it is material to determine whether this limitation is a condition precedent or subsequent. If it is precedent no right to take the property can vest in the sovereign until it is performed. The first statutory limitation of this nature is found in the Magna Charta,<sup>12</sup> where "immediate" payment was made necessary. The history of this provision shows that it was important that payment should be required to concur with or precede any right to take the property.<sup>13</sup> It was with such provisions, and with books whose writers jealously guarded private property<sup>14</sup> before then, that our statute writers adopted similar provisions. A proper interpretation of our constitutional requirements for just compensation, when private property is taken for public purposes, would seem to make compensation a condition precedent to the condemnor's right to take possession.<sup>15</sup> The state, or any person to whom it has delegated its power of eminent domain, should be required to pay, tender, or deposit the assessed compensation before it can have any vested right to take possession of property under condemnation proceedings. Until the condemnor has performed this condition placed upon its power, there is no justification for saying it elects to exercise its powers to take, and until it does so elect to exercise a power which is sovereign, no individual should have a right to payment as if there were a taking. To hold otherwise would in effect be imposing conditions on the power of eminent domain which are not found in the statute.

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67 N. Y. 242. In *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444, the court said, "I think the plaintiffs had a right to abandon at any time before the defendants were willing to receive it [compensation], or were in a position to demand it." This is certainly an extreme view when it is noticed that the amount assessed had been deposited with the county clerk pending appeal.

<sup>9</sup> U. S. CONST. ART. 5, AMEND.; STIMSON, AMERICAN STATUTORY LAW, *supra*.

<sup>10</sup> THAYER, CASES ON CONSTITUTIONAL LAW, 945 *et seq.* In *Boom Co. v. Patterson*, 98 U. S. 403, 406, the court says, "The right of eminent domain, that is, the right to take private property for public uses appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." See 15 HARV. L. REV. 399.

<sup>11</sup> *Boom Co. v. Patterson*, *supra*. In *United States v. Jones*, 109 U. S. 513, 518 the court says, "The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several states, for just compensation for property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised." See THAYER, CASES ON CONSTITUTIONAL LAW, 945 *et seq.*

<sup>12</sup> Chapter 28, "No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Chapter 30, "No sheriff or bailiff of ours or other person, shall take the horses or carts of any freeman for transport duty against the will of the said freeman."

<sup>13</sup> McKECHNIE, MAGNA CARTA (2 ed.), 329, 333-35; TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY, 144.

<sup>14</sup> CHASE'S BLACKSTONE (4 ed.), 78.

<sup>15</sup> 2 KENT, COMMENTARIES (8 ed.), 399, note (a).



ADMISSIBILITY OF TELEPHONE CONVERSATIONS. — When an ordinary conversation, held in the presence of the parties, is offered in evidence the usual questions are: is it relevant; and does it violate the Hearsay Rule. But when considering the admissibility of a telephone conversation we are immediately confronted with the question: did the witness actually speak with the party alleged. Obviously this is a question of identification — a question of fact; and much depends on the variant circumstances of the individual case, whether there is sufficient evidence to warrant this inference of identity. It is, of course, recognized that the mechanism of the telephone is sufficiently reliable so that the mere fact that the conversation was so conducted should not make it inadmissible.<sup>1</sup> But, on the other hand, it does not follow that since a person has placed himself in connection with a telephone system he is chargeable with every conversation purported to have been made by him.<sup>2</sup> Fortunately, however, there are in most cases other circumstances sufficient to establish the necessary identity. Can any generalizations be made? A very common circumstance is that the witness was acquainted with the speaker's voice, and on the occasion in question recognized the voice. This is generally sufficient.<sup>3</sup> But that there should be an absolute or presumption-raising criterion — a "voice test" — as some cases seem to indicate is quite unfortunate.<sup>4</sup> It is well known that in many cases, especially in the commercial dealings in our large cities, the voice in fact is not recognized, and yet rights and liabilities are continually being established solely on this mode of communication. To adhere to a "voice test" as a criterion of admissibility would be to place many of these transactions beyond the protection of the law. It is common experience that there are many other circumstances from which the inference of identity may be reasonably ascertained, and it is highly important that the courts should give such evidentiary matter its full weight consistent with a due regard for the interests of the party to be charged with the conversation. But to go to the other extreme and say that even though the speaker was not identified, yet the evidence should be admitted, "to be given such weight as, under the circumstances, the jury thought was proper," seems an inadvisable liberality.<sup>5</sup> Conceding then that the mere fact that a party calls up purporting to be B is too dangerous a circumstance to rely upon in showing identity; nevertheless, it is conceivable that circumstances preceding or following the conversation or indeed the very subject-matter may serve to establish that identity. On this, the

<sup>1</sup> *Shawyer v. Chamberlain*, 113 Iowa, 742, 84 N. W. 661.

<sup>2</sup> See *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 482, 11 S. W. 49, 52. See the criticism; *Rueckheim Bros. v. Ser Vis Co.*, 146 Ill. App. 607, 609; 3 WIGMORE, EVIDENCE, § 2155, note 7.

<sup>3</sup> *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807; *Johnson v. Hernig*, 49 Pa. Sup. Ct. Rep. 484.

<sup>4</sup> "Tanner admitted he did not recognize the voice of the person who spoke to him through the telephone . . . he could not tell whether it was Obermann's voice or not." *Obermann Brewing Co. v. Adams*, 35 Ill. App. 540, 541. See also *Kimbark v. Illinois Car & Equipment Co.*, 103 Ill. App. 632, 637. In both cases there were other circumstances sufficient at least to go to the jury.

<sup>5</sup> *Kansas City Star Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 99 S. W. 765. See 20 HARV. L. REV. 650.

cases seem to be quite generally in accord.<sup>6</sup> The converse situation at the outset is more reliable. Thus where A, in the ordinary course of affairs, gets B's number from the telephone directory, calls that number, and is answered by a party who purports to be B and who does in fact carry on an apparently *bonâ fide* conversation, this, in average experience, would seem to warrant an inference that in fact it was B who answered the call. Being a natural inference in ordinary experience it would seem to be a permissible inference for a jury, and therefore, it is submitted, those circumstances should be considered admissible as sufficient evidence to go to the jury on the question of identity. And there is considerable judicial support for this position.<sup>7</sup> Here again, of course, additional circumstances preceding or following the conversation, or the very subject-matter, may more clearly establish the identity.<sup>8</sup>

The case becomes more complicated, however, when the speaker does not purport to be any particular person, but merely a member of the B company, authorized to make the statement with which the B company is sought to be charged. It must be proved that A did in fact speak with someone at the B company's office, that that person had authority to make the statement; and this necessarily involves showing who that person was. Obviously it is impossible to establish this by direct evidence, and the question again becomes one of determining what circumstances are necessary to establish these inferences. We have previously considered what set of circumstances are admissible as sufficient evidence to go to the jury on the question of the speaker's identity when that speaker purports to be a particular person, and those observations are equally applicable here in determining the sufficiency of the evidence to permit an inference that A spoke with someone at the B company's office. But how are we to say that such person had the requisite authority? It seems clear that if A had gone in person to the B company to make a contract, had been referred by someone at the information desk to a person who purported to have authority to negotiate with him, and who did in fact enter into a transaction, these circumstances would be very strong evidence that A did in fact negotiate with an authorized agent of the B company, and, indeed in absence of rebutting evidence, would warrant a direction to that effect. It may

<sup>6</sup> *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407; *Rogers Grain Co. v. Taunton*, 136 Ill. App. 533. Cf. *Rueckheim Bros. v. Ser Vis Co.*, *supra*. See also cases in note 8.

<sup>7</sup> "In average experience the numbers and addresses contained in the telephone company's directory . . . are found sufficiently accurate to justify its substantial trustworthiness. When, therefore, a person so stated to live at the address, and bearing the same name as the party sought to be charged, is called for by the telephone at that number and address, and answers to the name, admitting the identity, it is to be accepted as the same evidence would be if the witness testifying had called in person and the ostensible owner had answered and admitted the identity." *Holzhauser v. Sheeny*, 127 Ky. 28, 104 S. W. 1034. See also *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, 458; *Guest v. H. & St. J. R. Co.*, 77 Mo. App. 258. Cf. *Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375 (admissibility of the telephone conversation does not seem to have been questioned). But see *Planter's Cotton Oil Co. v. Western Union Telegraph Co.*, 126 Ga. 621, 55 S. E. 495; *Swing v. Walker*, 27 Pa. Sup. Ct. Rep. 366, *contra*.

<sup>8</sup> *People v. McKane*, 143 N. Y. 455, 33 N. E. 950 (an affidavit of defendant referred to the conversation); *Davis v. Walter*, 70 Iowa, 466, 30 N. W. 804 (testimony of co-defendant disclosed the identity); *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245 (previous personal conversation); see also cases in note 6.



perhaps be suggested that A could subsequently identify the person with whom he dealt. But this would serve only as cumulative force rather than a necessary element in establishing that he dealt with an authorized agent. We may well suppose a case where A goes to the B company, steps up to one of the numerous cashiers' windows and pays a bill to a person having apparent authority to receive money; he does not know that person, and undoubtedly could not subsequently identify him, and yet no court would hesitate to say that that was sufficient evidence to sustain a finding that payment was made to an authorized person. It would seem equally clear that if A called up the B company — it being shown to the satisfaction of the jury that the connection was in fact with the B company — and upon proper inquiry was connected with a person who purported to be a particular official, or a member of a certain department having authority to deal with the matter, and such person did in fact proceed with a transaction, these circumstances would surely be admissible as sufficient evidence to permit a finding that A was talking with a person having the requisite authority. But here again we find decisions and statements highly prejudicial to this mode of communication.<sup>9</sup> There is, however, considerable judicial support for the position we have indicated.<sup>10</sup> Here again, of course, there may be additional circumstances to show that authority.<sup>11</sup> If the matter of identity or authority is not in dispute, then there are simply the ordinary questions of relevancy and hearsay. If after these considerations the conversation is admissible, obviously it may be corroborated by a witness who was in the presence of one of the speakers. But generally he can testify personally only as to what he heard one of the parties say — not both, as in ordinary conversations. Granting that he may testify as to what he heard A say to B over the telephone, is it proper to permit him to testify as to what A, during the conversation or immediately thereafter, told the witness what was purported to be B's answer. It seems only reasonable that in the ordinary experiences such testimony should be allowed whether we call it part of the *res gestae* or a permissible invasion of the Hearsay Rule. And the courts are inclined to this liberality.<sup>12</sup>

A different problem arises where A does not talk with B but with someone who purports to speak as B's automaton repeating verbatim or in

<sup>9</sup> "The sayings of that person [one who responded to the call 'Is this the Western Union' and proceeded to take the message] would not be admissible against the defendant until the fact of agency had been established," thus indicating that the court did not recognize the circumstances of the call admissible as sufficient evidence to permit a finding of the fact of agency. *Planter's Cotton Oil Co. v. Western Union Telegraph Co.*, *supra*. See also *Obermann Brewing Co. v. Adams*, *supra*; *Kimbark v. Illinois Car & Equipment Co.*, *supra*.

<sup>10</sup> "The burden was on the defendant company who had possession management and control of the telephone, to show affirmatively that the order was accepted by an unauthorized person or not accepted at all." *Star Bottling Co. v. Cleveland Faucet Co.*, 128 Mo. App. 517; *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590; *Gilliland v. Ry. Co.*, 85 S. C. 26, 67 S. E. 20; *Gardner v. Hermann*, 116 Minn. 161, 133 N. W. 558.

<sup>11</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Texas, 201, 17 S. W. 608; *Godair v. Ham Nat. Bank*, *supra*.

<sup>12</sup> *Miles v. Andrews*, 153 Ill. 262, 38 N. E. 644; *Northern Assurance Co. v. Morrison*, 162 S. W. 411 (Texas Civ. App.); *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029. See also 27 HARV. L. REV. 683.

substance what B has directed him to say. This is a subject not peculiar to telephone conversations, but involves the well-known principles of interpreters as agencies of communication.<sup>13</sup>

## RECENT CASES

AGENCY — SCOPE OF AGENT'S AUTHORITY — PRINCIPAL'S LIABILITY UNDER WORKMEN'S COMPENSATION ACT TO PERSON EMPLOYED BY AGENT TO ASSIST IN EMERGENCY. — Defendant's servant asked aid from plaintiff in getting a wagon out of the mud. In attempting to assist, plaintiff was injured. He sues under the Workmen's Compensation Act. (1913 MINN. GEN. STAT. § 8195.) *Held*, that he may recover. *State ex rel. Nienaber v. District Court of Ramsey County*, 165 N. W. 268 (Minn.).

An agent is justified in assuming extraordinary powers in an emergency. *Terre Haute, etc. R. Co. v. McMurray*, 98 Ind. 358. See STORY, AGENCY, 6 ed., § 141. His conduct must be necessary and limited to the exigencies of the case. *Gwilliam v. Twist*, [1895] 1 Q. B. 557, [1895] 2 Q. B. 84; *Foster v. Smith*, 2 Coldw. (Tenn.) 474; *Vandalia R. Co. v. Bryan*, 60 Ind. App. 223, 110 N. E. 218. See 29 HARV. L. REV. 547. An agent, ordinarily without authority to employ, may have such incidental power in an emergency, and it has been held that the person employed is a fellow-servant of the one by whom he is employed. *Gunderson v. Eastern Brewing Co.*, 71 Misc. (N. Y.) 519, 130 N. Y. Supp. 785; *Brooks v. Central Ste. Jeanne*, 228 U. S. 688. See F. R. Mechem, "Master's Liability to Third Persons for the Negligence of a Stranger Assisting his Servant," 3 MICH. L. REV. 198. There seems to be no reason why the person employed could not recover under the Workmen's Compensation Act. See *Paul v. Nikkel*, 1 Cal. I. A. C. 648, 650. It is no objection that the work was only casual. *Ginther v. Knickerbocker Co.*, 1 Cal. I. A. C. 458. However, the facts in the case do not seem to make the defendant an "employer" within the Minnesota statute, which defines an "employer" as one "who employs another to perform a service for hire." See 1913 MINN. GEN. STAT. § 8230. *Georgia Pacific R. v. Propst*, 83 Ala. 518, 3 So. 764, 85 Ala. 203, 4 So. 711. The cases have drawn a rather rough distinction between the volunteer who is acting partly to protect his own interests and the volunteer who is not, holding that the latter becomes an employee, while the former does not. *Street Ry. Co. v. Bolton*, 43 Ohio St. 224; *Wright v. London, etc. R. Co.*, 1 Q. B. D. 252; *Mayton v. T. & P. R.*, 63 Texas, 77.

ATTACHMENT — GROUNDS — WHETHER AN ACTION FOR FRAUD AND DECEIT IS AN ACTION "ARISING ON CONTRACT." — A statute provides that no attachment shall be granted on the ground that the defendant is a non-resident for "any claim other than a debt or demand arising upon contract." (OHIO GEN. CODE, § 11819.) The present defendant sued a non-resident "for fraud and deception" in inducing the defendant to buy certain shares of stock and attached his property. The plaintiff made a subsequent attachment of this same property, and attacked the prior attachment as not "arising on contract." *Held*, that the prior attachment prevails. *Weirick v. Mansfield Lumber Co.*, 117 N. E. 362 (Ohio).

<sup>13</sup> *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525; *Sullivan v. Kuykendall*, 82 Ky. 489; *Oskamp v. Gadsden*, 35 Nebr. 7, 52 N. W. 718. See 1 WIGMORE, EVIDENCE, § 699.



Though the forms of bringing action have generally been abolished, as in Ohio, the distinction in substance, not form, between tort and contract, is still considered rudimentary and fundamental. *Holt Ice Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575; *Howland v. Needham*, 10 Wis. 495. Deceit is a tort action, and though the method of committing the wrong was through the medium of a contract the action is nevertheless one in tort and not contract. *Francisco v. Hatch*, 117 Wis. 242, 93 N. W. 1118. It has been held expressly that an action to recover damages for fraudulent representations acted on does not arise on contract. *In re Harper*, 175 Fed. 412. If the suit is to rescind the contract because of fraud and get back the consideration, there is authority that it is an action arising on contract. *May v. Disconto Gesellschaft*, 113 Ill. App. 415, 71 N. E. 1001; *Nethery v. Belden*, 66 Miss. 490, 6 So. 464. *Contra*. *Ryles v. Shelby Mfg. Co.*, 93 Mo. App. 178. But it would seem that such an action properly sounds in quasi-contract on grounds of unjust enrichment. This would differentiate it from both contract and tort. See KEENER, QUASI-CONTRACTS, 198; WOODWARD, QUASI-CONTRACTS, §§ 4, 5, 281. The case seems unsound and is illustrative both of the fading distinction between forms of action in the minds of courts and of a blurred conception of the basic difference between tort and contract.

BILLS AND NOTES — CHECKS — NEGLIGENCE OF DRAWER — YOUNG *VERSUS* GROTE. — The plaintiff's confidential clerk, whose duty it was to prepare checks for signature, presented a check blank as to words of amount but having "£2. 0. 0" in the space provided for figures. The plaintiff signed. The clerk subsequently wrote "one hundred and twenty pounds" in the space provided for words, inserted "1" and "0" on either side of "2," cashed the check for £120 with the drawee-bank, and absconded. The plaintiff sues the bank for the amount charged to his account less £2. *Held*, he cannot recover. *Macmillan v. London Joint Stock Bank, Ltd.* [1917] 2 K. B. 439 (C. A.).

For a discussion of this case, see Notes, page 779.

CARRIERS — BAGGAGE — LIABILITY FOR LOSS OF HAND-BAGGAGE. — Before making up plaintiff's lower berth, the porter, an employee of defendant, placed plaintiff's camera in the unused upper berth. Next morning the camera was gone. Plaintiff sues for the value thereof. *Held*, that having assumed charge of the camera, defendant was bound to restore it or account for its loss. *Palmer v. Pullman Co.*, 167 N. Y. Supp. 610.

With respect to the personal effects of its patrons, a sleeping-car company is not held to the liability of a common carrier or innkeeper. *Lewis v. New York, etc. Co.*, 143 Mass. 267, 9 N. E. 615; *Pullman Co. v. Smith*, 73 Ill. 360. *Contra*, *Pullman Co. v. Lowe*, 28 Neb. 239, 44 N. W. 226. See 2 HUTCHINSON, CARRIERS, 3 ed., § 1130. Its liability is for negligence, and mere proof of the loss, if unexplained, justifies a recovery on analogy to the doctrine of *res ipsa loquitur*. *Goldstein v. Pullman Co.*, 220 N. Y. 549, 116 N. E. 376; *Kates v. Pullman Co.*, 95 Ga. 810, 23 S. E. 186. *Contra*, *Springer v. Pullman Co.*, 234 Pa. 176, 83 Atl. 98. Hence the question of custody does not assume importance. It is otherwise, however, where a railroad company or other common carrier is defendant in suit, for it is not liable as an insurer where there has been no bailment to it. *Weeks v. New York, etc. R. Co.*, 72 N. Y. 50; *Bunch v. Great Western R. Co.*, 17 Q. B. D. 215. Where control is not exclusive in either the carrier or the passenger, the authorities are conflicting. See 3 HUTCHINSON, CARRIERS, 3 ed., §§ 1257-65. See also 25 HARV. L. REV. 178, notes 17, 18. On facts similar to the principal case, a carrier has been held liable as an insurer. *Nashville, etc. R. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055. It is submitted, however, that in such cases the act of the employee is a mere courtesy, and that strictly there is no bailment to the carrier.

CONFLICT OF LAWS — CAPACITY TO CONTRACT — ENFORCEMENT OF FOREIGN CONTRACTS AGAINST THE PUBLIC POLICY OF THE FORUM. — A married woman domiciled in Texas, by whose laws she was incapable of making a valid contract of suretyship, made such a contract in Illinois where a married woman has such capacity. She was sued in the District Court of the United States for the Northern District of Texas. *Held*, that she is not liable. *Union Trust Co. v. Grosman*, U. S. Sup. Ct. Off., Oct. Term, 1917, No. 106.

The authorities are in confusion as to what law governs the validity of a contract. One line of cases takes the view that the law of the place of performance governs. *Pritchard v. Norton*, 106 U. S. 124. Another view is that the law of that place governs which the parties intend shall govern. *Gibson v. Connecticut Fire Ins. Co.*, 77 Fed. 561. A third line of cases holds that the law of the place of making the contract governs. *Garrigue v. Keller*, 164 Ind. 676, 74 N. E. 523. Much is to be said for the view that the validity of a contract is to be governed by the *lex loci contractus*. See J. H. Beale, "What Law Governs the Validity of Contracts?" 23 HARV. L. REV. 1. Additional confusion appears in the authorities when the question of capacity to make a contract arises. One line of authorities holds that the law of the place where the contract is made determines the capacity of the parties. *Milliken v. Pratt*, 125 Mass. 374. See STORY, CONFLICT OF LAWS, 8 ed., §§ 102, 102 a, 102 b. Another takes the view that the domicile of the parties determines their capacity to contract. *In re Cooke's Trusts*, 56 L. J. Ch. 637. See DICEY, CONFLICT OF LAWS, Rule 146. The principal case adopts none of the above views, but proceeds upon the basis that though the contract might have been valid if sued upon elsewhere, it was unenforceable in Texas because against public policy. The question of whether the contract of a married woman is against the public policy of a state is one upon which judges may differ. Cf. *Garrigue v. Keller*, *supra*; *Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807.

CONTRACTS — DEFENSES — "RESTRAINT OF PRINCES" IN CHARTERPARTIES. — Residents of Sweden, owners of a Swedish vessel, entered into an English charterparty by which the vessel was to make certain voyages subsequently prohibited by Swedish emergency legislation. The ship was at an English port. The charterparty contained the usual exception as to restraints of princes. The plaintiff brought an action to restrain the use of the vessel except in accordance with the contract. *Held*, that it is enough that the Swedish government is capable of enforcing the restraint upon the persons having the custody of the ship, and that the prohibition operates as a restraint of princes. *Furness, Withy & Co. v. Rederiaktiebolaget Banco*, [1917] 2 K. B. 873.

This decision depends wholly upon the significance of the common phrase, "restraints of princes." See DUCKWORTH, CHARTERPARTIES AND BILLS OF LADING, 2 ed., 136. Mere illegality by foreign law does not excuse performance of a contract, unless by rendering performance impossible it may be brought within an express or implied condition. *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. 985. See STEPHENS, CHARTERPARTIES, 145. See also 15 HARV. L. REV. 63; 18 *Ibid.*, 384. "Restraint of princes" is to be understood in its natural and ordinary meaning. Statements that restraints must be actual and operative, and not merely expected and contingent, must be read in connection with the special facts of the particular case. Cf. *Richardson v. Maine Ins. Co.*, 6 Mass. 102, 120. But see LEGGETT, CHARTERPARTIES, 2 ed., 341. The exception should not be confined to restraint of the vessel itself; indeed the term "restraint" seems more applicable to persons than to things. Restraints, of course, commonly arise from the interference of a sovereign with the dominion over the vessel itself, as by blockade, embargo, or quarantine. *Aubert v. Gray*, 3 B. & S. 163; *Geipel v. Smith*, L. R. 7 Q. B. 404. See *Olivera v. Un. Ins. Co.*, 3 Wheat. (U. S.) 183, 194. The exception does



not apply to detention as a result of ordinary legal proceedings, nor to restraints by persons acting in defiance of law. *Finlay v. Liverpool, etc. Co.*, 23 L. T. R. 251; *Nesbitt v. Lushington*, 4 T. R. 783. See *Northern Pacific Ry. Co. v. Am. Trading Co.*, 195 U. S. 439, 468. The principal case probably extends the meaning of "restraints of princes," but the decision is not without the support of well-considered *dicta*. See *Sanday & Co. v. British, etc. Marine Ins. Co.* [1915] 2 K. B. 781, 800, 827; *Nobel's Explosives Co. v. Jenkins & Co.* [1896] 2 Q. B. 326, 331; *Rodoconachi v. Elliott*, L. R. 9 C. P. 518, 522. But see *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378, 402; *Miller v. Law Accident Ins. Co.* [1903] 1 K. B. 712, 721. See also SCRUTTON, CHARTERPARTIES AND BILLS OF LADING, 7 ed., 207

DEATH BY WRONGFUL ACT — STATUTORY LIABILITY IN GENERAL — LIABILITY FOR FAILURE TO PERFORM A CONTRACT TO HEAT PREMISES. — The defendant, as part of his contract with a tenant, agreed to keep the premises heated. He failed to do so, and the tenant contracted a severe cold which, it is alleged, later resulted in his death. A statute allows an action for the benefit of the next of kin of a deceased person whose death was caused by the wrongful acts or omissions of another (1913 MINN. GEN. STAT. § 8175). *Held*, that the plaintiff may recover. *Keiper v. Anderson*, 165 N. W. 237 (Minn.).

Tort will lie for negligent misfeasance in the performance of a thing agreed upon. *Flint Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503; *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871. Generally it will not lie for negligent nonfeasance in the performance of a contract. *Samuel v. Novak*, 99 Md. 558, 58 Atl. 19; *Shick v. Fleischhauer*, 26 App. Div. (N. Y.) 210. Here it might be argued that the defendant's only breach was a failure to act. But the essence of the transaction was that the defendant undertook to keep his tenant warm, and so negligently performed his agreement that injury resulted. Bearing out this view is a previous Minnesota case that is very much in point. *Glidden v. Goodfellow*, 124 Minn. 101, 144 N. W. 428. It would seem to follow that plaintiff may recover, for although the act seems clearly to be a "death" statute, and not a "survival" statute, the court construes it as the latter. See 15 HARV. L. REV. 854; 30 HARV. L. REV. 396. But even under a death statute, plaintiff should recover, provided the element of damage is present. Under such statutes, the cause of action arises from a tort to the plaintiffs. See 15 HARV. L. REV. 854. The principal case would satisfy that requirement; it is well settled that a wrong to one person may arise out of breach of a contract with another. *Cf. Rex v. Pittwood*, 19 Times L. Rep. 37. Under a death statute, it is immaterial whether the deceased would have had a cause of action had he survived.

EMINENT DOMAIN — RIGHT TO ABANDON PROCEEDINGS. — A water company instituted proceedings to condemn land, and, after damages had been assessed and the assessment confirmed, attempted to abandon the proceedings. *Held*, that the company cannot withdraw. *York Shore Water Co. v. Cord*, 102 Atl. 321 (Me.).

For a discussion of this case, see Notes, page 791.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — ADMISSIBILITY OF TELEPHONE CONVERSATIONS. — The bailee of a horse, in attempting to establish that the owner had been notified before the expense was incurred, offered the veterinary as a witness to testify to a conversation by telephone with one whose voice the witness did not recognize but who said he was the servant of the owner. *Held*, that the alleged conversation was not admissible. *Smarak v. Segusse*, 102 Atl. 354 (N. J.).

For a discussion of this case, see Notes, page 794.

**EVIDENCE — RES GESTAE — CONTEMPORANEOUSNESS OF THE DECLARATION AND THE ACT.** — In a suit on an accident insurance policy the evidence showed that the deceased was seized with a violent fit of coughing while brushing his teeth. As soon as he could speak, some fifteen minutes later, he told his wife that bristles from the tooth brush had choked him. *Held*, that this was admissible to show the cause of death as part of the *res gestae*. *Eby v. Travelers' Ins. Co.*, 102 Atl. 209 (Pa.).

The principal case raises the question of how nearly contemporaneous with the act in issue a declaration must be to be admissible in evidence as part of the *res gestae*. Some of the authorities virtually require that it be simultaneous. *Regina v. Bedingfield*, 14 Cox C. C. 341; *Parker v. State*, 136 Ind. 284, 35 N. E. 1105. The other authorities allow such declarations to come in, when in the opinion of the trial judge, they have that degree of spontaneity which negatives premeditation and hence possible fabrication. *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397; *Washington, etc. Co. v. McLane*, 11 App. D. C. 220. See WIGMORE, EVIDENCE, § 1750. Under the former rule time is apparently the determinant, and logically the most deliberate of self-serving evidence would be admissible if made simultaneously with the act. The latter rule makes the absence of deliberation the deciding factor, time being but an element in that consideration. See CHAMBERLAYNE, EVIDENCE, § 3007. The principal case is in accord with the second view and seems especially supportable in analogy with the comparatively recent extension of the spontaneity principle to declarations made by a person rendered unconscious, upon regaining consciousness, even though considerable time has elapsed. *Britton v. Washington, etc. Co.*, 59 Wash. 440, 110 Pac. 20; *Paris, etc. Co. v. Calvin*, 103 S. W. 428 (Texas); *Missouri, etc. Co. v. Moore*, 24 Texas Civ. App. 489, 59 S. W. 282. *Cf. Sutton v. Southern Ry.*, 82 S. C. 345, 64 S. E. 401; *Christopherson v. Chicago, etc. Co.*, 135 Iowa, 409, 109 N. W. 1077.

**FORFEITURE — EQUITY — SUIT TO QUIET TITLE FOR BREACH OF CONDITION SUBSEQUENT.** — The plaintiff conveyed land to the grantor of the defendant, subject to building restrictions, and provided in the conveyance that "any violation of the foregoing conditions and instructions by the grantee, his heirs or assigns, shall work a forfeiture to all title in and to said lots." The defendant built contrary to the restrictions, and the plaintiff filed a bill in equity to quiet title. *Held*, that although equity would not work a forfeiture, the decree should be granted, since the title was already forfeited by the breach. *Sanderson v. Dee*, 168 Pac. 1001 (Okla.).

A condition subsequent, which provides that a given estate may be terminated, on breach of the condition, should be distinguished from a conditional limitation, which provides that the estate shall continue until the happening of an event. See 4 KENT, COMMENTARIES, 126 (\*). Although in the latter case the happening of the event immediately vests the estate in the remainderman, breach of a condition subsequent does not *ipso facto* vest the estate in the grantor. Until the grantor enters or sues in ejectment, title remains in the grantee. *Lewis v. Lewis*, 74 Conn. 630, 51 Atl. 854; *Miller v. Levi*, 44 N. Y. 489. If the condition in the principal case were in favor of a stranger, it would be construed as a conditional limitation, to prevent the heir of the grantor from defeating the remainder by not entering. *Proprietors, etc. v. Grant*, 3 Gray (Mass.), 142. See 2 BLACKSTONE, COMMENTARIES, 155 (\*). But, being in favor of the grantor, the language used seems to import a condition subsequent. *Cf. Ruch v. Rock Island*, 97 U. S. 693. Although equity will not work a forfeiture, it will protect legal title, even though acquired by forfeiture. *Lowrey v. Finkleslon*, 149 Wis. 222, 134 N. W. 344; *Shannon v. Long*, 180 Ala. 128, 60 So. 273. But where title is not yet in the grantor, a decree quieting title amounts to working a forfeiture, and would seem therefore to be improper.



*Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. 157; *Birmingham v. Lesan*, 77 Me. 494, 1 Atl. 151.

**FRANCHISES — RIGHT TO ENJOIN COMPETITOR ILLEGALLY DOING BUSINESS WITHOUT A LICENSE.** — Bill to enjoin defendant from operating a jitney-bus line in competition with complainant on ground that defendant's franchise was invalid because not signed by the mayor. *Held*, that the complainant is entitled to a perpetual injunction. *Memphis Street Ry. Co. v. Transit Co. et al.*, 198 S. W. 890 (Tenn.).

A franchise confers privileges which are exclusive in their nature against all persons upon whom similar rights have not been conferred. *Elizabethtown Gas Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844, 846. The rights are essentially in all respects property. *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649; *City of Morristown v. East Tenn. Telephone Co.*, 115 Fed. 304. Any person attempting to exercise such rights without legislative sanction invades the private property rights of one holding a valid franchise and may be restrained at the instance of the owner. *Bartlesville Electric Light & Power Co. v. Bartlesville Interurban Ry. Co.*, 26 Okla. 453, 109 Pac. 228; *Millville Gas Light Co. v. Vineland Light & Power Co.*, 72 N. J. Eq. 305, 65 Atl. 504. In a few jurisdictions the courts have proceeded on the ground that the complainant seeks to prevent competition with it, and have refused to grant an injunction. *Coffeyville Gas Co. v. Citizens Natural Gas Co.*, 55 Kan. 173, 40 Pac. 326; *Market R. Co. v. Central R. Co.*, 51 Cal. 583. Whether competition is so desirable as to justify this refusal of protection to a property right is questionable. Text-writers do not favor the doctrine. See DILLON, MUNICIPAL CORPORATIONS, § 1244.

**INSANE PERSONS — GUARDIANSHIP AND PROTECTION — RIGHT OF GUARDIAN OF INSANE WIDOW TO DISSENT FROM WILL.** — By statute a widow may elect whether to take under her husband's will or by descent (1903, ME. REV. STAT. c. 77, § 13). The guardian of an insane widow petitioned the probate court to be allowed to elect against the will. *Held*, that neither the guardian nor the court could exercise the widow's right for her. *Clark v. Boston Safe Deposit & Trust Co.*, 102 Atl. 289 (Me.).

A widow's right of election, being personal, does not survive to her heirs or personal representatives. *Donald v. Portis*, 42 Ala. 29; *Welch v. Anderson*, 28 Mo. 293. A few jurisdictions hold in accord with the principal case that if the widow is incompetent the right is defeated. *Crenshaw v. Carpenter*, 69 Ala. 572; *Lewis v. Lewis*, 29 N. C. 72. But the great weight of authority is that if the widow is incompetent the right may be exercised by a court of equity or by the guardian under the supervision of some court. *Penhallow v. Kimball*, 61 N. H. 596; *Kennedy v. Johnston*, 65 Pa. 451; *In re Andrews' Estate*, 92 Mich. 449, 52 N. W. 743; *Trower v. Spady*, 117 Va. 173, 83 S. E. 1049. See PAGE, WILLS, 719. This result has been generally reached by judicial decision, but in a few states it has been enacted by statute. See 1910, OHIO GEN. CODE, § 19574; 1908, N. C. REV. CODE, § 3080; MO. REV. STAT. § 355. The court in making its election leans toward the will. *In re Bringham*, 250 Pa. 9, 95 Atl. 320. But it considers the interests of the incompetent party and no one else. *Spruance v. Darlington*, 7 Del. Eq. 111, 30 Atl. 663. The decision of the principal case seems to be an example of the hostility of many courts toward statute law.

**INTERNATIONAL LAW — LEGATIONS AND DIPLOMATIC AGENTS — IMMUNITY OF DIPLOMATIC AGENTS FROM SUITS: EXTENT OF WAIVER.** — The defendant, an accredited minister of a foreign sovereign, having waived his diplomatic immunity, was surcharged with a sum of money upon his accounts in ad-

ministration proceedings, and on his failure to comply with an order for payment of the amount into court, the plaintiff, a beneficiary under the estate, asked leave to issue a writ of sequestration against personal property of the defendant. *Held*, that the writ will not issue. *In re Suarez*, 117 Law T. Rep. 239.

It is well settled that a diplomatic official, his family and subordinates, are immune from local process in the jurisdiction to which he is accredited. See WESTLAKE, PRIVATE INTERNATIONAL LAW, 5 ed., § 194; 1 KENT, COMMENTARIES, 15, 38. This immunity extends to business adventures outside the scope of his official duties. *Magdalena v. Martin*, 2 E. & E. 94. But a diplomatic official may submit to local jurisdiction by an express or implied waiver of his immunity. *Taylor v. Best*, 14 C. B. 487. The rule of immunity is not based upon any considerations inherently peculiar to the person of a diplomatic agent, but rather upon a decent respect for the interests of the foreign sovereign whom he represents, which forbids that the usefulness of the envoy to his superior be impaired, or that the dignity of his office be violated. See HALL, INTERNATIONAL LAW, 5 ed., 172. It has been argued that from this it follows that any waiver of immunity by an envoy without the assent of his sovereign is inoperative. See 27 HARV. L. REV. 489. There are *dicta* to this effect in the American decisions. See *United States v. Benner*, 24 Fed. Cas. 1084, 1087; *Valarino v. Thompson*, 7 N. Y. 576, 579. Whether or not it is necessary to hold a waiver without the assent of the sovereign inoperative for all purposes, and the court in the present case expressly left this problem open, it is clear that any proceedings against a foreign diplomatic envoy based on his waiver of immunity, not assented to by his sovereign, must stop short of an execution on the person or personal property of the official, if the requisite respect for the foreign sovereign is to be preserved. The decision in the present case was based on the Diplomatic Privileges Act of 1708, which provides in terms that any writ or process against the person or personal property of a foreign diplomatic official shall be void. See 7 ANNE, c. 12. But this statute is merely declaratory of the common law. See *Viveash v. Becker*, 3 M. & S. 284, 291. Inability to enforce a judgment against a foreign diplomat does not render the judgment nugatory, for the inability is only temporary.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—MINOR EMPLOYED IN VIOLATION OF STATUTE.—Statute prohibits the employment of children under the age of fourteen between 9 P. M. and 6 A. M. Plaintiff, a child of thirteen, was accidentally injured while working for defendant at 3 A. M. He brings action under the Workmen's Compensation Act. *Held*, that plaintiff cannot recover. *Pounteney v. Turlon*, 34 Times L. Rep. 103.

By the general rule of statutory construction, statutes not purely remedial apply only to such cases as fall within their language. *United States v. Goldenberg*, 168 U. S. 95; *Smith v. Boston & Albany R. Co.*, 99 App. Div. 94, 91 N. Y. Supp. 412. The Workmen's Compensation Act applies only where the relation of master and servant actually exists. *Gooch v. Citizens' Electric St. Ry. Co.*, 202 Mass. 254, 88 N. E. 591; *Flower v. Buck*, 159 N. Y. Supp. 1042. But the law does not recognize the existence of the relation of master and servant, when the contract purporting to create the relation and the employment under such contract are illegal and against public policy, for an illegal contract is itself void. *Wallace, Sup't v. Cannon*, 38 Ga. 199; *Gennert v. Wuestner*, 53 N. J. Eq. 302, 31 Atl. 609. Hence the principal case would appear to be sound, since the action was brought under the Workmen's Compensation Act, and this act does not apply. *Kemp v. Lewis*, [1914] 3 K. B. 543. A more interesting question would have been raised had the case been based on common-law principles, as an action for negligence. Here it would seem that the child is not barred by the violation of the statute. *Braasch v. Michigan Stove Co.*,



153 Mich. 652, 118 N. W. 366; *Beauchamp v. Sturges & Burn Mfg. Co.*, 250 Ill. 303, 95 N. E. 204. And the employer is liable, even in case of a pure accident, as the act of employment contrary to the statute is negligence *per se*, giving a basis for the action, if the employment is a proximate cause of the injury. *Kirchër v. Iron Clad Mfg. Co.*, 134 App. Div. 144, 118 N. Y. Supp. 823; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543; *Monroe v. Hartford St. Ry. Co.*, 76 Conn. 201, 56 Atl. 498. See *Smith v. Mine & Smelter Co.*, 32 Utah, 21, 30, 88 Pac. 683, 686. Cf. E. R. Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

**PUBLIC OFFICERS — NATURE OF PUBLIC OFFICE — BEGINNING OF TERM.** — A statute increased the salary of holders of certain judicial offices, who should be thereafter elected or who had been elected, but whose terms of office had not commenced (1915 ILL. LAWS, 442, § 1). The commencement of the term was not fixed by the statute creating said offices. Relator was duly elected but had not assumed the duties of his office. He sues for the increased allowance. *Held*, that the term of office began on the date of election. *People ex rel. Holdom v. Sweitzer*, 117 N. E. 625 (Ill.).

Statutes creating public offices usually specifically defer the commencement of the term to an appreciable time after election to give the new incumbent opportunity to arrange his affairs and qualify for office. See MECHEM, PUBLIC OFFICERS, § 386. In the absence of such provision, however, the term will run from the date of election. *State v. Constable*, 7 Ohio, 7; *Haight v. Love*, 39 N. J. L. 476. But cf. *Brodie v. Campbell*, 17 Cal. 11. The question suggests itself as to who is vested with authority where qualification of the new official is delayed. At the common law an officer's rights and duties ceased at the expiration of his term. *People v. Tieman*, 30 Barb. (N. Y.) 193; *State v. Sheldon*, 8 S. D. 525. See *Badger v. United States*, 93 U. S. 599, 601. But cf. *Anon.*, 12 Mod. 256. In a few jurisdictions a holding over was permitted for considerations of convenience, until a successor was qualified. *Robb v. Carter*, 65 Md. 321, 4 Atl. 282; *Tuley v. State*, 1 Ind. 500. However, almost everywhere today statutes or constitutions provide for a holding over until the new officer qualifies. See WILLIAMS, PUBLIC OFFICERS, 10 LIB. AM. L. & PR. 150. The rights and duties of the extended period are not varied, and a resignation is permitted if allowed during the term. *State v. Page*, 20 Mont. 238, 50 Pac. 719. The decision in the principal case seems sound, and the statutory distinction between election and incumbency inapplicable to relator's term of office.

**STATUTE OF FRAUDS — INTEREST IN LANDS — PAROL RESCISSION OF CONTRACT FOR SALE OF LAND.** — An executory written contract for the sale of land was rescinded by a subsequent oral agreement. *Held*, that the agreement to rescind was not within the Statute of Frauds. *Ely v. Jones*, 168 Pac. 1102 (Kan.).

It is well settled that equitable interests are within the statute. *Toppin v. Lomas*, 16 C. B. 145; *Dougherty v. Callett*, 129 Ill. 431, 21 N. E. 932. Since a binding contract for the sale of land creates an equitable interest in the land in the purchaser, it would seem that a rescission, which is tantamount to a reconveyance of this equitable interest, would be within the statute. This reasoning has the approval of most courts and text-writers. *Dougherty v. Callett*, *supra*; *Dial v. Crain*, 10 Tex. 444; *Hughes v. Moore*, 7 Cranch (U. S.), 176. See *Carr v. Williams*, 17 Kan. 575, 582. See also BROWNE, STATUTE OF FRAUDS, § 267; SMITH, STATUTE OF FRAUDS, § 3631; WILLISTON, SALES, 149, note 1. However, the principal case has the support of some authority. See *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66. If the contract did not give an equitable interest in the land, it would be on all-fours with contracts for the sale of chattels, of greater value than \$500, and the rescission would be effectual. See WIL-

LISTON, SALES, § 119. The authorities for the doctrine of the principal case, however, admit that the purchaser has an equitable estate, but say that it fails by operation of law upon the extinguishment of the contract, or that it is "rebutted" by the agreement to rescind. *Proctor v. Thompson*, 13 Abb. N. C. (N. Y.) 340; *Raffensberger v. Cullison*, 28 Pa. St. 426. This reasoning appears to be fallacious, and the majority rule would seem preferable.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — STATE TAX ON EXPORTS. — A Pennsylvania statute imposed a tax on dealers in merchandise, based on the volume of business transacted. The tax was assessed upon the gross receipts of plaintiff's business, including the greater part that came from the sale of merchandise shipped to foreign countries, on orders taken there. *Held*, that in so far as this tax is levied upon such gross receipts, it constitutes a regulation of foreign commerce and an impost on exports, in violation of the United States Constitution, Article I, §§ 8, 10. *Crew Levick Co. v. Pennsylvania*, 38 Sup. Ct. Rep. 126.

A state has no power to tax either foreign or interstate commerce. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Case of the State Freight Tax*, 15 Wall. (U. S.) 232. See 28 HARV. L. REV. 93. A tax on those soliciting for an unlicensed foreign business establishment is unconstitutional. *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *McCall v. California*, 136 U. S. 104. A state may not tax the gross receipts of railroads, or of other transportation companies, or telegraph companies, doing an interstate business. *Fargo v. Michigan*, 121 U. S. 230; *Galveston, etc. Ry. Co. v. Texas*, 210 U. S. 217; *Crutcher v. Kentucky*, 141 U. S. 47; *Leloup v. Port of Mobile*, 127 U. S. 640. A state has power to tax all property having a *situs* within its limits, and the use of such property in interstate commerce does not render it exempt from state taxes. A license fee may be exacted, even if it is a burden on interstate commerce, provided it is a legitimate exercise of the police power. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. The greatest difficulty has been found in passing upon the validity of state taxes upon corporations doing an intra-state and an interstate business. *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Philadelphia, etc. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *West. Un. Tel. Co. v. Kansas*, 216 U. S. 1; *Williams v. Talladega*, 226 U. S. 405; *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68; *Lusk v. Botkin*, 240 U. S. 236; *Looney v. Crane Co.*, 38 Sup. Ct. Rep. 85. See J. H. Beale, "Taxation of Foreign Corporations," 17 HARV. L. REV. 248; T. R. Powell, "Indirect Encroachments on the Federal Authority by the Taxing Powers of the States," 31 HARV. L. REV. 321, 572, 721. The holding in the principal case seems to throw additional doubt upon the authority of one prior adjudication. *Cf. Ficklin v. Shelby County Taxing District*, 145 U. S. 1. The Pennsylvania tax applied equally to domestic and foreign commerce, but this does not make it valid as a property or a privilege tax. Its operation was to lay a direct burden upon each transaction in foreign commerce, and as such was properly declared unconstitutional.

TAXATION — INCOME TAX — STOCK DIVIDENDS AS INCOME. — A corporation declared a stock dividend on the occasion of the transfer of surplus earnings to its capital account. The surplus was earned before the passage of the Income Tax Act but the dividend was declared after the passage of the act. The act provided for a tax to be "levied . . . upon the entire net income arising or accruing from all sources . . . to every citizen of the United States." A stockholder paid the income tax on his share of the dividend under protest, and sued to recover the amount paid. *Held*, that a stock dividend is not income, within the meaning of the act. *Towne v. Eisner*, 38 Sup. Ct. Rep. 158.

For a discussion of this case, see Notes, page 787.



**TAXATION — WHERE PROPERTY MAY BE TAXED — BANK DEPOSITS AT DOMICILE OF OWNER.** — Deposits in a bank in Missouri owned by a resident of Kentucky were taxed at the owner's domicile. *Held*, that the tax was valid as a tax on the owner, measured by his property. *Fidelity & Columbia Trust Co. v. City of Louisville*, 38 Sup. Ct. Rep. 40.

For a discussion of this case see Notes, page 786.

**TORTS — CRIMINAL ACT — TORT LIABILITY FOR VIOLATION OF CRIMINAL LAW.** — The plaintiff sought recovery of a sum extorted from him by the defendant and also of the sum of \$125 as special damages incidental thereto. A statute made extortion a crime. (1915, REM. CODE, [Wash.] § 2610.) *Held*, that plaintiff is entitled to recover under the statute. *Bertschinger v. Campbell*, 168 Pac. 977 (Wash.).

The plaintiff had a good cause of action in quasi-contract for the sum extorted. *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651; *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069. But the holding of the court, that the statute making extortion a crime created in favor of the plaintiff a cause of action for injuries received from the commission of that crime, is evidently erroneous. It may be argued that since the statute makes extortion a wrong, anyone suffering from the wrong may recover in tort. But this was an intentional injury for which the common law gave no redress; and by no reasonable construction can the simple criminal statute be made to give a civil right of action. A criminal statute designed to protect a particular group of individuals may give to a member of that group a civil action for a violation thereof. *Couch v. Steel*, 3 El. & Bl. 402; *Chamberlaine v. Chester, etc. Ry.*, 1 Exch. 870; *Willy v. Mulledy*, 78 N. Y. 310. See COMYN'S DIGEST, Action upon Statute (F). Some courts have so construed child labor statutes. *Strafford v. Republic Iron Co.*, 238 Ill. 371, 87 N. E. 358. However, such is not the nature of this statute. It would seem evident, therefore, that the plaintiff has no cause of action for the special damages. See 2 JAGGARD, TORTS, § 263. See also Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

**TRUSTS — CREATION AND VALIDITY — ORAL AGREEMENT TO HOLD LAND OR THE PROCEEDS THEREOF IN TRUST.** — Plaintiff conveyed land to his sister without consideration, on an oral agreement that she should enjoy the income therefrom for life, remainder to him on her death, or if she should elect to sell the land she was to enjoy the use of the proceeds of the land for life, remainder to him. The sister sold the land, and on her death plaintiff sues her executor for the proceeds. *Held*, that he may recover. *Chace v. Gardner*, 117 N. E. 841 (Mass.).

The question to be determined is whether the agreement created a trust in land so as to come within the statute of frauds. Where there is an express agreement to sell the realty, and hold the proceeds in trust, there is a split of authority as to whether the trust is enforceable. *Bock v. Martin*, 132 N. Y. 280, 30 N. E. 584; *Brown v. Logan*, 20 Okla. 334, 95 Pac. 441. *Contra*, *Cameron v. Nelson*, 57 Nebr. 381, 77 N. W. 771; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651. It seems on principle that at the time of creation of the trust, an interest in land is in fact conveyed, and that some indication of the intent of the transferee to hold the proceeds in trust should be required at or after the time of the conversion. *Collar v. Collar*, 36 Mich. 507, 49 N. W. 551. *In re Symond's Trusts*, 201 Pa. 413, 50 Atl. 1005. Where the transferee has an option to convert into cash or not, as he chooses, since he may elect to retain the land, it seems even clearer that the trust is one of land. It might be possible, however, to split up the agreement into two parts, one being an agreement to hold the proceeds in trust if a conversion was effected. But even this does not meet the objection, that some expression of intent by the transferee to be

trustee at or after the time when the trust came into existence, that is, the time of the conversion, should be required. However, it seems that relief should be given in this case on the broad ground of unjust enrichment, rather than by enforcing the trust; that the plaintiff is out and the defendant is in, and that this is inequitable. See 26 HARV. L. REV. 661. Even in cases of oral trusts to hold land for the benefit of the grantor, Massachusetts, though denying recovery of the land, has permitted recovery of its fair value, and this remedy would seem adequate in the principal case. *Twomey v. Crowley*, 137 Mass. 184; *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433.

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## BOOK REVIEWS

A TREATISE ON THE POWER OF TAXATION, STATE AND FEDERAL, IN THE UNITED STATES. By Frederick N. Judson. St. Louis: The F. H. Thomas Book Company. 1917. pp. xxx, 1144.

"Judson on Taxation" has become the standard book upon its narrow subject — narrow, because only questions involving the legal power to tax are considered, and those questions are all assumed to be based upon the Constitution of the United States. Within this narrow field the author covered his ground to the satisfaction of the profession; the book was needed, it was adequate, and the second edition, after fifteen years, will be welcomed. In this second edition one new chapter has been added, entitled "Enforcements of Limitations upon Federal Taxation;" about one hundred sections have been added to the other chapters, and about four hundred new cases have been cited. The new matter bears marks of Mr. Judson's terse and accurate style, and brings the text down to date. One might wish that the very important decision of *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, had received fuller consideration, instead of being dismissed with two brief paragraphs giving its gist, and that in this fuller consideration the author had compared it with the cases of *New York Central R. R. v. Miller*, 202 U. S. 584, and *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, by which its scope is certainly limited. Here, as now and then in other cases, the author errs on the side of brevity, a failing which the profession, groaning under the dreary length of type-writer-manufactured books, will pardon. Every independent opinion of Mr. Judson's on this difficult subject is helpful and authoritative. We wish he had given us more of them, but we are grateful for those he has given us.

JOSEPH HENRY BEALE.

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SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS. Translations by Ernest Bruncken and Layton B. Register. Introductions by Henry N. Sheldon and by John W. Salmond. Modern Legal Philosophy Series. Volume IX. Boston: The Boston Book Company. 1917. pp. lxxxvi, 593.

To meet with an ungrudging, and even enthusiastic, acknowledgment that philosophy is the indispensable foundation of intelligent life and action, is for a present-day philosopher an experience sufficiently rare to be wholly delightful. But it is positively thrilling to meet with such an acknowledgment on the part of the leaders of a profession which is distinguished equally for its learning and subtlety, and for its practical shrewdness and hard-headedness. It must have been the desire to refresh the parched soul of a philosophical colleague with



this thrill which moved the review editor to entrust the reviewing of "The Science of Legal Method," not to a lawyer who might have judged it from his own experience as an expert, but to a mere philosopher, who can judge it only as a layman and an outsider. Fortunately the task of giving an opinion on a book containing selections from the writings of such men as François Gény, Eugen Ehrlich, Johann Georg Gmelin, Géza Kiss, Fritz Berolzheimer, Josef Kohler, Roscoe Pound, Heinrich B. Gerland, Édouard Lambert, Karl Georg Wurzel, Alexandre Alvarez, Ernst Freund, is less embarrassing than it might have proved, because the Editorial Committee for the series has not only supplied an admirable editorial preface, the joint work of Professors John H. Wigmore and Albert Kocourek, both of Northwestern University, but it has also induced Mr. H. N. Sheldon, a former justice of the Supreme Judicial Court of Massachusetts, and Mr. John W. Salmond, Solicitor-General for New Zealand, to write each a special introduction. Between them, these four authorities supply all that one could possibly ask for in the shape of a review of the book from a lawyer's point of view. It is really a most ingenious and admirable plan for the editors and introducers to eliminate the professional reviewers by doing their work for them far more competently than ninety-nine out of one hundred of them could conceivably have done it themselves. It is safe to say that any student of law who takes the trouble to master especially the editorial preface (pages xxi-lxvii) will find himself splendidly prepared for appreciating intelligently what is to be said for and against the method of "free judicial decision;" or what is the function respectively of legislator and judge; what are the data, the methods, the aims of juridical thinking. This, happily, being so, the philosopher-reviewer can, with a good conscience, keep out of the lion's den of legal experts, and, peeping safely through the bars, confine himself to some observations on the logical and philosophical aspects of their behavior.

As a student of logic, I am above all interested in what our authors have to say concerning the logic of juridical thinking. Their common problem is to determine the method of thinking which will yield the best results in terms of "substantial justice" and "social utility." They are engaged in a vigorous effort to shake off the fetters of traditional formalism, and to adopt a freer, more elastic method, which will better secure the ends of justice in the complex and ever-changing tissue of modern life. But what strikes a logician as most curious is that this movement of challenge and reconstruction should take the form of an attack on "logic." There is surely a strange paradox here, is there not? On the one hand, all our authors are clearly agreed that work so delicate and fraught with consequences so far reaching for human welfare as the making and administering of laws, demands reasoning powers of the very highest order. In other words, the kind of thinking required must, so one would expect, be in the highest degree logical. But, on the other hand, there runs through most of these essays a remarkable distrust and depreciation of logic. Gény recommends the lawyer to realize that the elements of every system of positive law "are not logical entities, but those ethical and economic realities which alone can give us an insight into the effective forces of social life" (page 42). Ehrlich, after his fashion, is refreshingly vigorous: "Of all the gifts of the human intellect, logical acumen is the least fruitful. There is profound wisdom in the fact that German legend frequently portrays the devil as a sharp dialectician" (page 84). Gmelin inveighs against those who "care everything for formal logic and nothing for the sense of justice" (page 140). Kiss contrasts the Roman idea of "*aequitas*" which kept the interpretation of the law plastic, with the "degenerate" scholastic application of it by "formal dialectic logic" (pages 154 *et seq.*). Berolzheimer calls for emancipation from "the letter of the law" (page 167). Such an authority as Dean Pound declares, "application of law must involve not logic merely but a measure of

discretion as well," and he adds that the law cannot be made "purely mechanical in its operation" (page 208). Wurzel records the appearance at the present time of the postulate that juridical thinking is "to have even the courage of being illogical" (page 297). He claims to be "substituting for the purely logical a dynamic or psychological point of view" (page 358), and, in doing so, to be in line with a reform movement in the science of logic, as the leaders of which he names Erdmann, Sigwart, and Wundt.

Well, if logic goes, what is to take its place? Various are the suggestions. "We need a process of reasoning which starts from an intuition supplemented by the feeling for what is just, and arrives at exact conclusions by a series of deductions under the constant guidance and control of practical common-sense," says Géný (page 17). Ehrlich, after a vehement outburst against "legal technicalism" as "nothing less than the sin against the Holy Ghost" (page 65), declares that "a legal rule must be treated not like a rigid dogma but like living energy" (page 77), and that "there is no guaranty of justice except the personality of the judge" (page 65). He calls for "the element of creative thought" supplied by "great individual minds" (page 74). Gmelin would rely on an innate "sense of justice," strengthened by practice and training. Others speak of "legal tact," "discretion," and so forth, notwithstanding the complaints of their critics, that this is to open the door to arbitrary whim, emotionalism, subjectivism, individualism, and a host of other abusive-isms.

Now this whole dissatisfaction with logic, these appeals to psychology, sociology, creative thought, sense of justice, and what not, are not only a sign of the times, but, in my opinion, one of the most promising signs. They are typical of a general movement of self-criticism and reform, of which, perhaps, the extremest expression is Bergson's depreciation of the "intellect" as abstract, static, mechanical, repetitive in its workings, by contrast with the concrete, dynamic, alive, creative character of "intuition." What is called "pragmatism" is another form of the same movement, full, especially in the writings of William James, of the same impatience with logic, the same healthy appetite for the concrete; full, especially in the writings of John Dewey, of the same desire to make thinking an instrument of social welfare. Like many other students of philosophy, I welcome whatever is emancipating and constructive in this movement, because I firmly believe it will end by reestablishing the contact, largely broken during the second half of the nineteenth century, especially in Germany, between the methods of thinking which yield the best results in science and law, and the logical theory of the Kantian and Hegelian schools, which Professor Kocourek in the preface happily characterizes as "realistic idealism" (page lvi). This is not an invitation to *jurare in verba magistræ*, to set up Hegel's logic as another infallible dogma, not to be criticized, only to be reverently repeated like a magic charm for the salvation of one's philosophical soul. But it is an invitation to remember that the antithesis of "formal logic" and "creative thought," of "intellect" and "intuition," is precisely the same antithesis which Kant and Hegel discussed in terms of the contrast between "understanding" and "reason." It is a reminder that the logicians who have learned in the school of the great idealists, have always conceived the movements of thought as no less concrete, flexible, dynamic, yes, and experimental, than the movements of life itself.

In short, our authors cry out against logic in general, because they find lawyers practising and preaching bad logic, and are unaware of the existence of a better. Hence, having an inadequate concept of logic, they are driven to calling the better thinking, which they desire, "illogical." This treatment calls from a logician for two comments. (a) In the first place, the student of logic must decline to be held responsible for faults of method which are wholly due to mistaken concepts of the functions of laws and lawyers, apparently still



prevailing among the legal profession. Witness the startling confession in the preface: "Philosophy of law has been to us almost a meaningless and alien phrase" (page vi). Suppose it true that often, as Gmelin says, "decisions are based on doubtful arguments drawn from the letter of the statute or an artificial, abstract deduction, while reasonable inferences from the concrete facts, equity, and the subjective sense of justice were neglected" (page 122). What logician ever demanded of a lawyer a procedure yielding artificial, unreasonable, unjust results? It is the lawyer, not the logician, who has insisted on treating statutes as sacrosanct, absolute, unchanging, and on torturing the ever novel, ever changing forms of social and industrial life into a strait-jacket of concepts and rules, which are not only treated as rigid and fixed, but which may even, like the Roman law, have been taken over from a very different type of civilization. It is the lawyer, not the logician, who has elevated faithfulness to the letter of a statute, or to the hypothetical intention of an ancient legislator, to the dignity of an ideal, regardless of the effects of such interpretation on "substantial justice" and "social utility." There is no logic known to me which forbids the recognition that "legal systems do and must grow, that legal principles are not absolute, but are relative to time and place" (Pound, page 207); or which demands the ignoring of the connection between law and economics, and compels the lawyer to apply the law of property of a non-industrial age so as to justify the "economic exploitation of the working class under the yoke of capitalism" (Berolzheimer, page 181). I have the most lively sympathy with the vigorous demands for less of the letter of the law and more of the spirit of justice which breathes through these essays, but the remedy for the acknowledged defects of the present attitude and method is, not to enthrone the "courage to be illogical" in the place of logic, but to abandon a worse logic for a better.

But (b) what makes the difference, in the sense here intended, between "bad" logic and "good" logic? Between the kind of thinking that is rightly denounced as formalism, logic-chopping, hairsplitting, "squeezing decisions out of a statute with a hydraulic press" (Ehrlich, page 76), and the kind of thinking which our authors seek to secure by the "free decision" of the judge, by the introduction of historical, sociological, psychological considerations? *The difference is material, not formal.* Formally, thinking is good or bad, according as the conclusion does, or does not, follow from the premises. Materially, thinking is good or bad, according as the premises from which conclusions are drawn are more or less complete as measured by the whole range of the problem, or more or less relevant to the task and the purpose in hand. What our authors criticize as bad logic is really bad premises, not a faulty technique in deducing conclusions, but a faulty subject-matter, — what I described above as a mistaken concept of the function of laws and lawyers, expressing itself in trickiness of "interpretation," the devices and make-believes necessary for twisting the terms of a statute so as to apply to novel situations, the abstractness and rigidity of legal formulas, which, artificially tied down to the legislator's "intention," and therefore to the forms of social life of the legislator's experience, inevitably lag behind the mobility and fluidity of actual life. What our authors call for, and seek to secure, is better premises, a fuller and completer range of *material* considerations out of which to elicit "substantial justice." That this is the real character of the desired logical reform in juridical thinking is easily illustrated. Thus Professor Wigmore, in his section of the Editorial Preface, speaks of the "unlimited opportunity and necessity for the judiciary to reconstruct the thought (of a statute) by its own standard of experience, which may and must often differ from that of the legislator" (page xxxv). He refers with approval to the way in which courts rely on considerations of "public policy" in reaching their verdicts (page xl). Professor Kocourek points out that "the law is a dead letter

unless 'it works'; and it will not work unless and until it is adjusted to the material and psychic conditions of the society in which it is to operate" (page lvii). Gény preaches throughout from the text that courts should be guided by considering "the nature of things," and that, in order to do this, they should avail themselves of individual and social psychology, "statistics and every other means of learning social facts, as well as ethical, political, and economic considerations" (page 35). Ehrlich is full of the thought of "social evolution" and the "legal revolutions" which accompany it, as when "before our eyes, the matrimonial relation is turning from a relation of dominion of a man over a woman into an association of two individuals of equal importance and equal rights" (page 57). He is almost too Heracleitean when he declares that law "is really antiquated the very moment it has been formulated" (page 61), though his real point is sound, *viz.*, that legal thought should reflect the great intellectual and social movements of the time. Gmelin's "subjective sense of justice" is explicitly instructed to seek support in such "material factors" as actual human rights, interests, needs, habits, opinions. Berolzheimer contrasts the fiction of an absolute Law of Nature with "the Law of Civilization which is relative" (page 178), *viz.*, relative to the concrete social and economic conditions of each age. For Kohler, the sociological method requires us to look upon laws as "products of the entire people of which the legislator was but the organ" (page 189). "A statute," he goes on to say, "in truth is nothing but a way of bettering conditions, an instrument for attaining certain human ends, for promoting civilization, for repressing whatever factors are inimical to progress, and for developing the powers of the nation" (pages 192-93). Pound reminds us "that the lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture . . ." (page 224), a view which is the lawmaker's charter of emancipation from the trammels of the past for constructive work in the present. Wurzel lays his finger on the point when, in a brilliant footnote (page 295), he remarks that "Method is not a purely formal law of thought . . . for instance, by choosing for linguistic or economic investigations either the historical, statistical, organic, or some other method, one betrays at once the point of view from which one looks at these things, and will arrive at different results accordingly." Wurzel's whole very able essay is one sustained effort to make legislators and judges aware of the extent to which their thinking at every step is, and ought to be, determined by material considerations; how even when they appear to be merely subsuming facts under a legal rule, their thinking is determined "by general social phenomena, in brief, the entire fabric of society" (page 384); how it consists of "estimating the character of the facts with the aid of the whole conception, ethical, economic, social, and otherwise, which the judge has of human life" (page 408). Yet his clear perception of this fact does not prevent him from seeing also why the fiction that nothing enters into a decision except the facts and a legal rule meets a social want (page 418).

At bottom, then, if I am right, the problem of "free decision," and of the judge's law-making influence exercised through skilful "interpretation" of statutes, or through ingenious extension of precedents in case-law, is a problem of material logic, so to speak. The solution depends on what view we take of the function of a judge, the nature of the law in relation to the life of society, and of the factors which ought to be considered, if concrete justice is to be secured in each particular case. Different views on these points yield different conclusions, *i. e.*, different philosophies of law. No logician can legislate for the lawyer on such material points. He cannot, *ab extra*, dictate what is relevant and what is irrelevant. These are questions which must be settled, and are settled, experimentally, by trial and error, — the experiments being on a



vast social scale, and involving the stability and welfare of nations. But sound logic will always support, in the very name of that "reason" to which all our authors appeal, the methods of that thinking which surrenders itself to the "logic of facts" and also, what in the law is of even greater importance, to the "logic of ideals"; which learns by experience, and relies on the concretest possible grasp of, and acquaintance with, the range of relevant subject-matter, instead of following merely abstract general rules. If this be true, then Ehrlich is surely right when he claims for the ideal judge qualities which remind one of the philosopher-king of Plato's Republic: "a standard of mental and moral greatness far above the common average" (page 66). And so are the Editors right when they lay it down that "philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced to its perfect working" (page v). Legal education in this country could render no greater service to the community than by inspiring the coming generations of lawyers with the ambition to practise their profession with something of this largeness of outlook.

R. F. ALFRED HOERNLÉ.

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## AN INTERPRETATION OF THE PRINCIPLES OF PUBLIC LAW

IN the age of Louis XIV Corneille, Racine, and Molière used to criticize their own books, and the example is worth following. No one knows better than the author the purpose of his book, and none better, also, how that purpose is frustrated in the execution.

The first edition of my "Principles of Public Law" dates from 1910, the second from 1916; but the differences in both the plan and detail by which they are distinguished are not large enough to alter the general outline of the book.

The fundamental basis of public law is not contract nor the rule of law nor statute; it is not even directly the state. The real basis is the institution, and the state attains its real form only on becoming a corporate institution. This view I should defend somewhat as follows:

It has been my effort to construct a theory of the state different from the German theory of the *Herrschaft*, which is too subjective and anti-liberal in character. I yet desire to preserve the element of collateral power which in the jurisprudence of M. Duguit disappears too completely.<sup>1</sup> To attain this object my theory had to be not less juristic than political. It had to take account of the fact that the political organization of the state is bound up with the juridical organization of the nations in such fashion that the state

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<sup>1</sup> On M. Hauriou's relation to the philosophy of M. Duguit, *cf.* his brochure, "Des Idées de M. Duguit," 1911. — Eds.



is not less a totality of legal situations than the governmental and administrative systems. In such perspective the fundamental problem is the relation between the state and law. The central point of dispute is to know if and how the state is submitted to law.

In England the solution of the problem is made easier by the fact that law is in large part customary in origin, is not, that is to say, derived from government. For that reason Professor Dicey has had some difficulty in basing the theory of the rule of law, at least in so far as it concerns the attempt to place the submission of a governmental process to customary law, on a sure foundation; but he has not expressly touched upon the question of the submission of Parliament to ancient written statute. In those countries where life is organized under the control of the written law, there is real difficulty in subordinating the governmental power which makes new written laws to the system of law represented by statutes of earlier origin. Practice has of course discovered the expedient of written constitutions. Ordinary law is subordinated to constitutional law; and ordinary law is annulled by the courts in case of conflict, but every mind eager for theoretical explanation must search to attach this expedient to some fundamental principle of jurisprudence.

In this situation German jurists have evoked the absolutist principle of the auto-limitation of the state; and similarly M. Duguit has postulated the *quasi-anarchic* principle of a rule of law in the formation of which the state has no part and which is imposed on the state in the same manner as on private citizens. It was to find a middle way between these two extremes that I have been led to the distinction between established law and new law, and thence to the notion of the institution. It is within the institution by the phenomenon of custom that new governmental law is transformed into an established law imposed upon government as a constitutional statute, but as a statute to the formation of which it has itself contributed. We thus obtain our fundamental equation. A constitution involves an institution, and an institution involves the submission of sovereignty to law by objective means.

The state is not the only corporate institution. We have incorporated municipalities, business, trade unions, etc. Briefly, there is a whole class of incorporated moral persons of which the

state is only a peculiarly interesting variety. The central theory of public law must then be the corporate institution with its internal constitution.

A corporate institution is a social organization on the road to personality. This raises the question of corporate personality which M. Duguit has tried in vain to eliminate.<sup>2</sup> It is essential because instinctive and anthropomorphic man finds the solution of the difficulties arising from the relations between social power and law by reproducing in social structure that personal structure which in his view aids in the distinction between justice and injustice. The inconveniences of the theory of corporate personality seem to arise from their having been envisaged under subjective and metaphysical aspects. I believe the same theory can be regarded objectively and organically and that it then presents a high value. Thence is derived the idea of personality, which means the organization of an objective individuality; that in its turn is the active appearance of the noumenon of the moral person. This assimilation of corporate personality and human personality supposes a postulate. It supposes that human individuality is organized in constitutional fashion, so that the constitutionalism of politics simply reproduces the constitutionalism in the human being without entering into a psychological discussion which would here be out of place. It is clear that this postulate is justified by the fact of liberty. Political liberty in the state is like the internal liberty of man, in that both are conditioned by organization and by structure, by the balance and adjustment of powers, are conditioned, in brief, by an objectively internal constitution.

In this way the idea of a corporate institution involves in itself the problem of a relation of political power to law and to personality; it is for this reason that it is taken as the pivot of theories of public law. Nor is this all. The institution serves admirably as a subject of historical study; it grows, it develops, it is organized and lives over the space of time. We are thus in the presence of a special phenomenon of the institution: it is the transformation of an organization of fact into an organization of law, of the real into the right. The question of the relationship of fact to law is one of the most difficult, as it is one of the most important. Immedi-

<sup>2</sup> For M. Duguit's views on this question, cf. his *TRANSFORMATIONS DU DROIT PUBLIC*, chap. I, and *L'ÉTAT DE DROIT OBJECTIF*, 242-55. — Eds.



ately the origin of law is historically considered its discussion becomes essential.

German jurisprudence solves it very simply. It equates law with force. A legal situation is a situation created by a power which has triumphed over resistance and made its will triumphant. There is no need to modify the situation by the action of any principle other than that of force. Force becomes law by success. Constituted law is an attack that has succeeded.

It is easier to protest against the cynicism of such an outlook than formally to refute it. At first sight history seems to prove it. In international conflict and political revolution brutal conquest has long been responsible for the forcible union of peoples, and insurrection has given rise to legitimate government. My theory of the institution makes possible a satisfactory explanation of the difficult problem of legitimacy arising from prescription. We have to analyze with exactness the events that have occurred. Around an organization of fact which the process of history has institutionalized and made legitimate we have in reality a succession of phenomena of which the apparent unity comes from their clustering round the single centre. In reality they are very different. In the first phase an organization is created simply by force, and it then desires to live in peace. But to obtain a peaceful existence the new organization must obtain pardon for its origin, must modify itself, must put itself in harmony with the conscience of jurisprudence. Peaceful existence is possible only when the demands of law are satisfied. Until that is achieved the usurper must maintain an armed peace, and an armed peace is not a peaceful existence. So any organization derived from force becomes neither institutionalized nor legitimate save when law has beatified it. Nor does law beatify by reason of force alone.

If we apply these principles to contemporary evidence it is clear that the armed peace imposed by Germany on France and on herself from 1870 to 1914, the clauses of the treaty of Frankfurt, and notably the forcible possession of Alsace-Lorraine, never became legalized by peaceful existence. It has always been a simple state of fact which the present war has brought rudely to an end.

The corporate institution thus occupies so central a position in public law that it is fundamental to inquire if it is not the social source of positive law. Let me explain. It has been customary for

a long time to catalogue the immediate sources of law as custom, statute, ordinance, and decree. But we are to find their relation to the social organization. The sources of written law, of statute or decree, are immediately perceived to belong to the organization of government. Custom escapes this category. It is certainly not governmental in origin; but because it is not governmental that does not mean that it is out of relationship with the structure of society. There are two theories as to the formation of custom. The opinion of the Roman and Canon lawyers derives it from the *usus communis* which has no relation with any social organization; the modern historical school supported by E. Lambert in his "*Études droit Commun Legislatif*" recognizes that it comes from the operation of a certain number of social institutions of non-governmental character — the practice of the officials of trade unions, of great business companies, the theories of courts. In reality we shall combine the two theories. From the initiative of a constituted body we get a precedent; common usage accepts it. The formation of custom has thus two parts. We have the initiative that originates a precedent, and is taken either by an institution or by a person to whom some institution has given social authority: without that authority the initiative will be fruitless. We have the acceptance of this initiative; the public accepts and repeats the precedent and it becomes obligatory. This clearly is the part played by common usage. Now while trade unions, business houses, and the rest are non-governmental institutions, they are nevertheless institutions of the state. The public which accepts the *usus communis* is itself an element of the state. As a result the formation of custom is related to the life of the state when the latter is regarded as a vast corporate institution containing within itself the centralized institutions. Every source of positive law may thus be brought back to the corporate institution and may perhaps emphasize in greater precision the bearing of this relationship. A corporate institution in general and the state in particular are here discussed only as sources of positive law. I have no concern at the moment with the relation of natural law to the law of the state. In itself, the state is only a formal organization for positive law. That is no reason why it should not search to approach the ideal by making its positive law conform to justice; but the idea of justice is not inherent in it. It is outside the state, as it is probably outside all social organization.



The state attempts approximation to it just as an individual tries in his personal conduct to approach the ideal of good. Natural law I propose to discuss in a later series of studies.

The positive law made by the corporate institution of the state is objective. It is not, that is to say, derived from the subjective will of the corporate state person, but results from the procedure followed by the functioning of those collective organizations which in their sum make up the objective individuality of the state. Here, again, it is clear that the definition I have given of personality has a real value.

These conceptions greatly help to solve the problem of the submission of the state of law. On the one hand, the necessity of submitting the mass of positive law to natural law is formally reserved. On the other hand, in order to facilitate the submission and because the ideal of justice has its influence upon the individual conscience living under a régime of liberty, every part of positive law is most favorably influenced towards liberty. We have in this sense what is called decentralization — the sources of law most directly derived from government are subordinated to those hardly derived from that source at all. So it is that ordinance and decree have to be subordinated to statute. The mechanism of statute is more decentralized because it meets with the phenomenon of the electorate. Thus, statute itself has in a certain measure to be submitted to the consolidating work performed by custom. Custom by its derivation from precedent, and from precedent made by autonomous institutions, as well as by the *usus communis*, is still more decentralized than the legislative apparatus. The ultimate guarantee is thus a statute confirmed by custom or *statutory custom*. Law is thus based on general custom.

So we come to the constitutional régime which marks the necessary reaction of custom on statute. Statutes, of course, we must have at the basis of everything, but custom is necessary to their making. In this aspect England, the parent of constitutional government, is right in making her constitution customary. Written and rigid constitutions are good experience for such countries as do not possess ancient general customs. But they can only fulfill their task when long usage has made them pliable and sacred.

So far I have done no more than analyze the first part of my book. The second, which deals with the régime of the state, is compara-

tively simple. It is, so to speak, a natural history of the state regarded as a special social formation peculiarly perfected and set over against more elementary formations.

The state may be defined as the political, economic, and legal centralization of a people, or, as sometimes occurs, of several peoples. It is not, that is to say, any society, but a society that has come to the historic stage of nationality, that has eclipsed earlier organizations. The proper form of the state is that of centralization; in a contrary sense, the fabric of the nation is reacted on by the forces of decentralization, and when under a democratic government a state is built on the basis of national sovereignty, we have the compromise of national decentralization balancing the centralization of the state.

The organization of the state has, as its concrete end, the establishment and protection of the civil life, political liberty being but the guarantee of civil liberty. That is to give to the life of the state the individualistic sense consecrated by tradition and to subordinate public law to private law. I may once more emphasize that I am not dealing here with natural law, but simply with the facts that observation discloses. I am simply pointing out the form of the state, what it may achieve and to what it is related. If the element of collectivism is introduced, if an attempt is made to overthrow the respective importance of public and private life so as to make public life prominent, the régime of the state does not evolve in a new direction, but is broken. What really results is to destroy the delicate equilibrium that has been attained. The effect of a leap in the dark is on every hand disturbance.

Indeed, I have tried carefully to study the methods by which the state is so organized as to assure such a life as to make it possible to suggest that the form that it has taken and the direction will undergo no change. So far, the only evidence given has been that based on differentiation of function. I have shown, as I think, that there is another of greater importance; the separation and the balance of powers is fundamental. It has been used with patient ingenuity, progressively to secure civil liberty by centralizing opposing forces. It is in this fashion that sovereignty has been progressively separated from private property: that in sovereignty itself we have seen a gradual separation between religious and material power, as also from civil power, in order that the latter may not too greatly



oppress sovereignty as a whole. In the same way, civil power itself has undergone constitutional separation into different powers for the purpose of reciprocal moderation. All these separations, of course, go only to a certain point. They neutralize antagonistic forces; they do not destroy them.

The organization of the state proceeds by different phases, of which the most interesting is administrative organization where centralization predominates over decentralization. All that proceeds, combined as it is with the theories of the corporate institution and the separation and balance of powers, leads to a theory of national sovereignty which, as I think, accurately resumes the facts. I have maintained in addition to the classic separation of governmental powers defined by Montesquieu a separation of the forms of sovereignty. Practically speaking, sovereignty has three forms which, in the play of the constitution, combine. We have sovereignty of statute, sovereignty of government, and the individual sovereignty of each subject.

The sovereignty of the constitutional condition is an idea familiar to American lawyers, and it is to American law that I owe the idea. However, I explain it differently. The American sovereignty is explained by delegation; it is that portion of the sovereignty which the nation reserved when it delegated power to government. I have no liking for the theory of delegation in that it is a fiction and leads to a denial that governmental power is original. The government takes its power from its own centralizing strength; the national corporation, in so far as it is decentralized, draws its own strength from the groups of which it is composed. It is this decentralized force we find behind the constitution. What is of interest is the fact that this explanation enables the recognition that judicial authority is an organ of the constitutional sovereign and not of the governmental sovereign, because it represents the decentralization of the social régime. In this way the power of the courts to declare statutes unconstitutional may be explained.

The sovereignty of government is the governmental power organized in a representative form. It may be divided into three parts — executive, legislative, and elective; but their analysis would lead me farther than I can here go.

Finally, the idea of sovereignty retained by the individual provides room for the two essential elements of a constitutional régime.

individual liberty and the element of publicity. The contribution made by the form of sovereignty to the common labor of the state is the spontaneous collaboration for the public good of individuals and of individual enterprises. Without that collaboration the life of the modern state would be impossible.

The bond between these three forms of sovereignty is found in the person of the head of the state. It demands for him a strong power. Such is the juristic structure, in all its complexity, of modern law. I am more happy to submit it to American lawyers, because more than one part of its teaching is derived from their own constructive effort.

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THE WORD "EQUITABLE" AND ITS APPLICATION  
TO THE ASSIGNMENT OF CHOSSES IN ACTION

MY friend, Professor Cook, has said that the assignee of a chose in action has the legal title thereto.<sup>1</sup> I found fault with this label which he affixed to his interesting illustrations of the alienability of choses in action, contending that the assignee's rights should more properly be called "equitable."<sup>2</sup> In a retort courteous, Professor Cook has elaborated his statement and objected to my description of the assignee's rights as equitable and especially to my further statement, necessarily implied, that because they were equitable they were not legal. In a note to his later article Professor Cook says: "If all that Professor Williston means is to insist that whatever limitations the assignee's 'rights' had when purely equitable they should continue to have when they become concurrent, there is little occasion for controversy between us. Apparently, however, he means much more." In fact, that is all that I mean, if there be added that I wish a terminology which shall indicate my meaning.

I return once more to my thesis not with any undue desire to refute my learned friend in regard to the few matters whereon I differ from him, but simply to explain somewhat more fully the meaning which I attach to my language. I should not undertake to do this as a matter of personal justification; but the same misunderstandings which have made Professor Cook and myself seem much further apart than we are, I am sure, have clouded other legal thought and discussion.

Most of our trouble here, as so often in the law, is due to that ambiguity of language which has been called the worst reproach of the common law. Any attempt to avoid this ambiguity by adopting new terminology meets with difficulty. We are addressing a profession steeped in the old words and phrases, and all the sources of our law in judicial decisions and statutes are expressed in them. While, therefore, new terminology is occasionally un-

<sup>1</sup> 29 HARV. L. REV. 816, 836.

<sup>2</sup> 30 HARV. L. REV. 97.

avoidable, and not infrequently helpful if its equivalence to or difference from older expressions is clearly indicated, we must generally be content with received terminology, making the precise sense in which we use it as clear as may be. Even so, misunderstanding is not always avoided.

Lawyers have become accustomed to the ambiguity which lurks in the words "common law," and when one writer refers to the common law as opposed to statute law, another lawyer is not likely to assume that he means the common law as opposed to the Roman system. But where equity and equitable rights are concerned, perhaps because the various meanings of the words are less sharply defined, there is not infrequent confusion. My learned friend emphatically says:<sup>3</sup>

"If it be 'confusion' to attach to the word 'right' the adjective 'legal' when the right in question is recognized and sanctioned by a court of law, and the adjective 'equitable' when the right is recognized and sanctioned by a court of equity, I must plead guilty to being hopelessly confused, for that is precisely the way in which I have always used these terms. This seems to me to be not only their natural meaning but also the only really useful one to attach to them. To me the confusion appears to lie in the minds of those who assert that there is some 'fundamental' or 'essential' characteristic of 'equitable rights' — aside from the fact that they are recognized and sanctioned by courts of equity — which differentiates them from all other classes of 'rights' and requires us to regard them not merely as equitable but as *exclusively equitable and not legal*, even after they have come to be fully recognized and sanctioned by courts of law as well as by courts of equity."

There is, of course, no confusion or impropriety in using the word "equitable" and "legal" with the meanings stated in this quotation. They are unquestionably the primary meanings of the words. But the words have other meanings, and I indicated that I was using them in another sense. I am treading in the footsteps of many distinguished judges and lawyers; and while even such authority cannot make an unsound principle sound, it can give a meaning to a word in legal writing, not open to successful attack. The word "equitable," as applied to rights, has not only the meaning with which I used it, and also that which my friend prefers, but it has others. It has at least the following meanings:

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<sup>3</sup> 30 HARV. L. REV. 460.



1. Exclusively enforceable in courts of chancery;
2. Enforceable in courts of chancery, though not exclusively;
3. Originally enforceable in courts of chancery though no longer so, but retaining characteristics which distinguished the right in question when enforced in chancery;
4. Having characteristics of rights enforced by courts of chancery, though neither now nor at any other time enforced in such courts;
5. Fair or just.

It may be, and doubtless is, unfortunate that one word should have such a variety of meanings, and a law writer may perhaps prefer to confine his own use of the word to something less than all of these meanings, but that all of them are in good current legal use, a little reflection will readily convince the most skeptical.

I presume this will hardly be doubted so far as the first two meanings are concerned. It is the third meaning which seems to excite hostility in some writers and teachers of law; but when a court or a statute speaks of an equitable defense to an action at law, the chances are that the court or the statute is not referring to a proceeding in chancery to obtain an injunction, but to a plea in an action at law. It is in this sense that courts have used the word in the scores of cases where the right of an assignee of a chose in action has been called "equitable," though his action was necessarily brought in a law court. An assignee has for centuries recovered in an action at law; and for more than a century has rarely had occasion to ask the aid of a court of equity. He was not allowed to proceed in equity in any ordinary case,<sup>4</sup> and without the aid of any statutes allowing equitable pleas, and long before such statutes were passed, a court of law afforded the assignee protection against defenses of the debtor acquired after notice of the assignment.<sup>5</sup> Courts which during the nineteenth century called the rights of the assignee equitable must, therefore, have been using the word "equitable" not as meaning enforceable in chancery, but as retaining certain "fundamental" or "essen-

<sup>4</sup> Since *Cator v. Burke*, 1 Brown's Ch. 434 (1785), where an assignee brought suit in equity against the maker of a bond and his bill was dismissed because his remedy should have been at law, it has been settled that the assignee's exclusive remedy was in courts of law.

<sup>5</sup> See *e. g.* *Winch v. Keely*, 1 T. R. 619 (1787); *Welch v. Mandeville*, 1 Wheat. (U.S.) 233 (1816); and cases cited by Professor Cook, 29 HARV. L. REV. 824-28.

tial" characteristics of equitable rights. It is in this sense that the word is habitually used in code states where law and equity are said to be "merged." There are no longer courts of chancery in such states, but certain rights retain not only the characteristics of their former days when they were enforced by courts of chancery, but also the name.

It would be easy to add further illustrations of this use of "equitable," but this seems unnecessary.

An instance of the fourth use may be found where a court says, as courts so often say, that an action for money had and received is an equitable action, and this statement, I think, will carry to the minds of most lawyers a more definite idea than that the action is based on principles of fairness.<sup>6</sup>

Analogous to this is the common usage which my friend criticizes of calling various negotiable defenses to a negotiable instrument, equities. This he deems erroneous, but he will not doubt that it is current usage of courts, and if it is considered that a maker induced by fraud to sign a promissory note may maintain a bill in equity to regain the note, and that the boundaries of his defense when sued at law on the note are identical with those of his right to maintain a bill in equity against a holder of the instrument, the current usage may not seem strange.

For the fifth meaning of "equitable," it is enough to refer to the dictionary.

One who in the discussion of legal theory uses the word may fairly be expected to make it clear in which of these meanings he is using it; but he can hardly be reproached if he does this for using the word in any of these senses. The simplest way that occurs to me of avoiding a part at least of the ambiguity is by using the word "chancery," instead of "equity" for the description of mere questions of procedure. But, in any event, one who

<sup>6</sup> "It has been held that the action for money had and received, being an equitable remedy, lies generally where a bill in equity will lie, and that decisions, therefore, in Chancery, which recognize the principle, may be justly held to sustain it. *Culbreath v. Culbreath*, 7 Ga. 64, 50 Am. Dec. 375, 381. This has been thought, however, to be too broad and indefinite a statement. The better rule is laid down in *Moore v. Mandlebaum*, 8 Mich. 433, 448, to the effect that as a general rule, where money has been received by a defendant under any state of facts which would, in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover in an action for money had and received." *Bither v. Packard*, 115 Me. 306, 312, 98 Atl. 929, 932 (1916).



wishes to understand Anglo-American law as it has been written, must be prepared to recognize these different meanings, and must also be prepared to recognize a corresponding ambiguity in the antithesis to "equitable." The antithesis to the fifth meaning which I have given of that word is "inequitable," but the antithesis in each of the other cases can be nothing but "legal," which has, moreover, still another meaning as opposed to "illegal." If, then, a right is said to be equitable, rather than legal, and "equitable" appears or is stated to be used in the sense of having or retaining the characteristics of a right enforced in chancery though now enforced at law, it should not be understood as a denial that the right has any of the characteristics of a right enforced by a court of law, for obviously it has the particular characteristic of being itself enforceable in a court of law; but that it preserves or has some fundamental characteristics of rights enforced in chancery which differ from rights ordinarily enforced by a court of law.

Though Professor Cook summarizes my argument with verbal fairness,<sup>7</sup> the ambiguity of meaning in "legal," and "equitable," lurks in his summary, and in his subsequent discussion, by giving to those words the meaning which he uses as their exclusive one, he magnifies a difference between us into undue proportions. In the main we agree.

Not only do I assent to the statement of Professor Cook quoted at the beginning of this article, but I also cordially agree with his statement that "the ownership of a chose in action is a complex aggregate of jural relations." He criticizes my statement of his position as inadequate for a failure to recognize that the assignee instead of "a right," has a variety of rights, privileges, powers, and immunities. I must express my regret for any inadequate presentation of his views; yet in different language, it was also my purpose to insist upon, what he insists upon, namely, the lack of all the incidents of full ownership in the assignee. To speak of him as "owner," is an ambiguous statement which cannot well be traversed or admitted. The same may be said of the statement that the assignee has a "legal title." If by this is meant that the assignee enforces his rights in a court of law, it is certainly true, and has been for centuries; and it would please me better to have that idea expressed in that way.

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<sup>7</sup> 30 HARV. L. REV. 462.

As I cordially agreed with most of what Professor Cook wrote, I did not deem it necessary to repeat all that he had written. What I criticized, and still criticize, is that after having explained that the assignee, prior to notice to the debtor, has not all the rights, privileges, powers, and immunities of full ownership, he thereafter habitually calls the assignée "owner" and possessed of the "legal title," and gives the weight of his approval to the equally ambiguous statements of others.

It is because I deem it important to define the extent of the ownership of an assignee, that I believe it to be desirable to speak of his ownership as "equitable."<sup>8</sup> If that word is given the meaning which I have ventured to give it, I believe that this will without elaboration define in a not inexact way the rights, privileges, powers, and immunities of an assignee of a chose in action, not only as they are generally in the law today, but as they ought to be.

I quite agree also that when any property is alienated the assignee is invested by the law with rights similar to the assignor's and does not, strictly speaking, become the owner of the same rights.<sup>9</sup> There is, however, this difference between contractual choses in action, at least,<sup>10</sup> and other property, that while the boundaries of most rights and liabilities are determined by the law without a hampering general principle, so that a transferee of most property can be given such rights as may seem advisable, it is otherwise in the case of contracts. The law in recognizing their validity has established the principle that the boundaries of contractual obligation are fixed by the expressed mutual assent of the parties. The law may give defenses to contracts or limit their operation for any reason of policy without regard to expressions of assent by the parties, but if it imposes liability upon them different from that which they have assumed in terms express, or fairly to be implied, it is violating an established principle. And this it certainly seems to do when it holds A liable to C (an assignee) without his assent on a contractual obligation to pay B (an assignor). Where, however, the difference in the nature of the obligation is merely formal or of negligible practical importance,

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<sup>8</sup> If in every case where I have used "right" or "rights" in this and in my preceding article the words "privileges, powers, and immunities" be added, in the reader's mind my argument will not be affected.

<sup>9</sup> See also AMES, *LEGAL ESSAYS*, 194.

<sup>10</sup> Compare AMES, *LEGAL ESSAYS*, 210.



the technical objection may be and has been disregarded. Otherwise a state bankruptcy law, such as was in force in a number of states prior to 1898, vesting title to the bankrupt's contracts in his assignee, would have violated the clause of the federal constitution prohibiting the impairment of contracts.

I agree that the "equitable origin [of the rights of the assignee] must never be lost sight of if we are to understand the present state of our law;"<sup>11</sup> and I think the best way to avoid losing sight of this important fact is to call the right or ownership, or rights, privileges, powers, and immunities of the assignee equitable. The surest way to induce losing sight of the origin, or to induce the belief that the origin is now of no importance, is to say the assignee is the owner and has the legal title.

I also agree that if the assignee gives notice of his assignment to the debtor, and no invalidating circumstance has happened between the assignment and the notice, the assignee is vested with all the rights, privileges, powers, and immunities of an owner. Why then bother about calling his ownership equitable? Because it furnishes an answer to other situations than that just supposed and enlightens us on the effect of the assignment without the notice.

I see little occasion for discussion whether the right of the assignee is equitable in any other sense of the word than that in which I have used it, but I certainly agree with Professor Cook's proposition that the ownership of the assignee, such as it is, is "concurrently legal and equitable" in the sense that it is "recognized and sanctioned both by common law and equity." Could any one doubt it? Certainly, I do not.

I more than cordially agree with Professor Cook's statement that even if it be admitted argumentatively that rights enforced by courts of equity have such a fundamental characteristic as I have attributed to them,

"... it does not follow that they *necessarily* lost this characteristic when in the course of the development of our law they came to be recognized and sanctioned by courts of law. . . . There is no *inherent* reason why the chancellor should change his views as to their scope, or why the law court, recognizing their historical origin may not give them precisely the same limitations they previously had when exclusively equitable."<sup>12</sup>

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<sup>11</sup> Professor Cook, 29 HARV. L. REV. 831.

<sup>12</sup> 30 HARV. L. REV. 467. (Italics are Professor Cook's.)

My whole essay was aimed to establish the truth of this statement put in the positive form that there is an inherent reason why the law courts, not only because of the historical origin of the rights in question, but because of the fact that thereby just results will be secured, should give them their old limitations.

The misunderstanding between Professor Cook and myself, I conceive, to have been chiefly due to the fact that we are interested primarily in different aspects of the question, and therefore lay our emphasis differently. His interest seems largely in theoretical classification and analysis of jural relations, and in what is "intrinsically necessary." I do not dispute the value of such work, but it is not my primary interest. My main concern is wholly practical, both in regard to the results achieved concerning choses in action, and in regard to terminology. When I speak of what is "possible," I refer to what seems to me a legal possibility for a court bound by the system of Anglo-American common law, not to what is a conceivable idea in general jurisprudence.

In a passage that I have quoted from my learned brother's essay, he doubts the existence of essential or fundamental characteristics in rights developed by courts of chancery. He also casts doubt upon the generality of application of the principles of purchase for value,<sup>13</sup> and the allegation that an innocently acquired legal title will prevail over an equitable right he regards as a striking example of formalistic jurisprudence.<sup>14</sup> Here, I cannot go along with him. I should be reluctant to believe that the jurisdiction of chancery had no further unifying characteristic than that of a kind of trespass on the case, developed to include odds and ends for which the legal writs afforded no redress. In its origin doubtless this may describe chancery jurisdiction, but without imitating Blackstone in his admiration of the laws of England, I take pleasure in believing that for centuries, not only has it been characteristic of the rights enforced by equity that they are directed primarily against one person, and secondarily against those who stand in no better position (that is, donees or purchasers with notice); but that this way of working out most of the legal problems with which equity has had to deal is valuable and should not be given up. If this is true, it follows as a natural and necessary consequence of the essential characteristics of personal rights, that a right to property

<sup>13</sup> 30 HARV. L. REV. 476.

<sup>14</sup> 30 HARV. L. REV. 481.



which is valid against one person, or set of persons, is ineffective when title to the property gets into the hands of another person. Such a rule is no more "formalistic" than the rule that a purchaser of real estate from one who has already conveyed it, acquires title if he is a purchaser for value without notice, and the prior conveyance has not been recorded. "Axiomatic" is a better word than "formalistic" to express the rule.

Even if I had no faith in the principles to which I have just referred, I should still advocate a method of speech not misleading to courts and lawyers who still preserve their faith in them.<sup>15</sup>

Professor Cook argues that the terms "ownership" and "legal title," may well be applied to the qualified ownership of an assignee because of the analogy of the recording acts. I believe it is not wholly by accident that the best illustration which he can find for a dealing with rights by courts of law in a manner analogous to that of courts of chancery is that furnished by recording acts—a modern statutory creation. The illustration proves that there is no impossibility in achieving through the procedure of a court of law the results achieved in many instances by courts of equity, but it certainly does not show that the common law has tended to develop a similar kind of qualified ownership; or even that common-law courts, however unnecessarily, have not been antagonistic to it.

The subject is a large one and worth a much fuller treatment and illustration than it is in my power to give, but I will submit a few suggestions in support of my belief that there is a real danger that the old boundaries of an assignee's rights first established by courts of equity, and afterwards adopted by courts of law, will be lost sight of when the assignee sues in his own name if his right is described as a legal title; or when it is said without more that the assignee of a chose in action is the owner of it.

The doctrine of *stoppage in transitu* was first developed by courts

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<sup>15</sup> For example, a few weeks ago the Supreme Court of the United States said in *Duncan Townsite v. Lane*, 245 U. S. 308, 311 (1917): "The doctrine of *bonâ fide* purchaser for value applies only to purchasers of the legal estate. *Hawley v. Diller*, 178 U. S. 476, 484 (1899). It 'is in no respect a rule of property, but a rule of inaction.' POMEROY, EQUITY JURISPRUDENCE, § 743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone v. Chiles*, 10 Pet. (U. S.) 177, 210 (1836)."

of equity,<sup>16</sup> and it is probable that had the right continued to be enforced by courts of equity, it would have been available, like other equitable rights, against all but innocent purchasers for value;<sup>17</sup> and that the price due under a subsale could have been subjected to the creditor's right if the goods themselves had passed into the hands of such a purchaser, but courts of law having taken charge of the matter, have fixed different boundaries to the right, which are arbitrary, and based, I venture to believe, not on teleological considerations, but on ignorance and procedural inadequacies.<sup>18</sup> The seller's rights are still qualified now that they are enforced by courts of law, and the qualifications are in effect narrower than those imposed in equity; but the main point is that they are different, and I think worse than they would have been had the fundamental and essential characteristic of an equitable right been preserved.

It is interesting to observe the different results which have been achieved in mortgages, and in conditional sales of chattels. The inability (not necessary but actual) of courts of law to recognize ownership qualified on equitable principles has made a confusion of the latter subject which can be cured only by statute. In dealing with the security of a mortgage involving the same situation in all but form, courts of equity have established the principles which should govern a title held merely for security; and when they had thus clearly marked out the road which should have been followed, there is no inherent reason why courts of law should not have been able to work out analogous results with conditional sales. But for the most part they have failed to do so<sup>19</sup>—not from any inherent inadequacy of procedure, but from an inability to understand clearly that a seller might have the "legal title" and the buyer a beneficial ownership which should be a property and not simply a contract right.

The same difficulty in recognizing ownership qualified on equitable principles, has prevented courts from dealing satisfactorily with the rights of parties in goods shipped under bills of lading. In order to secure payment to the seller of the price of goods or to secure a loan by a banker who has advanced the price, bills of

<sup>16</sup> *Wiseman v. Vandeputt*, 2 Vernon, 203 (1690); *Snee v. Prescott*, 1 Atk. 245 (1743).

<sup>17</sup> See the opinion of Hardwick, in *Snee v. Prescott*, 1 Atk. 245 (1743).

<sup>18</sup> See WILLISTON ON SALES, §§ 525, 536-38.

<sup>19</sup> WILLISTON ON SALES § 579



lading are constantly made out to the order of the seller or of the banker when they are shipped in conformity with an order of a buyer, or under a contract with a buyer. That the consignee named in the bill of lading or the holder of it to whom it was assigned for security has a property interest in the goods, and that, nevertheless, the buyer also has a property right, has seemed extremely difficult for the courts of common law to grasp,<sup>20</sup> although such a conception clearly underlay the customs of the merchants who adopted the methods in use. That one or the other party must have the "legal title," and if one has it the other can have only a contract right, has seemed to too many courts a necessary truth. It has taken statutes to correct this evil.

The qualified ownership derived from an infant or insane person, or one under duress, also may profitably be compared with ownership qualified on equitable principles by fraud or mistake in its acquisition. Where the limitation was established by courts of law attention seems to have been centered on the character of the original transaction, and the hardship to a subsequent innocent purchaser who obtained title in good faith was not weighed against the hardship of the original owner.<sup>21</sup> So far as duress is concerned, this has been changed in modern times under the influence of courts of equity.<sup>22</sup> It was comparatively easy for courts of law to make this change of the rule in regard to duress, because not only did they have the example of the equitable defenses of fraud and mistake, but the doctrine of undue influence could not well be kept permanently separate from the doctrine of duress, though even yet the boundaries of the latter doctrine are injuriously affected in many jurisdictions by the narrow limitations of the common law.

I cannot see that there is any danger whatever that an assignee, if his right, title, or ownership is described as equitable, is likely to be deprived of any of the rights, privileges, powers, and immunities which Professor Cook and I would both give him; but I feel satis-

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<sup>20</sup> See WILLISTON ON SALES, §§ 281, *etc.*

<sup>21</sup> "The law regards chiefly the right of the plaintiff and gives judgment that he recover the land, debt, or damages because they are his. Equity lays stress on the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear." AMES, LEGAL ESSAYS, 232.

<sup>22</sup> For the early law see Sheppard's Touchstone, page 61: "For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself." The modern law is shown by Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596.

fied that when the assignee is simply said to be the "owner" of the chose in action and to have the "legal title" thereto, many will enlarge the scope of his rights, privileges, powers, and immunities beyond what they have been in the past and beyond what I believe to be just. And for the most part, they will do this not because of any consideration of teleological fitness, but by mechanical reasoning from the words "owner" and "legal title." The idea is so ingrained in the mind of the modern judge, lawyer, and layman, that all property and all rights are assignable, that emphasis must be laid on limitations rather than the reverse. I find that most members of a first-year class, consisting of intelligent college graduates, generally assume at the outset of a discussion of the subject not only that all rights in choses in action can be effectively assigned, but that all duties under them may also be assigned.

The statutes which purport to vest legal title of the chose in action in the assignee,<sup>23</sup> are not, I believe, carefully reasoned enactments for the purpose of enlarging the rights of an assignee in any other than a procedural way; but certainly they seem to justify an argument that their effect is more than procedural. I have at least one learned friend who holds this belief. Probably when an English judge said that "Henceforth in all courts a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods,"<sup>24</sup> he meant more than the judge who said that the Judicature Act does not "give any new rights, but only affords a new mode of enforcing old rights;"<sup>25</sup> but how much more I do not believe he had defined in his own mind.

The second mode of expression marks boundaries exactly, the first does not. If, as I infer from the passage quoted from Professor Cook, near the beginning of this article, he agrees with me that the rights, privileges, powers, and immunities of the assignee are or should be changed only procedurally by the allowance of an action in his own name, I should regret to lose, on account of any difference in terminology, an ally in the war against those who would give the assignee more enlarged substantive rights.

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<sup>23</sup> 30 HARV. L. REV. 105.

<sup>24</sup> *Fitzroy v. Cave*, [1905] 2 K. B. 364, 373.

<sup>25</sup> *Walker v. Bradford Old Bank*, 12 Q. B. D. 511, 515 (1883).



SOME ASPECTS OF FIFTEENTH-CENTURY  
CHANCERY

## I

IT is now more than thirty years since Justice Holmes in a brilliant and daring essay<sup>1</sup> set on foot an inquiry<sup>2</sup> which has revealed the remote beginnings of English equity. Equity and common law originated in one and the same procedure and existed for a long time, not only side by side, but quite undifferentiated from each other. Their origin is to be found in the system of royal justice which the genius of Henry II converted into the common law; but this royal justice was in the beginning as much outside of, or even antagonistic to, the ordinary judicial system of the Anglo-Norman state as was ever the later equity of the Chancellor. There was no equity as a separate body of law; for the king's justices felt themselves able to dispense such equity as justice require. In fact to speak of law and equity is to import into the twelfth and thirteenth centuries a modern distinction which is absent. Just as Bracton was inclined to see in the King's Bench and Council but one court, so he regarded equity as an active, mitigating principle working in and through the administration of royal justice. The manner in which equity in this sense disappeared from the common law is become common knowledge. The jealousy of parliament, which may be but the reflection of the attitude of the community at large, the realization that the power to make new writs is a power to make new law, forced the writs into a closed cycle, and put an end to the free development of the common law. Without doubt the judges, who seem to become more conservative as ecclesiastics sit more rarely on the bench, furthered this restrictive movement. At all events the law became so rigid and inflexible, its practitioners were so absorbed in nice questions of form

<sup>1</sup> "Early English Equity," 1 L. QUART. REV. 162; SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, II, 705.

<sup>2</sup> Through the work of Maitland, and more recently of Mr. Bolland this new field has been explored. Dr. Hazeltine has well summarized the results of the earlier work: "The Early History of English Equity," ESSAYS IN LEGAL HISTORY (ed. Vinogradoff), 261. A very careful treatment of the whole subject is given by George Burton Adams, "The Origin of English Equity," 16 COL. L. REV. 87.

and pleading, that there was no longer room for equity. This has become the situation early in the fourteenth century; as a result a new field for the royal prerogative is found and equity is administered in the council from which in the next century the Court of Chancery breaks off.

If this view be correct, equity antedates the appearance of chancery as a court by more than two hundred years. It has not been accepted without challenge and the question of the continuity of equity has been raised.<sup>3</sup> Into this question I do not propose to enter; for I am concerned primarily with the evolution of equitable doctrines through chancery in the fifteenth century. The lines upon which modern equity has developed were determined in this crucial period. For good or ill equity is outside the common law, even antagonistic to it. It becomes in a very real sense a rival system, as contemporary testimony bears witness. "For these two lawes," complains an aggrieved sergeant,<sup>4</sup> "one being contrarye to the other cannot stande together but one must be as voyde. Wherefore it must needs followe, that, if this lawe be maintayned in chauncery by a subpoena, the common lawe which is contrarie to that, must needs be as voyde and of none effect." Although it has become the fashion<sup>5</sup> to discount the opposition between equity and law, this very opposition was an important factor in the fifteenth century. One should notice further that the shaping of equity is in the hands of ecclesiastics who knew little of the common law but a good deal of another system; their interference with the law is indirect, but more marked in that they act through an independent court.<sup>6</sup> For the future there will be two distinct bodies of doctrine which clash with each other. Thus

<sup>3</sup> See Holdsworth in 26 *YALE L. J.* 1, and the reply of Professor Adams, 26 *YALE L. J.* 550. As Professor Adams has pointed out, there is no necessary disagreement in the two positions. It should be noticed, however, that the term, "equity," is commonly used in the courts of law in the sense of analogy (BROOKE, *ABR.*, Parliament, 13, 19 ff.), whereas in St. German's treatment equity excepts from the law on grounds supplied by reason and conscience. See Vinogradoff in 24 *L. QUART. REV.* 379. Though upon the institutional side there seems to be no break in the continuous development of equity, the use of the words, "reason" and "conscience," indicates the reception of new doctrines through which the older equity is quite transformed.

<sup>4</sup> "A Replication of a Serjaunte . . .," HARGRAVE, *TRACTS*, 323, 325.

<sup>5</sup> E. g. MAITLAND, *EQUITY*, 17 ff. But cf. Hohfeld, "The Relations between Equity and Law," 11 *MICH. L. REV.* 537; "The Conflict of Equity and Law," 26 *YALE L. J.* 767. Professor Hohfeld's argument appears to me to be unanswerable.

<sup>6</sup> Holdsworth, "The Early History of Equity," 13 *MICH. L. REV.* 294.



English equity becomes a radically different thing from what it would have been had it remained a part of the common law.

Fifteenth-century chancery presents a number of interesting problems. One of the first relates to the organization of the Court of Chancery itself. Many cases that seem to begin in chancery are in fact heard and determined in the council. Hence an attempt must be made to differentiate the two jurisdictions and to determine when and how chancery became an independent court. We know further that the Chancellor sometimes consulted judges and even apprentices of the law. Was this a normal or abnormal procedure, or, what is more important, does it indicate that chancery borrowed from the common law or at least followed the analogy of legal doctrines? Again the rivalry between the two courts which culminated in the struggle between Coke and Lord Ellesmere is exhibited plainly in the fifteenth century. How far did the fear of an encroaching, competing court influence and stimulate the growth of the common law itself? Finally we may ask the most important question of all: In what kinds of cases did the Chancellor grant relief, and what was the basis of the doctrines he developed? Contrary to a somewhat general notion, I venture to suggest that most of these questions have not been finally solved, and, though I make no pretense of possessing the talisman, I propose to examine the material out of which the final solution may perhaps be worked.

## II

As the common practice has been to place great reliance upon the Year Books it will be well to take notice of them first. For the collection of the cases, most of which are very familiar, I have relied upon the abridgments. The oldest abridgment<sup>7</sup> notices but four cases, one under the title "Conscience" and three under "Sub pena." Fitzherbert<sup>8</sup> has some twenty-three, or as you please to count, twenty-four entries, all under the title, "Sub pena." Brooke's "Abridgment" has the most complete collection and is further distinguished by a more discriminating classification.<sup>9</sup> His

<sup>7</sup> STATHAM'S ABRIDGMENT, *Epitome Annalium Librorum Tempore Henrici Sexti*, was published circa 1495.

<sup>8</sup> Fitzherbert has all of Statham's cases; in at least one instance he appears to have copied Statham verbatim: FITZ. ABR., Sub pena, 23; STATHAM, ABR., Conscience, 1.

<sup>9</sup> In addition to the titles quoted, notes concerning chancery and equity will be

most extensive title, "Feffementes al uses,"<sup>10</sup> unfortunately throws little light on equity; the most interesting cases will be found under "Conscience & Sub pena & Iniunctions."

The weakness of this line of authority is revealed by a cursory examination. It represents in the main an extremely brief period, the short reign of Edward IV; perhaps this is explained by the fact that the appearance of a chancery case in the Year Book is largely fortuitous. Moreover a goodly number of these reports are inaptly described as cases. They are mere incidental references to chancery in an action at common law, as, for example, the remark<sup>11</sup> of Moyle, J., in a writ of *Quare Impedit*, or Littleton's casual statement,<sup>12</sup> "*Jeo veia un foits un Subpæna port par tiel.*" Again an equity case is rehearsed in an action of debt,<sup>13</sup> or there is a necessary reference to chancery because an injunction has "arrested" judgment in trespass in the King's Bench.<sup>14</sup> If to these be added the extra-judicial expositions of "conscience" by the judges and an occasional reporter's note, fully half the cases are accounted for. The remaining half do purport to be real proceedings in chancery, but they are cases in which the Chancellor sought the advice of the judges, sergeants and even apprentices, usually in the Exchequer Chamber. Now from this the inference has been drawn that the Chancellor constantly resorted to the advice of the judges before deciding a doubtful case. I do not think the evidence of the Year Books is of great value upon this point; for the mere fact that a number of cases of consultation is reported is quite without significance. It is precisely those cases in which a common-law judge did assist that the reporter will take down in his notebook. The apprentice is a regular attendant of the common-law courts; that is an important part of his education. He does not attend hearings in chancery, and his opportunity to report an equity case is chiefly through the arguments before the judges. It is certainly worthy of note that the decrees in chancery,<sup>15</sup>

found under *Actio sur le cas*; *Barre*; *Courts*; *Judges*, *Iustices et lour power*; *Judgements*; *Iurisdiction*; *Parliament*; *etc.*

<sup>10</sup> Probably the collection of cases under this title was occasioned by the passage of the Statute of Uses.

<sup>11</sup> Y. B. 6 EDW. IV, 10. 2 (*ad fin.*). See also Y. B. 21 EDW. IV, 22. 6.

<sup>12</sup> Y. B. 7 EDW. IV, 18. 16.

<sup>13</sup> Y. B. 37 HEN. VI, 13. 3.

<sup>14</sup> Y. B. 22 EDW. IV, 37. 21.

<sup>15</sup> Of the decrees which I have been able to examine, the great majority is made by the Chancellor alone.



so far as they are at present available, do not bear out the notion of frequent consultation. Further, many of the cases in the Exchequer Chamber concern uses; this is not without significance. Whatever his general attitude, the common lawyer realized that in protecting the use the Chancellor was doing a work of vast importance. Indeed, it is not improbable that one reason why the common law failed to give any legal effect to the use was that to do so would rob that device of much of its efficacy. If the statement<sup>16</sup> of Frowyk, C. J., be correct, in the time of Henry V the greater part of the land of England was in feoffment to uses; judges and attorneys, like other men, were vitally interested in the protection of the use. Again, as Spence<sup>17</sup> has pointed out, once the use is recognized, there is no occasion to depart from regular legal rules; and, as the Chancellor sought to direct the use by analogy to rules governing the devolution of the legal estate, the presence of the judges was necessary and important. But the Year Books do not explain why or how the Chancellor came to enforce uses, nor do they give much evidence of his theory and practice.

With regard to the cases as a whole, two observations may be made. The judges often base their advice, not upon the law, but upon their own ideas of "conscience." In an interesting argument, which unfortunately is reported only in an abridgment,<sup>18</sup> Prisot, C. J., pressed very strongly a legal analogy; he was interrupted by Fortescue,<sup>19</sup> C. J., who said, "*Nous sumus a arguer la consciens icy et nemy la ley. . . .*" This is an important admission in that it recognizes "conscience" as a juristic principle which finds its proper application in chancery. But to accept such interpretations of "conscience" as appear in the remarks of the judges is to approach the doctrines of equity from the wrong direction. In the second place, the reports come from hostile, or at all events, prejudiced

<sup>16</sup> Y. B. 15 HEN. VII, 13. 1. In the Year Book the name is spelled Frowike. It is doubtful whether he was Chief Justice at this time. Cf. FOSS, JUDGES, *sub nom.*, Frowyk. The statement quoted is repeated by COKE, CO. LITT. 272 a.

<sup>17</sup> 1 EQ. JUR. 384.

<sup>18</sup> FITZ. ABR., *Sub pena*, 23.

<sup>19</sup> Perhaps Fortescue's aspirations to the chancellorship, which he later asserted he had held, gave him a peculiar tenderness for "conscience." The derivation he suggests for the word ("*consciens dicitur a con et scio, quasi simul scire cum deo, scilicet de sauer la volonte de dieu cy procheine come reason puit*") seems to indicate a familiarity with scholastic philosophy. Cf. DIALOGUS DE FUNDAMENTIS LEGUM ANGLIE, f. vii, verso.

witnesses. It was a constant complaint of the common lawyer that the Chancellor did not acquaint himself sufficiently with the common law; indeed Coke<sup>20</sup> singles out Sir Robert Parning for especial praise for that he "knowing that he that knew not the common law could never well judge in equity . . . did usually sit in the Court of Common Pleas . . . and heard matters in law there debated." But this practice of the earlier chancellors, admirable as it may have been,<sup>21</sup> was not followed by the ecclesiastical chancellors of the fifteenth century. In consequence it is not surprising that judges and sergeants took such opportunity as a common hearing in the Exchequer Chamber afforded to express themselves vigorously on what should be the principles and practice of the Court of Chancery, so much so as sometimes to draw a sharp reproof.<sup>22</sup> Hence it is necessary to read their statements in the light of their prejudices.

I do not wish to belittle the Year-Book reports of chancery cases; merely do I desire to emphasize their limitations. They preserve the only extant accounts of what the Chancellor is supposed to have said and some of his remarks are very interesting. It would be a real loss did we not have a generalization<sup>23</sup> of the "cases of conscience" from the mouth of the Chancellor; nor can one overlook the vividly reported debates, the sudden outburst of Cardinal Morton<sup>24</sup> who justified a subpœna by saying, "*Nullus recedat a Curia Cancellariae sine remedio*," and Bishop Stillington's maxim,<sup>25</sup> "*Deus est procurator fatuorum*."<sup>26</sup> These and many more are of great value, as is likewise the evidence of the pressure exerted by chancery upon the common law.<sup>27</sup> Thus if they be

<sup>20</sup> 4 INST. Cap. viii, 79. Parning was, in Coke's words, "Chief Justice of England," before he was made Chancellor.

<sup>21</sup> It excited such violent admiration in Lord Campbell that he supposes Parning to have "laid the foundation-stone of that temple of justice, afterwards reared to such fair proportions by an Ellesmere, a Nottingham, and a Hardwicke." LIVES OF THE CHANCELLORS, (3 ed.), I, 246.

<sup>22</sup> An attorney who sought to parade his views was halted by the abrupt statement, "*ne parlez puis de l'autorite de cest court*." Y. B. 27 HEN. VIII, 14. 6 (*ad fin.*).

<sup>23</sup> Y. B. 7 HEN. VII, 10. 2.

<sup>24</sup> Y. B. 4 HEN. VII, 4. 8.

<sup>25</sup> Y. B. 8 EDW. IV, 4. 11.

<sup>26</sup> The Y. B. reads, "futuorum," an obvious mistake. See 24 L. QUART. REV. 373, 380.

<sup>27</sup> E. g., Fairfax, J., in Y. B. 21 EDW. IV, 22. 6. Note the surprising assertion that the King's Bench may issue an injunction. A clearer statement appears in BROOKE, ABR., Conscience, 21.



properly utilized and brought into relation with other material, no misapprehension will result; but to rely upon them for adequate evidence of the jurisdiction of chancery is to invite error. And yet this is precisely what has often been done. Out of a mass of books West's "Symboleography" may be instanced as typical. His analysis of "causes remediable in Chancery,"<sup>28</sup> is based largely upon these very cases, supplemented by references to the "Diversity of Courts" and "Doctor and Student." The latter treatise is indeed of unique importance, but it has often been misinterpreted. Even a more striking example is that of Coke, whose account of chancery<sup>29</sup> is not merely colored by his native bias, but is subject to the same limitations in the matter of authority. Thus the tradition became established, and it has endured to our own time. Now the vice of this method of approach is not only that it ignores the material out of which a study of chancery should be made, but it persists in envisaging equitable doctrines through the medium of common law. In part this is responsible for the widespread impression that the chancellors decided cases without regard to principle or precedent, and gave free play to whim and caprice. It has led also to a somewhat contemptuous view<sup>30</sup> of the Court of Chancery and to an utterly inadequate conception of the extent of its jurisdiction. We are thus treated to a picture of chancery painted by the common lawyer, — a picture that is not simply imperfect, but in many particulars untrue.

The only satisfactory evidence of the actual proceedings in chancery is to be found in a series of documents preserved in the Public Record Office and known as the Early Chancery Proceedings.<sup>31</sup> This collection contains petitions addressed to the chancellors from the time of Richard II to the early years of Henry VIII. It is estimated that there are some three hundred thousand; the mere number is bewildering, and it is only since the record office has begun to prepare careful calendars<sup>32</sup> that anyone will have the

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<sup>28</sup> SYMBOLEOGRAPHY OF THE CHAUNCERY (ed. 1618), § 18.

<sup>29</sup> 4 INST. Cap. viii.

<sup>30</sup> E. g., REEVES, HIST. OF ENG. LAW, (2 ed.), III, 384: "Its jurisdiction did not comprehend a great extent and the exercise of it was feeble and imperfect . . ."

<sup>31</sup> Hereafter cited: E. C. P. The petitions are divided into bundles. There is no standard method of citation; for convenience I have adopted the method of indicating the number of the bundle in Roman numerals and the number of the petition in Arabic numerals. Thus, X:10 means Bundle ten, petition ten.

<sup>32</sup> The calendars are more useful to a pedigree hunter than a legal historian; for,

hardihood to attack so huge a mass of material. A portion, unfortunately very small, of the petitions has been published. When the Calendars of Chancery for the reign of Elizabeth were printed the commissioners published a number of specimen petitions drawn from the earlier series. It is impossible to tell upon what principle of selection they proceeded, nor how far the petitions there presented are representative of the whole body. In 1896 the Selden Society carried on the work, abandoned half a century earlier, with the "Select Cases in Chancery,"<sup>33</sup> edited by Mr. W. P. Baildon. Elsewhere other specimens<sup>34</sup> will be found, but although much good work has been done, the fact remains that less than one per cent of the petitions is as yet published.

The standard collections have rendered the form of the petition<sup>35</sup> so familiar as to require no comment, but one of its defects as evidence must be noticed. So far as its extraordinary jurisdiction is concerned, chancery<sup>36</sup> was not a court of record in the fifteenth

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though names of parties and places are always given in detail, the reader is often left to guess the nature of the suit.

<sup>33</sup> In this collection all the petitions in Bundle III are printed, and in addition a number of select petitions. Mr. Baildon has prepared the first scholarly edition of the Chancery Proceedings.

<sup>34</sup> *ARCHAEOLOGIA*, 59 (Part. I) 1; 60 (Part II) 353, collected by C. Trice Martin, Esq.; *THE ANTIQUARY*, IV, 185; V, 38, collected by S. R. Bird, Esq. In *OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY*, IV, 172, I have brought together petitions to illustrate the treatment of contract in chancery. If other printed specimens exist I am not familiar with them.

<sup>35</sup> The statement of the case is frequently so informal and in language so uncouth or obscure that it seems clear that many petitioners were without professional advice. This marked characteristic of the chancery petitions was found to have a counterpart in the Bills in Eyre, recently discovered by Mr. Bolland, and published in 30 S. S. In the first enthusiasm of discovery, it was assumed [*e. g.*, Pollock, "Transformation of Equity," *ESSAYS IN LEGAL HISTORY* (ed. Vinogradoff), 291], that in the bills the ancestor of the petition was at last found. This assumption has not stood the test of careful analysis, and the better opinion seems to be that the petition in chancery developed from the petition to the council. Holdsworth, 26 *YALE L. J.* 14; Adams, 16 *COL. L. REV.* 87, 98; Powicke, 30 *ENG. HIST. REV.* 330, 332; BALDWIN, *KING'S COUNCIL*, 283, note 1.

<sup>36</sup> There was a common-law side to the Court of Chancery of which a familiar account is given by COKE, 4 *INST. Cap.* viii, 79. For the most part the proceedings were begun by common-law process, and it is generally agreed that in the exercise of this jurisdiction the Chancellor followed the law and could not advert to matters of conscience. Since Pike published the case of *Hals v. Hynckley*, 1 *L. QUART. REV.* 443, it has been known that these proceedings sometimes began by bill, and that the defendant was brought into court by subpoena. Hence one must always be on one's guard; for a petition in the Early Chancery Proceedings may involve a case on the common-law side of the court.



century. The decrees were not enrolled,<sup>37</sup> and the only record which we have of them is in the chance case when the decree was indorsed upon the bill itself. The absence of records gives color to the complaint of the common lawyer and it is doubtless true that the ecclesiastical chancellors did not feel themselves hampered by the lack of a previous decision. Still the fact that so many bills have been preserved indicates that they were kept for some purpose, and we know that in some cases the chancellors did consult the old bills for guidance.<sup>38</sup> However if a bill be unindorsed it is impossible to say that relief was granted in that particular case, and as the great majority of the bills are without indorsement, the limitations of the printed collections are apparent. This difficulty can be overcome only through an intensive study of the Early Chancery Proceedings. I wish to point out some lines along which it may be profitably pursued.

### III

Perhaps no situation is better calculated to reveal the antithetical attitudes of equity and the common law than the simple one which arises when an obligor has satisfied his obligation, but has taken no acquittance.<sup>39</sup> If the obligee brings an action of debt, the obligor cannot wage his law against the sealed instrument nor plead payment, and hence he is without defense. The law's failure to protect the foolish person who is so stupid as not to protect himself is justified by the theorist very easily.

"It is ordained," says the Student in the Dialogue,<sup>40</sup> "by the Law to avoyd a great inconvenience that else might happen to come to many people; that is to say, that every man by a Nude parol, and by a bare Averrement should avoid an Obligation. Wherefore to avoid that inconvenience, the Law hath ordained, that as the defendant is charged by a sufficient writing, that so he must be discharged by sufficient writ-

<sup>37</sup> The decree rolls begin in 26 HEN. VIII, the decree and order books in 36 HEN. VIII. Some specimens will be found in MONRO, *ACTA CANCELLARIAE*, 328 ff.

<sup>38</sup> In Y. B. 22 EDW. IV, 6. 18, the Chancellor is reported to have said that it was the common course to grant relief in certain cases, "*car nous trovoms recorde en le chancery de tiels.*" I believe this must refer to the indorsements on the petitions. Cf. an interesting decree, E. C. P. XXIX, 13; OXFORD STUDIES, IV, 216.

<sup>39</sup> Variations will be found in OXFORD STUDIES, IV, 85-97.

<sup>40</sup> DOCTOR AND STUDENT, Dial. I, chap. 12. A similar argument is made by the sergeant, HARGRAVE, TRACTS, 323, 324.

ing, or by some other thing of as high authority as the Obligation is. And though it may follow there upon, that in some particular case a man by occasion of that generall Maxime may be compelled to pay the money againe that he payd before: Yet neverthesse, no default can be thereof assigned in the Law."

The Chancellor took no such beatific view of the law; he did regard the "nude parol," and he did not hesitate to order the cancellation of an obligation.<sup>41</sup> However the order to cancel an obligation may not produce the desired result; for if the obligee refuses to produce his obligation in chancery the action at law can proceed. Although there was some fluctuation of opinion among the judges as to the effect of a decree of cancellation, it was settled in the reign of Henry VI,<sup>42</sup> if not earlier, that the decree of itself could have no effect upon the instrument: its operation was confined to the person of the defendant and did not extend beyond him. It was thus that the theory that equity acts *in personam* was fastened upon the Court of Chancery, but it speedily found a method of turning this limitation to advantage. An injunction is but an order to the person; the common lawyer was precluded by his own decisions from viewing it in any other light. Hence the Chancellor could well maintain that an injunction against prosecuting an action at law was merely an order to the defendant and

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<sup>41</sup> An extreme case arises when the instrument chances to be a statute merchant; for that is matter of record and if the Chancellor may tamper with it, what records of the law are safe? In Y. B. 22 EDW. IV, 6. 18, such a case was put before the judges in the Exchequer Chamber. A recognizor in a statute merchant had paid the money but failed to take a release; the recognizee proceeded to sue out execution. If he were brought into chancery he would admit payment; ought a subpoena to be granted? Fairfax declared that it would be against all reason to grant a subpoena and thus by the testimony of two witnesses to upset matter of record. (There is no significance in the number, two. Commonly a much larger number were heard in chancery; and cf. Y. B. 16 EDW. IV, 9. 10, *ad fin.*). The recognizor ought to have protected himself; "*moi semble qu'est sa folie.*" The Chancellor replied that to grant a subpoena where an obligation was paid was common practice in chancery and he went on to compare the relief given against the heir of a feoffee to uses. This particular illustration roused the ire of Hussey, Chief Justice of the King's Bench; if descent or a statute merchant might be impugned by the testimony of two witnesses, all legal records would be endangered. But Hussey would place any sealed instrument in the same category, and he concluded grandly, "*Jeo die ceo pur ley et issint est le ley.*" The Chancellor, according to the reporter, conceded the exception of the statute merchant. But see the decree in 10 S. S. 140, where a statute merchant is ordered canceled by the advice of the judges.

<sup>42</sup> Y. B. 37 HEN. VI, 13. 3.



not an interference with a court of common law. The judges took with ill relish this neat counter move, which was the more exasperating, in that they had no process wherewith to retaliate;<sup>43</sup> and directly the injunction was used with effect the seeds of a long and bitter struggle were sown. The following petition, hitherto unpublished, presents through its indorsement more detailed evidence of the procedure of chancery than any other that I have seen. As it bears directly upon this question discussed so bitterly in the Year Books, the reproduction of the *ipsissima verba* seems warranted.

To the most reverent ffader in god & his good & gracioux lord tharche-  
bysshopp of Caunterbury & Chaunceler of Inglond.<sup>44</sup>

In humble wyse shewith unto your good lordshipp Thomas Iden of Stoke in the Countie of Kent Esquier, that, where he was bounde by his Obligacion to oon Edward Wode, late Citezen & Grocer of London, in the some of xvij li. vj s. viij d., sithen whiche tyme of makyng of the seyd Obligacion the seyd Edward Wode in his lif Resceyved xiiij li. by thandes (*sic*) of dyvers Sufficyent & Credybyll personez; And the seyd Thomas Iden & the seid other personez by whoos handes the seyd xiiij li. was payde, of great trust & Confydence and by cause the seyd somez of money were payed at dyvers dayes and tymes, the seyd Obligacion was left & sufferd to remayne in the handes & kepyng of the seyd Edward Wode in his lif; And after the decease of the seyd Edward Wode the seyd Obligacion came to thandes (*sic*) of Angneis, late wyf of the

<sup>43</sup> Punitive damages were awarded where an injunction was dissolved, Y. B. 21 Edw. IV, 78, 20, but such a method would not be available if chancery retained jurisdiction. In Y. B. 22 Edw. IV, 37, 21, the judges urged a plaintiff to proceed to judgment in defiance of an injunction and assured him that if he were imprisoned in the Fleet by the Chancellor, they would release him by *habeas corpus*. But the plaintiff would not be persuaded.

<sup>44</sup> E. C. P. CCCXXVI, 49. Two other indorsed petitions involving injunctions against actions at law may be of interest. In E. C. P. LIX, 242, an obligor, the petitioner, alleges that the obligee, defendant, altered an obligation so as to make it read 40 s. instead of 20 s. and brought an action of debt upon it by attorney. The obligor pleaded "nat his deed," but the obligee "hath caused a panell to be returned of soche persones of his affynyte which woll here no evydence for the part of your seid Orator. . . ." A subpcena was sought. In his answer, E. C. P. LIX, 243, the defendant denied every allegation in the petition, but the decree, indorsed on the petition, shows that an injunction was granted staying the action at law until the matter could be heard in chancery. This case was in 19 Edw. IV. Another petition, E. C. P. LX, 84 (22 Edw. IV), prays for relief against suit on a bond of one hundred pounds, given to secure a debt of half that amount. The defendant, it is alleged, by divers devices made it impossible for the petitioner to pay the debt. An injunction, in terms similar to those in the principal case, was granted.

seyd Edward Wode, pretending to be executrice of the testament of the seyde Edward Wode, whiche Agneis hath taken to husbonde oon Thomas Denys; And howe be it the seyde Thomas Iden hath be redy to paye to the seyde Agneis iij li. vj s. viij d. residue of the seyde xvij li. vi s. viij d. and to have delyverie of the seyde Obligacion, that to doo the seyde Agneis hath alwey refused; yet that nat withstanding, the seyde Thomas Denys and Agneis hys wyf as executrice of the testament of the seyde Edward, of their Covetyse mynde & yevyll dyspocycion have Comensed and (*sic*) accion of Debt ayenst your seyde Supplyaunt upon the seyde Obligacion afore the kynges Justices of his Comon Benche, entending by the same to recover the seyde xvij li. vj s. viij d. ayenst all ryght and good conscience, wherof your seyde Supplyaunt hath no remedy by the Comon lawe of this lande: It may therefore please your good and gracieux lordshipp, the premisses tenderly to consydre & to graunt a writt of Sub pena to be dyrectyd to the seyde Thomas Denys and Agneis his wyf commaundying them by the same to appere be fore the kyng our souverayne lord in his Chauncery at a Certeyn day & under a certeyn payn by your good lordshipp to be lymytted there to answeere to the premisses; And that it may please your good lordshipp to commaunde & streytly to engoyne the seyde Thomas Denys and Agneis that they procede no fferther in their seyde accion unto the tyme the premisses and all Circumstauncez therof be dewly examyned and determyned as shall accord with reason & good conscience, And your seyde supplyaunt shall dayly pray to god for preservacion of your good lordshipp.

PLEGII DE PROSEQUENDO:<sup>45</sup>

{ Johannes Smyth, *de* London, Gent'.  
 { Henricus Horn, *de eadem*, yoman.

INDORSED: *Coram Rege in Cancellaria sua die lune xxvj die Octobris Anno Henrici vij xxij<sup>o</sup>.*

*Memorandum quod termino*<sup>46</sup> *Michaelis videlicet vicesimo octavo die Octobris Anno regni regis Henrici septimi vicesimo secundo iniunctum fuit per dominum Cancellarium Angliae et Curiam Cancellariae Bartholomeo*

<sup>45</sup> At the end of many petitions there appear the names of the persons who stand as pledges for the petitioner. This was probably an ancient practice, *cf.* BROOKE, *ABR.*, Conscience, 24, but by Stat. 15 HEN. VI, c. 4, it was provided that no writ of subpœna should issue until the petitioner had found sureties to satisfy the defendant for his damages in case the allegations made in the petition were untrue. This soon became a mere form, for the pledges were given fictitious names, the draftsman using colors or fish according to his fancy, until at length John Doe and Richard Roe appear. MARTIN, *ARCHAEOLOGIA*, 60 (Part II), 354-55.

<sup>46</sup> The reference to Michaelmas term is puzzling. It may be that I have misread the manuscript. Chancery did not keep terms; the court was always open. BROOKE, *ABR.*, Jurisdiction, 74; 1 Spence, *EQ. JUR.* 383.



*Prouz attornato infrascriptorum Thome Denys et Agnetis sub pena viginti librarum de terris et catallis ipsius Thome Denys levenda quod nec ijdem Thomas et Agnes nec aliquis alius eorum nomine aut per eorum mandatum, auctoritatem seu instanciam, in aliquo placito siue querela materiam infracontentam aliquo modo tangentem coram Justiciis dicti domini Regis de Banco communi seu alibi ulterius persequantur, quousque materia in infrascripta petitione contenta coram dicto domino Rege in Cancellaria sua praedicta pendens indecisa plenarie fuerit discussa et determinata vel aliter a dicto domino Cancellario et Curia habuerint licenciam.*

*Memorandum quod termino sancti Michaelis videlicet vicesimo octavo die Octobris anno Henrici vij xxij<sup>o</sup> dies data est partibus infrascriptis ad producendos testes ad probandum materiam infracontentam hucinde usque cras sancti Martini tunc proxime sequentis cum<sup>47</sup> expressita renunciacione ulterioris termini dilacione ex assensu parcium.*

*Memorandum quod termino sancti Michaelis videlicet decimo septimo die Novembris anno Henrici vij xxij<sup>o</sup> iniunctum fuit per reverendissimum in Christo patrem Willelmum Cantuariensem Archiepiscopum Cancellarium Angliae Thome Iden quod ipse adducet vel adduci faciat coram domino Rege in Cancellaria sua infra novem dies post dictum decimum septimum diem Novembris proxime et immediate sequentem omnimodas scripturas et litteras acquietancie solucionem cuiusdam summae infrascripta petitione contentae concernentes [vel quod]<sup>48</sup> sinautem<sup>49</sup> Thomas Denys et Agnes a dicta curia [quiate] dimittantur.*

*Memorandum quod termino sancti Michaelis videlicet vicesimo nono Novembris Anno Henrici vij xxij<sup>o</sup> ordinatum et decretum fuit per venerabilem in Christo patrem Willelmum Cantuariensem Archiepiscopum Cancellarium Angliae et Curiam Cancellariae quod si infrascriptus Thomas Iden rationabilem finem cum infrascriptis specificatis Thoma Denys et Agnete uxore eius de et pro solucione cuiusdam summae infrascriptae infra Octavas sancti Hillarij tunc proxime sequentis minime fecerit, quod tunc praedicti Thomas Denys et Agneis ab omnibus et singulis deductis et allegatis in infrascripta petitione penitus absolvantur et a dicta curia superinde totaliter dimittantur quieti sine die et ulterius quod Iniuncio [. . .]<sup>50</sup> per eundem dominum Cancellarium Bartholemeo Prouz attornato ipsorum Thome Denys et Agnetis ut praenotatur<sup>51</sup> facta, relaxata est ac idem Bartholemeus dicta summa xx li ea consideratione quietus et exoneratus existit.<sup>52</sup>*

<sup>47</sup> The passage "cum . . . dilacione" is very obscure. This portion of the decree is almost illegible and hence the reading is conjectural.

<sup>48</sup> Words in brackets are struck out.

<sup>49</sup> "si non autem"?

<sup>50</sup> An erasure; probably "facta" was written twice and the first subsequently erased.

<sup>51</sup> A conjectural reading.

<sup>52</sup> "existit"?

Through the decree this case can be followed from the first step to the conclusion. On the 26th of October the complainant presents his petition, praying for a subpoena and an injunction. Probably the subpoena was granted at once and two days later an injunction was issued, directed to the attorney of the defendants; in its somewhat clumsy phrase it is designed to restrain not only the attorney, but the defendants or anyone acting in their behalf, from proceeding further with the legal action until the matter be heard in chancery. The subsequent orders show that it was effective. Whether the defendants had already appeared cannot be determined; it was a common practice to grant an injunction upon the presentation of the petition. Indeed it was charged in the articles of impeachment of Wolsey that he granted injunctions without a bill. The fact that the attorney is mentioned in the order, although he is not mentioned in the petition, seems to indicate that the defendants had put in an appearance, perhaps by attorney.<sup>53</sup> The absence of a written answer is inconclusive. On the day on which the injunction is issued a time is set for the hearing, namely the "morrow of St. Martin" (November 12), when both parties are ordered to produce their witnesses. At this hearing the complainant was evidently unable to establish his case by oral evidence and on the 17th of November a further order is made requiring him to bring into chancery such written evidence<sup>54</sup> as he may have of the payment alleged in the petition. Twelve days later comes the final decree, in conditional form. Unless the complainant will make a final settlement (*rationabilem finem*) with the defendants, presumably by paying the residue of the sum due, the defendants will be dismissed *sine die*, and the injunction will be dissolved.<sup>55</sup> This indicates very nicely the flexibility of chancery procedure and at the same time shows the careful investigation of all the facts of the case. By successive orders the Chancellor is able to retain jurisdiction of the matter involved until final settlement; it is noteworthy that, once having taken jurisdiction, he disposes

<sup>53</sup> Appearance by attorney was a not uncommon practice. See 10 S. S. 1, 14 ff.

<sup>54</sup> The words, "*omnimodas scripturas et litteras acquietancie*" may refer to a sealed release, etc., but I do not so interpret them.

<sup>55</sup> If the change from subjunctive to indicative in the final sentence of the decree is significant, it would mean that the injunction is dissolved in any case. But the decrees rarely exhibit a nice discrimination in moods, and the indicative after *quod* is not unusual.



of all the questions and does not remit the parties to further action at law. The final decree, unlike a judgment at law which must necessarily follow the writ upon which it is predicated, may assume any form requisite to meet the exigencies of the particular case.

One phrase invites comment. The decree is made "*per . . . Cancellarium et Curiam Cancellariae*." This form, which is very common, might lead to the inference that the decree was made, not by the Chancellor alone, but by the Court of Chancery, implying perhaps the presence of other officials, judges or councillors, as a part of the court. I believe, however, that the words indicate nothing more than that the decree of the Chancellor is the decree of the court; for the same form is preserved in general use down to the time of Charles II,<sup>56</sup> when there can be no question of the existence of chancery as a distinct tribunal. Further, as the council and the judges are mentioned in many decrees the absence of any mention in this case seems to be conclusive. In fact the decrees not only reveal in detail the procedure of chancery, but offer the best material out of which the two problems of the consultation of the judges and the relation of chancery to the council<sup>57</sup> may be solved.

#### IV

In retrospect at least, the two most important doctrines evolved in chancery relate to contract and uses. With reference to the first I may be brief as I have attempted to examine it in detail elsewhere.<sup>58</sup> The Chancellor gave relief in a very heterogeneous class of cases, but I am here concerned primarily with the simple case of parol contract, in which chancery gave a remedy nearly one hundred years before Assumpsit had been evolved out of Trespass on the Case. Appeal is made to equity not simply because the litigant seeks a better remedy than is afforded by common law; for while specific performance is granted early in the fifteenth century it is by no means the only relief sought. Chancery gave damages as well. What is most significant, however, is

<sup>56</sup> 1 SPENCE, EQ. JUR. 389.

<sup>57</sup> The relation of chancery to the council has been very carefully studied by Professor Baldwin in KING'S COUNCIL, chap. x. It may be doubted whether the decrees will throw much new light upon this question.

<sup>58</sup> "The History of Contract in Early English Equity," OXFORD STUDIES, VOL. IV.

that no distinction is drawn between misfeasance and nonfeasance; the Chancellor seems to have proceeded upon a purely contractual theory. Unlike the common lawyer he did not approach contract through tort. Perhaps the most striking feature of these contracts, or as the petitioners prefer to call them "bargains" and "accords," is their formless character, and indeed it was their very informality which put them without the pale of common law. The community, however, cannot await with patience the slow evolution of a legal system whose staple analogy is the technical relation of lord and tenant. Feudalism as a practical system had ceased to be of importance long before the law which was bottomed upon it had adapted itself to a new environment. The fifteenth century saw a rapid expansion of commercial enterprises and the necessity of some recognition of fluid and formless agreements became pressing. In addition the host of "bargains" between people of humble station, who from ignorance or lack of means failed to observe the technique of legal forms, cried out for attention. What more natural than that the Chancellor, who assimilated the *lex mercatoria* to the law of nature,<sup>59</sup> and whose court was always open to the poor, should step into the breach, and enforce promises upon the principles of reason and conscience? The extent of his activity is too evident to be dismissed casually, and no study of the development of contract is complete which fails to give due weight to the influence of chancery.

Of uses I speak with great hesitation as I have never made any effort to collect the cases from the Early Chancery Proceedings. I am confident, however, that there are hosts of such cases from the persistency with which they obtruded themselves upon my attention when I was searching for other matters. The poverty of the material relating to uses in the bills published by the Record Commissioners, of which Spence<sup>60</sup> complained, is entirely accidental; unfortunately the nature of the "Select Cases in Chancery" made it impossible to supply this deficiency. Doubtless the *cestui que use* first appealed to the council,<sup>61</sup> but by the time of Henry V petitions to the Chancellor are very common,<sup>62</sup> in 1450 the use is

<sup>59</sup> Y. B. 13 EDW. IV, 9. 5; cf. OXFORD STUDIES, VOL. IV, 131 ff.

<sup>60</sup> 1 EQ. JUR. 447.

<sup>61</sup> There was a case of a use before the council as late as Henry V. BALDWIN, KING'S COUNCIL, 278.

<sup>62</sup> The earliest decree in the printed collections is in 24 HEN. VI; 2 Cal. Ch. xxii.



recognized as a vendible interest.<sup>63</sup> It seems probable that the development of the use of land can be traced step by step through the petitions, and it is highly desirable that the evolution of the most important institution of chancery should be studied in the best sources.

But the use of land is no isolated phenomenon in chancery. There are numerous cases of uses of chattels and trusts of money. As an illustration of the latter the following petition deserves notice.

To the ryght reverent and wirchipfull lord the Archbysshopp of Canturbury and Chaunceller of England.<sup>64</sup>

Besebeth mekely your poure and continuall Bedeman, Nicholas Lyghtfote, that where oon John Lyghtfote his fader toke tokepe uppon trust to oon Robert Oke xx li. in money tobe delyvered to the forsaid Nicholas whenne he were att full age and whenne the said Robert were required, the said Nicholas divers tymes and oft hath required after the deth of his ffader hath required<sup>65</sup> the forsaid Robert tomake delyverie to him of the said xx li. after the will and entent of his fader, which todo the said Robbert utterly hath refused and yit refuses to the grete hurte and hynderyng of poure Suppliant, Consideryng ryght gracious lord that your poure bedeman hath no remedy atte commone lawe: Pleas hit your ryght gracious lordshipp to consider thies premisses and there uppon of your good grace to graunt to your poure Suppliant a writt sub pena direct to the said Robert gyfying hym in charge to appere before yow in the Chauncerie att a certayn day under a certayn payne as good faith and conscience requiren, and that for the luf of almyghty god and in the way of charite.<sup>66</sup>

A single unindorsed petition is entitled to little weight, and I should not venture to print this one except that I believe it to be typical of a large class,<sup>67</sup> of which representatives may be found throughout the fifteenth century. If the real intent of the parties was that the specific twenty pounds be delivered to the petitioner, there would be a true trust in the modern sense. But it may be

<sup>63</sup> E. C. P. XIX, 59; OXFORD STUDIES, VOL. IV, 199.

<sup>64</sup> E. C. P. XVI, 627. The date cannot be fixed with certainty. It may be as early as 8 HEN. IV; it is not later than 35 HEN. VI.

<sup>65</sup> The repetition of the words "hath required" is quite characteristic of the careless phrasing of many petitions.

<sup>66</sup> The "pledges to prosecute" are omitted.

<sup>67</sup> E. C. P. XVI, 628 is a case precisely similar. In examining the Chancery Proceedings I noticed many cases of this type but unfortunately did not transcribe more than one.

doubted whether the ecclesiastical chancellors demanded in all cases the existence of a specific trust *res*; the money is delivered in confidence, and if confidence raises a binding obligation,<sup>68</sup> it may be satisfied by the delivery of an equivalent twenty pounds. At the same time this transaction may be viewed as a contract, and as equity readily recognized the right of the beneficiary to sue on the contract the remedy sought here could be supported on that theory. Confessedly the subject needs further investigation; it may be that a careful study of the petitions involving trusts of chattels and money would throw new light upon the development of the trust idea in chancery.<sup>69</sup>

## V

"Three things are to be judged in court of Conscience: Covin, Accident and breach of Confidence." So runs the antique rhyme, attributed to Sir Thomas More, which has often been quoted as a summary of the extraordinary jurisdiction of chancery. Fraud (covin) and accident must be passed by, copiously as they might be illustrated from the petitions; I merely wish to notice one or two further cases in which "conscience" may be involved. The first is suggestive of a familiar problem in Quasi-Contract. In a peculiarly artless petition<sup>70</sup> one John Trerise recounts his plaint. He chanced to be in London with his friend John Gotholhan when the latter borrowed forty shillings of a certain Henry Mederose.

"The whiche Henry," continues the complainant, "asked the said John Gotholhan ho shuld be his suerte for the said xl s. and he answered and seid . . . 'there nedith no suerte for this money betwene you and me, for we be of olde aqueyntaunce and knowledge;' and so they were agreed. And for asmuche that your said suppliaunte thenne seid to the said Henry these words, 'I trow ye dare not dowl of youre payment at the said day by cause of youre olde aqueyntaunce,' the said Henry hath taken a pleynt of dette withynne the said Citee ayenste your said suppliaunte supposyng that he undirtoke for the said xl s. And by force

<sup>68</sup> As to the effect of "confidence," see Vinogradoff in 24 L. QUART. REV. 373, 381.

<sup>69</sup> There is danger in focusing attention too severely upon any one institution. The protection of the use proceeded *pari passu* with the enforcement of parol contract. There seems to be an interaction of principles between contract and use, and the doctrine of "conscience" is involved in both. But I do not venture to advance a definite theory without a further study of the Chancery Proceedings.

<sup>70</sup> E. C. P. XLV, 292. Date uncertain, probably 1443.



of the whiche he hath paid the said xl s. to the said Henry ayenste all reson and conscience."

The complainant did not attempt to recover the money from the creditor but instead "certified the said John Gotholhan of the premisses;" the debtor refused to pay and "for asmuche that there was never any contracte"<sup>71</sup> betwene youre said suppliaunte and the said John Gotholhan upon the said xl s. wheruppon youre said suppliaunte myght have an accion by the course of the comyn lawe ayenste the said John Gotholhan," the complainant was left without remedy except in chancery. He therefore prayed for a subpcena to the debtor, requiring him "to answeere to the premisses and to be coarted to pay and contente the said xl s. to youre said suppliaunte as *reson and conscience requireth*." It would be dangerous to draw definite conclusions from a single bill, but it suggests a problem which might well be explored by searching for analogous cases. One may hazard the guess that relief was granted. The debt is discharged by the forced contribution of the complainant. Why should he not have relief against the person who in reason and conscience should have discharged it? In fact the situation is not very different from that in which the plaintiff has under constraint discharged the defendant's obligation. The obligation of the debtor, in the absence of an express undertaking, to discharge his surety had its origin in equity and was imported into the law by Lord Mansfield. It is true that this complainant was not a surety nor even a co-obligor of the defendant; but it is recognized today that if the plaintiff discharge the defendant's obligation to prevent the sale of his (plaintiff's) property, the defendant must respond;<sup>72</sup> and this is clearly an equitable principle. The courts have taken the view that the seizure of the property must be a lawful seizure, which would distinguish the principal case where the action of debt was without foundation. Still it has been argued with great force that an unlawful seizure may be fully as coercive as a lawful one, and that a remedy should be given against the obligor;<sup>73</sup> so here the complainant is no volunteer, but

<sup>71</sup> The only "contract" which would give a remedy at law would be a deed. Y. B.

44 EDW. III, 21. 3; HOLMES, COMMON LAW, 264.

<sup>72</sup> Cf. *England v. Marsden* L. R. 1 C. P. 529 (1866); *Edmunds v. Wallingford*, 14 Q. B. D. 811 (1885). These cases were brought to my attention by Prof. Edgar N. Durfee.

<sup>73</sup> KEENER, QUASI-CONTRACTS, 395; WOODWARD, QUASI-CONTRACTS, § 250.

one who has been compelled to satisfy another's debt by duress of legal action. A decision in his favor would not be difficult to support upon principle.

The other matter relates to sorcery and witchcraft. A defendant, so it is charged,<sup>74</sup> "*par divers artz erroneus et countre la foy Catholic, cestassavoir socery*," has succeeded in withdrawing all the water from the petitioner's pond, to the great damage of his beasts pastured in the meadow adjoining. He brought an action of trespass and after failure therein concluded that loss of water by sorcery was "*une mater de conscience*." Another complainant<sup>75</sup> prays that the defendant may be restrained under oath from using "the craftys of enchauntement, wycchecraft & sorcerye" whereby "he brake his legge and [his] foul was hert." It is said that the "comyn lawe may nouzt helpe." Had the complainant but waited another hundred years he would have found a sympathetic audience in the common-law jury.<sup>76</sup> Perhaps the most interesting aspect of these petitions lies in the light which they throw upon the relation between chancery and the ecclesiastical court. It is the Court Christian which appears to be the proper forum<sup>77</sup> for pleas of sorcery and its twin, heresy, and if chancery was usurping jurisdiction in this matter it was against that court. If usurpation there was, it seems not to have been resented. Cases which have been collected by Mr. Trice Martin<sup>78</sup> show that the churchmen were constantly applying to the Chancellor for aid in suppressing witchcraft and sorcery or for relief when they were threatened with actions because of too vigorous treatment of witches. So when one of that kidney, *nomine* Tanglost, made "and ordeyned ij ymages of wax . . . to distrow" the Bishop of St. Davids and, dissatisfied with her own poor handiwork did "send for another woman which . . . cowde and hadd more connyng and experiens . . . and made the iij<sup>d</sup> ymage," the Bishop, finding that an 'examination before "iiij Doctours of Devynyte" followed by spiritual "corrections" had no effect upon so hardened a sinner, appealed to chancery for a 'subpœna.<sup>79</sup> However trivial or frivolous these

<sup>74</sup> E. C. P. XII, 168. Another petition relating to sorcery is E. C. P. XII, 210.

<sup>75</sup> 1 Cal. Ch. xxiv.

<sup>76</sup> Thayer, "Trial by Jury of Things Supernatural," LEGAL ESSAYS, 325.

<sup>77</sup> HALE, CRIMINAL PRECEDENTS, *passim*.

<sup>78</sup> MARTIN, ARCHAEOLOGIA, 60 (Part II), 353.

<sup>79</sup> E. C. P. CCLXVII, 41; MARTIN, ARCHAEOLOGIA, 60 (Part II), 374.



petitions may seem, they are too numerous to be ignored. Whether or no the suppression of "nygromancy" be ordained by "conscience," it gives another indication of the large place occupied by the Court of Chancery<sup>80</sup> in the life of the century.

## VI

The cases in which the doctrine of conscience had its peculiar application do not by any means exhaust the jurisdiction of chancery. By its methods of procedure and speed of decision the court was so definitely filling a popular need that suitors do not scruple to resort to subterfuges to gain access to chancery. Less exactness of pleading was required than by the law, and even if a bill were "misconceived" the complainant was not out of court; if he had any case at all he was permitted to amend orally, and the defendant was required to answer.<sup>81</sup> Thus it is that the Chancellor says that his decision proceeds "*secundum conscientiam et non secundum allegata*,"<sup>82</sup> by which the context shows him to mean that the truth is to be discovered by any means within his power. While the common law, through its reliance upon the witness function of the jury, would not compel, nay would not permit, the defendant to testify, the Chancellor found one of his most important weapons in the examination of the defendant under oath.<sup>83</sup> How successful this procedure was, is evidenced by the fact that the petitions uniformly pray for such examination, often adding that the defendant has already made material admissions which it is desired to get into evidence. If we remember that the court is governed by no set terms, but is always open, its more conspicuous virtues are manifest.

Situations too complicated for the common law were easily amenable to the procedural devices of equity. Familiar examples are found in the bill of account or bill of peace<sup>84</sup> of which there

<sup>80</sup> Cases involving sorcery came before the council; chancery did not have an exclusive jurisdiction in this matter.

<sup>81</sup> Y. B. 16 EDW. IV. 9. 9. Cf. remark of the Chancellor in Y. B. 9 EDW. IV, 41. 26: "*En cest court il n'est requisite que le bille soit tout en certain solonque le solemnity del comon ley, car icy il n'est forsque petition.*"

<sup>82</sup> Y. B. 9. EDW. IV, 14. 9.

<sup>83</sup> As illustrative of this procedure, see 1 Cal. Ch. xxxi; 2 Cal. Ch. xvii; OXFORD STUDIES, IV, 147.

<sup>84</sup> E. g., E. C. P. CCCXXVI, 37 (the defendant is bringing three actions of debt in different courts upon the same obligation).

are numerous specimens in the Chancery Proceedings. It was likewise with the administration of estates. Some of the circumstances which may have induced the Chancellor to act are set forth in an interesting petition.<sup>85</sup> A widow was made sole executrix by the last will of her late husband. He was, according to her statement, "a manne of great countenance and putte hym selve to grete costys and charges," so much so that she feared that his "goodys wold not stretche for to pay his dettys and perfourme his last will." Hence she feared to undertake administration, yet if she did not she might "lose all suche goodys as were bequest unto her." Neither her friends nor her learned counsel could advice her what to do; in the meantime two actions of debt had been brought against her as executrix, and "how so ever she aunswere to the same as yet by the cours of the comyn lawe she must nedys entricke her self and put her in iubardie of losse of all her movable goodys." It was no baseless fear to which she thus gave expression; for the position of the executor or administrator at common law was extremely precarious. A little negligence or a slight mistake in pleading and the liability of the testator or intestate became the personal liability of the representative.<sup>86</sup> Naturally this was so; for the common law, with its attention always focused upon actions between plaintiffs and defendants, did not consider the estate as a whole. Inasmuch as the common-law judges had in one way or another limited the field of action of the ecclesiastical courts,<sup>87</sup> there was an insistent demand for some tribunal competent to deal with the settlement of the personal estate. Thus the ecclesiastic regained in chancery what he had lost as a churchman; and in a later period the system of rules governing the rights and liabilities of the personal representative were elaborated in chancery. Equity profited at the expense of both common law and Court Christian.

It is not simply the cases in which the inherent defects of common-law procedure are manifest, with which we are here concerned. While it is accepted as a fundamental rule that no successful appeal can be made to the Chancellor unless the petitioner is without remedy at law, this does but raise the further question, what con-

<sup>85</sup> E. C. P. XLV, 132.

<sup>86</sup> HOLDSWORTH, *HIST. ENG. LAW*, III, 462-63.

<sup>87</sup> HOLDSWORTH, *op. cit.*, I, 398-99.



stitutes lack of remedy at law.<sup>88</sup> Common-law writs are oftentimes expensive luxuries and the person injured may be too poor to avail himself of the orthodox remedy. On the other hand his adversary may be very rich and powerful, and it will be hopeless to proceed in the ordinary courts. Thus we have one class of cases which come into chancery because of the inequality of the parties. There are many pathetic recitals in the bills, in which the complainants make much of their poverty or illness and the great fear in which they stand of the defendants. "Be the Comon lawe your seid Besecher getes no remedy, ffor ther der no Sheraff execute the Comon lawe agaynes thaym (defendants) in that parte."<sup>89</sup> No relief can be had against the defendant "because of his grete supportacion."<sup>90</sup> Such are but instances. Distrust of a jury, especially if it be impaneled in a local court, is repeatedly expressed. It is said to be "parcyall and not indifferent,"<sup>91</sup> or is described, with unconscious irony, as a "favorable enquest."<sup>92</sup> Indeed, so far as one can reconstruct popular feeling, a jury, far from being regarded as a palladium of liberty, was an object of aversion. If it is not the jury itself which is at fault, it is probably some local official. One instance will suffice.<sup>93</sup> The complainant<sup>94</sup> brought an "assise of fressh force . . . before the Mayor and Sheriffs of York." One of the Sheriffs before whom "the seid plee honged ther to be determyned," by color of office, "brought ynne to the seid Court atte divers dayes of the seid plee divers extorconners, riotours and misdoers . . . in terroure of the persones empanelled in the seid assize . . . so that such personnes empanelled . . . drust (*sic*) not appere & some apperyng drust not sey trougthe ther ynne." If

<sup>88</sup> There is one surprising ground of inadequacy of legal remedy, namely wager of law in debt or detinue, whereby the defendant may deprive the complainant of his just debt or chattel. OXFORD STUDIES, VOL. IV, 99, 111, 187 (E. C. P. XI, 427 a, decree indorsed).

<sup>89</sup> E. C. P. XXVII, 5.

<sup>90</sup> E. C. P. XV, 30.

<sup>91</sup> E. C. P. CCVI, 51.

<sup>92</sup> E. C. P. XXVIII, 75.

<sup>93</sup> Further examples of this type of case are E. C. P. XIII, 109 (Mayor and sheriffs of Bristol will not give judgment for petitioner, pretending a *certiorari* has issued out of chancery); LXXVIII, 29 ("oon of the Bailiffes of the under Shireff of Kent" arrested petitioner without cause "surmittyng that he shulbe utlawed" and will not release him "in lesse than your seid besecher will gif hym xx s. for a bribe."); XLV, 117 (Petitioner says the court "will take no credence to his enformacion" because of the might of the defendant).

<sup>94</sup> E. C. P. XIII, 85 (24 HEN. VI).

then we combine the cases in which through inequality of parties a remedy fails with those in which misconduct of courts and officials is the ground of appeal, we have a class which numerically at least is very large. The matters which form the substance of complaint in these cases concern ordinary legal causes of action, such as disseisins, torts and breaches of contract.

The prevalence of violence and outrage, so vividly pictured in the Paston Letters, which was induced by the disordered state of the country disrupted by civil wars, led to many cases in chancery partaking of a criminal nature. The cases are closely connected with those just discussed, but the remedy which is sought is not compensation; rather is it the punishment of the offenders. Thus where the petitioner has been threatened and assaulted, he prays that the defendants be brought before the Chancellor and "be so chastised & punysshid that it be an ensample & drede to all other sich mysdoers . . . Consideryng that the commune puple of that Shire crieth uppon the grete extorcion of hem and her mayne & that their punysshement shall cause grete rest & pees yn that Shire."<sup>95</sup> It is in brief the complete breakdown of the system of criminal justice which occasioned the Chancellor's action.<sup>96</sup> Beyond question appears the imperative need in mediæval England for a great judge who had the prestige and power to suppress the outrages of offenders who were strong enough to put at naught the ordinary processes of the law. It is but natural that such an one should be found in the Chancellor, who possessed the confidence of the king and who was not easily influenced by threats or bribes. Certainly the petitions bear witness to the belief among all classes that in the Chancellor resided a general power to redress all wrongs if for any reason the person injured could not protect himself through the common law. When the court of Star Chamber was established, most of the cases which required punishment were transferred to that tribunal, but chancery continued to give reparation under the Tudors. This phase of the jurisdiction in turn ceased as crimes diminished in frequency, and the courts of law proved more successful in giving compensation for injuries.

<sup>95</sup> E. C. P. X, 41. Cf. E. C. P. V, 175 (Ravishment and abduction of petitioner's daughter); V, 191 (Defendant, who is "*le plus grande meffesour, enbraceur, malignenour et commune barretor de tout le pays*," with others of his persuasion has put petitioner in terror of his life, etc.).

<sup>96</sup> Very likely the Chancellor acted in conjunction with the council.



In this brief review some of the more important of the Chancellor's activities have been noticed. The court draws its authority, in ultimate analysis, from the royal prerogative by which it is endowed with sufficient power to give relief in cases where the common law gave no remedy, whether by accident or design. But this is not all. The Chancellor did not scruple to interfere with that precious child of the law, the *franc tenement*, where the complainant was violently dispossessed of his land. Again, if common-law process were used fraudulently, or if the inequality of parties left the legal remedy of but theoretical value, a remedy was found in chancery. Through its superior process and procedure the court dealt easily with situations which baffled the common law, and by means of the injunction and specific performance, preventive and specific relief found a place in the English legal system. But novel and effective procedure was not chancery's sole contribution; for to a new substantive doctrine was due the recognition of the use and the enforcement of parol contract. Thus through the Early Chancery Proceedings is the wide-sweeping jurisdiction of the Court of Chancery revealed; we gain an insight into its influence and importance which will go far to correct the false impression created by the Year Books.

With Wolsey the great line of ecclesiastical chancellors came to an end. Their work was done; of its popularity there can be no question. Complaints of course there are and in the sixteenth century they become loud voiced. The subpœna is not to be found in the *Natura Brevium*; it is charged that it cannot be ordained by the law of the realm.<sup>97</sup> But these complaints proceed almost without exception from jealous practitioners of the common law who make grievance of the competition of chancery<sup>98</sup> and particularly of its interference with legal rights. Herein there lies a grave danger. Such is the political power of the Chancellor that, if his action be arbitrary and unrestrained, it may be utilized for purely political ends; it is not so much the Chancellor as the king who may deride the common law. Under such a government as England was fast developing this could not be tolerated. As Sir

<sup>97</sup> "Replication of a Serjaunte . . .," HARGRAVE, TRACTS, 323, 327.

<sup>98</sup> In 1547 "divers studentes of the Common-Lawes" complain that by reason of the activity of chancery the common law is so hampered that the courts have scarcely any business. ACTS OF THE PRIVY COUNCIL (1547-50), 48-50; Maitland "English Law and the Renaissance," SELECT ESSAYS, I, 193, note 51.

Frederick Pollock <sup>99</sup> has well said, the Court of Chancery could not remain a "fountain of unlimited dispensations," but must become "as regular a court of jurisdiction as any other." The change begins with James I, but its fruition comes in another century. Through the common lawyers <sup>100</sup> who had custody of the great seal from the Restoration onwards, the equity of chancery becomes recognized as part of the law of the land. The foundation, however, was laid already; for the ecclesiastics of the fifteenth century had erected the groundwork upon which the structure of modern equity is reared.<sup>101</sup>

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<sup>99</sup> The Transformation of Equity, *ESSAYS IN JURISPRUDENCE* (ed. Vinogradoff), 293. Cf. his statement in 21 *L. QUART. REV.* 434, 435.

<sup>100</sup> MAITLAND, EQUITY, 10. Cf. Professor Roscoe Pound in 30 *HARV. L. REV.* 201, 216.

<sup>101</sup> The iteration of the words, "reason and conscience," in the petitions raises a difficult problem to which only incidental reference has been made. I hope in the near future to examine the relation of the doctrine of conscience to the development of contract in chancery. The whole subject has been placed on a new footing by Sir Paul Vinogradoff's remarkable study of the influence of scholastic philosophy upon English equity, "Reason and Conscience in Sixteenth-Century Jurisprudence," 24 *L. QUART. REV.* 373.



## SOME LEGAL ASPECTS OF FEDERAL CONTROL OF RAILWAYS

THE proclamation of the President taking possession of the transportation systems of the country is ascribed to the powers vested in him by the joint resolutions declaring war against Germany and Austria, the Act of August 29, 1916, "and by virtue of all other powers thereto me enabling." While there is no disposition to question the authority of the President's action, the powers which warrant it must be scrutinized to determine how far the control of railways extends, and the effect of government control upon our system of railway regulation.

The pertinent portion of the Act of August 29, 1916, reads as follows:<sup>1</sup>

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

This paragraph was added to the Army Appropriation Act, passed August 18, 1916. If we look to the history of this legislation to discover the intent, it will be found that the enactment was designed to take care of our troops in Mexico. Congress was on the eve of adjournment. The railroad brotherhoods were threatening a strike. To provide for our forces in Mexico this amendment was incorporated into the Army Appropriation Act.

It is apparent that there was no intent that all railways should be taken. The unification of our entire transportation system under government control was not contemplated. Our entry into the European War was at that time considered a rather remote contingency. There is, however, language in the statute which authorizes a wider exercise of power than perhaps Congress in-

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<sup>1</sup> 39 STAT. AT L. 645 (1916).

tended. And we are all familiar with the attitude of the Supreme Court in construing statutes in the light of their history. If the history adds force to the construction found, it is usually cited. If it does not, the history is ignored.<sup>2</sup> But the whole intent of the statute is clearly confined to an executive function. It is a war measure; its purpose is transportation; it authorizes operation of trains; it authorizes no function of legislation, such as rate making, nor regulation, unless or except as they might be necessary to operation.

From this source of authority alone, the President is restricted to the explicit power conferred by the statute. An erroneous construction by the President of his authority under the statute would be no defense to an agent or officer exceeding the power conferred by Congress. In the *Flying Fish*,<sup>3</sup> a naval officer acting in obedience to the President's directions, which were themselves in excess of the power conferred by Congress, was held liable in damages.<sup>4</sup>

As Commander-in-Chief of the army, the President has war powers, which may under some circumstances authorize the taking of property without congressional warrant. These war powers are distinct from powers arising after a declaration of martial law. Where martial law has been declared, the civil laws are silent.<sup>5</sup> But there are war powers, independent of a state of martial law, which are constitutional powers, subject to constitutional limitations. The leading case on the war power is *Mitchel v. Harmony*.<sup>6</sup> In that case the court said:

"... in order to justify the seizure the danger must be immediate and impending and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise."

The court further said:<sup>7</sup>

"But we are clearly of the opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public

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<sup>2</sup> *Hoke v. United States*, 227 U. S. 308 (1913).

<sup>3</sup> 2 Cranch (U. S.), 169 (1804).

<sup>4</sup> And see *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774).

<sup>5</sup> *Ex parte Milligan*, 4 Wall. (U. S.) 2 (1866).

<sup>6</sup> 54 U. S. (13 How.) 115, 133 (1851). <sup>7</sup> *Ibid.*



service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.”<sup>8</sup>

The urgency and immediate necessity, the impending danger, are questions of fact. The decision of the President would have great weight in determining their existence. But if it be admitted that conditions required the seizure of the transportation system, the power over this system after seizure is still no greater than the public peril and necessity require. The necessity of operation may be granted. But there would scarcely be a necessity of rate legislation or regulation disassociated from operation. It was pointed out in *Wilson v. New*,<sup>9</sup> that while emergency may afford a reason for the exertion of a power dormant until the emergency arose, the emergency cannot call into life a power which has never lived.

During the Civil War, Congress enacted a statute authorizing the President to take over railroads and telegraph lines whenever the public safety required.<sup>10</sup> When the bill was before the Senate it was said by Senator Wade, of Ohio, that it was supposed that under the war power the Executive might seize this property without the authority of Congress, but it was thought better “that it should be done by authority of the law than by what may be considered by some as an usurpation.”<sup>11</sup> It is interesting to note that at the same session a joint resolution was passed placing limitations upon the power of the Executive, prohibiting him from constructing new roads or completing those under contract for constructions, so great was the fear of government ownership of railways.

The power of the Executive, whether derived from the Act of August 29, 1916, or the war power inherent in the Commander-in-Chief of our armies, does not extend beyond the seizure and use of private property to meet the needs of the occasion. It is a restricted power to this extent. But in so far as the public necessity requires the exercise of that power, all individual rights must yield.

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<sup>8</sup> See also *United States v. Russell*, 80 U. S. (13 Wall.) 623 (1871); *United States v. Pacific R. R.*, 120 U. S. 227 (1886); *Dow v. Johnson*, 100 U. S. 158 (1879); *Moyer v. Peabody*, 212 U. S. 78 (1909).

<sup>9</sup> 243 U. S. 332, 348 (1917).

<sup>10</sup> 12 STAT. AT L. 334 (1862).

<sup>11</sup> HANEY, CONGRESSIONAL HISTORY OF RAILROADS, vol. II, 158.

## RATES

A question has arisen if the Interstate Commerce Commission may still exercise its functions while the carriers are under government control. It is, of course, admitted that Congress may delegate its legislative power of rate-making to the President or to a director-general, as lawfully as to a commission. But in the Act of August 29, 1916, there is no such delegation of power. It must not only be specifically delegated, but the Act must describe the conditions, or rules, under which the tribunal or person shall exercise the legislative function.<sup>12</sup> "The true distinction," says Sutherland's "Statutory Construction,"<sup>13</sup> "is between the delegation of power to make the law, which involves a discretion as to what the law shall be and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."<sup>14</sup>

The power to legislate as to rates seems entirely absent from the Act passed, and the war power, under which the President might have acted without congressional authority. If, however, the exercise of the power of operation requires as an incident thereto rate-making, or rate regulation, it might be done upon the principle that when a statute gives a right or imposes a duty, it confers by implication the power necessary to make the right available, or to discharge the duty.<sup>15</sup> But except under unusual conditions rate-making and operation are separate and distinct functions. Movement of traffic, expedition, efficiency, and unity of operation are only remotely dependent upon rates. Rates affect revenue and financial conditions. Their influence upon operation is oblique.

Unusual circumstances may bring a closer connection between rates and operation. If, for example, lumber, coal, or other commodities necessary for military affairs will not move upon the published rates, the rates would affect operation to such an extent that the Director-General might control them. A demurrage rule is a component part of rates. The demurrage rule providing drastic

<sup>12</sup> *Field v. Clark*, 143 U. S. 649 (1892), and cases cited; *Butterfield v. Stranahan*, 192 U. S. 470 (1903).

<sup>13</sup> (2 ed.) vol. 1, 148.

<sup>14</sup> *Approved in Union Bridge Co. v. United States*, 204 U. S. 364, 382 (1907).

<sup>15</sup> 2 SUTHERLAND, STATUTORY CONSTRUCTION, (2 ed.) § 510, and citations.



penalties for failure to unload cars lately issued by the Director-General is an example of when rates materially and actually affect operation. And such a rule could be issued under the Director-General's power without regard to the Commission. But in the absence of unusual conditions the Director-General has no power over rates. While analogies are dangerous, the Director-General's power over rates may be compared to the Commission's power over intra-state rates. The power in each instance exists when the commerce is obstructed. The power extends to remove the obstruction, and no further.

Under the pending bill in Congress, the railroads are to be paid a fixed revenue, guaranteed by the government, and any excess becomes the property of government. Does this change the rights of the public to have reasonable and nondiscriminatory rates? The carriers, of course, immediately lose interest in rate schedules. Their property rights are no longer affected.

The common-law right to reasonable charges grows out of the theory that: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."<sup>16</sup> When the public takes the place of the owner of the private property, the reason for regulation disappears. There is a merger of interests between the owner and shippers. The charges imposed become analogous to taxes, and there is no limitation upon the taxing power. The power to tax is a power to destroy.<sup>17</sup> There also seems to be no constitutional limitation upon the power of the government to charge discriminatory rates. The equality clause of the Fourteenth Amendment is a limitation only upon the states. And the direction that duties, imposts, and excises shall be uniform<sup>18</sup> would hardly afford protection to a shipper against discriminatory rates. Fundamental principles of justice and equity might be invoked, but with doubtful results.<sup>19</sup>

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<sup>16</sup> *Munn v. Illinois*, 94 U. S. 113, 115 (1876).

<sup>17</sup> *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 431 (1819); *McCray v. United States*, 195 U. S. 27, 56 (1904).

<sup>18</sup> CONSTITUTION OF THE UNITED STATES, Art. I, Sec. 8.

<sup>19</sup> *Knowlton v. Moore*, 178 U. S. 41 (1900).

The House Bill provides that rates, except as the President may order, shall continue to be determined as hitherto. In both the Senate and House bills the President is authorized to initiate rates which shall be "fair, reasonable and just." Complaint may be made to the Interstate Commerce Commission, which may review the rates so initiated, and (under the Senate Bill) make orders concerning them, and (under the House Bill) make findings which are reported to the President. It is not to be presumed that the Commission will consider schedules initiated by the Director-General, as it has in the past considered changes instituted by the carriers. And when the President is authorized "when the public interest requires," to increase rate schedules, a fundamental change in the angle of review results. The Commission would hardly be expected to take the attitude of a friend of the shipper, as has been its custom. It is of course apparent that the object of this presidential power is to increase the revenues of the carriers for the benefit of the government. The relationship of rates, questions of discrimination, and the reasonableness of particular rates will not be the objects of presidential inquiry. But the revenues as a whole may be increased by presidential fiat.

The presidential power may be exercised (by the Director-General) for either of two purposes: first, to prevent a deficit in revenues, and to secure the government against loss by reason of its guaranty to the carriers; second, to raise revenue for the government, under the clause which gives the government the excess over the guaranty. In either case the usual considerations affecting the reasonableness of rates are abandoned. A system of judicial inquiry, a chapter in our jurisprudence, has grown out of rate regulation. It is unfortunate that either to save the government from a contractual obligation, or to aid the government in raising funds, the test of rates shall be only the income they produce. It is a metamorphosis in our economic history that the government should take for its motto "all the traffic will bear."

Indirect taxation has generally been considered an unsound policy. It is conceivable that it will be a most unjust policy. It means a tax upon the necessities. It is also to be remembered that flat increases in rates necessarily result in discriminations. By reason of differentials, river crossings, etc., rates increased by a fixed percentage lose their relationships. Rate structures as a whole are



disturbed in their relative character. And the area of competitive trading is narrowed with every rate increase.

### REGULATORY STATUTES

An argument was lately made in the House of Representatives by Mr. Lenroot, a student of government regulation, that the vesting of control of operation in the government did not repeal the statutes regulating carriers with the exception of the anti-pooling provision. It is true that the sovereign government is subject to general laws passed for the 'general welfare.'<sup>20</sup> Statutes regulating carriers are general laws for the general welfare. But the foundation of such laws was our economic theory of government. "According to them (the Sherman Act and similar statutes) competition not combination, should be the law of trade."<sup>21</sup> "The Sherman law," said Mr. Brandeis, "lays down a rule of action, which declares an economic proposition, which I believe to be economically sound."<sup>22</sup>

But the anti-trust laws, in spite of the decisions in *United States v. Joint Traffic Association*,<sup>23</sup> and *United States v. Trans-Missouri Freight Association*,<sup>24</sup> have long been dead statutes as to railroads (except as to stock ownership).<sup>25</sup> Railroad rate competition has ceased. Section 6 of the Act to Regulate Commerce, requiring carriers to publish their rates and not change them except upon statutory notice, was a far more effective instrument for preventing rate competition than traffic agreements or any other contracts in restraint of trade. And the present power of the government is to do the very thing, or one of the things, the anti-trust laws prohibited. No argument is needed to show that the anti-trust laws are suspended during government operation. Other statutes which grant certain rights to shippers and the public must also yield to the sovereign power. The shipper's right to route his shipments<sup>26</sup> must fall. And the common-law right of the shipper

<sup>20</sup> *United States v. Knight*, 14 Pet. (U. S.) 301 (1840); *United States v. Herron*, 20 Wall. (U. S.) 251 (1873).

<sup>21</sup> *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129 (1905).

<sup>22</sup> *HEARINGS BEFORE JUDICIARY COMMITTEE ON CLAYTON AMENDMENT* (1914), 665.

<sup>23</sup> 171 U. S. 505 (1898).

<sup>24</sup> 166 U. S. 290 (1897).

<sup>25</sup> *United States v. Union Pac. R. R.*, 226 U. S. 61 (1912).

<sup>26</sup> 36 STAT. AT L. 551, § 12 (1910).

to have his goods transported upon reasonable notice and demand may be abrogated by the government's diversion of cars and equipment to other divisions, or other lines.

#### POWER OF THE STATES TO TAX RAILROADS UNDER FEDERAL CONTROL

The fundamental principle of taxation is expressed in *McCulloch v. Maryland*:<sup>27</sup>

"All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

And in *Coe v. Errol*<sup>28</sup> it was said:

"We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction (for taxation) of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States."

It is thus apparent that the question of ownership becomes important in considering questions of taxation. The property rights the government obtains in railroads when it takes them over for operation must be borne in mind. It is undeniable that today the government has no property right in the carriers which it has taken possession of. It has seized them for the purpose of operation only. The bill now pending before Congress which provides for a guarantee to the carriers of a stated revenue does not change the relation of the government to the carriers. The government is still only a guarantor with no property right in the carrier, or the carrier's revenues. If the government owned the carriers, the states, of course, could not tax them.<sup>29</sup>

The nearest analogy on the question of the power of a state to tax instrumentalities of government, such as the carriers now are, is found in the case of *Union Pacific Railroad Co. v. Peniston*.<sup>30</sup> The government issued bonds in behalf of the carrier to the amount

<sup>27</sup> 4 Wheat. (U. S.) 315, 429 (1819). See also *Kirtland v. Hotchkiss*, 100 U. S. 491 (1879).

<sup>28</sup> 116 U. S. 517, 524 (1886).

<sup>29</sup> *McGoon v. Scales*, 9 Wall. (U. S.) 23 (1869).

<sup>30</sup> 18 Wall. (U. S.) 5 (1873).



of \$16,000 per mile, which became a first mortgage on the carrier's property. In default of redemption of the bonds when due, the government had the right to take possession of the railroad for the use and benefit of the United States. It thus had a financial interest in the operating revenues of the road similar to the government's financial interest in the revenues of the roads now seized. The court said: <sup>31</sup>

"... the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; ... They [charter provisions] all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. ...

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

In answering this question, the court said: <sup>32</sup>

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers." <sup>33</sup>

The states cannot tax the means employed by Congress to carry into execution powers conferred upon Congress by the Constitu-

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<sup>31</sup> 18 Wall. (U. S.) 5, 31 (1873).

<sup>32</sup> 18 Wall. (U. S.) 5, 36 (1873).

<sup>33</sup> The same ruling is made in *Thomson v. Pac. R. R.*, 9 Wall. (U. S.) 579 (1869). See also *Massachusetts v. Western Union Telegraph Co.*, 141 U. S. 40 (1891); *Central Pac. R. R. v. California*, 162 U. S. 91, 125 (1896); *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530 (1888). These cases all follow the doctrine laid down in *Union Pac. R. R. Co. v. Peniston*, *supra*, note 30. See *Crandall v. Nevada*, 6 Wall. (U. S.) 35, 44 (1867). See also *South Carolina v. United States*, 199 U. S. 437 (1905); *Choc-taw, etc. R. R. v. Harrison*, 235 U. S. 292 (1914).

tion,<sup>34</sup> nor a franchise conferred by Congress.<sup>35</sup> But the means employed by Congress to carry into execution its powers do not extend to the property of the instrumentality. A state cannot tax the interstate transportation of carriers or revenues derived from the interstate transportation,<sup>36</sup> but it may tax the property of the carrier in its jurisdiction which makes possible those revenues.<sup>37</sup> It should be noted that it has been held that Congress may exempt from state taxation the entire agency of carrying into execution its powers, if it sees fit. Mr. Justice Swayne, concurring in the judgment in *Union Pacific Railroad Co. v. Peniston*,<sup>38</sup> said:

"But I hold that the road is a National instrumentality of such a character that Congress may interpose and protect it from State taxation whenever that body shall deem it proper to do so."<sup>39</sup>

The national bank tax cases go further in restricting the power of the states to tax. In *Mercantile Bank v. New York*<sup>40</sup> it was said:

"... and neither the banks themselves nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States."

The court holds the express consent of Congress necessary to enable the states to tax any property of national banks. In *People v. Weaver*<sup>41</sup> it was said:

"That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch v. The State of Maryland*,

<sup>34</sup> *Providence Bank v. Billings*, 4 Pet. (U. S.) 514 (1867); *Society for Savings v. Coite*, 6 Wall. (U. S.) 594 (1867); *Provident Institution for Savings v. Massachusetts*, 6 Wall. (U. S.) 611 (1867); *Van Brocklin v. Tennessee*, 117 U. S. 151, 177 (1886); *Wisconsin R. R. Co. v. Price Co.*, 133 U. S. 496 (1890).

<sup>35</sup> *California v. Central Pac. R. R. Co.*, 127 U. S. 1, 38, 40 (1887).

<sup>36</sup> *Kansas City Ry. v. Kansas*, 240 U. S. 227, 231 (1916), and cases cited.

<sup>37</sup> *St. Louis Southwestern Ry. v. Arkansas*, 235 U. S. 350 (1914).

<sup>38</sup> 18 Wall. (U. S.) 5, 37 (1873).

<sup>39</sup> See also *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 416 (1894); *Smyth v. Ames*, 169 U. S. 466, 520 (1898); *Minnesota Rate Cases*, 230 U. S. 352, 425-32 (1913).

<sup>40</sup> 121 U. S. 138, 154 (1887).

<sup>41</sup> 100 U. S. 539, 543 (1879).



4 Wheat. 316; *Osborn v. Bank of the United States*, 9 *Id.* 738; *Weston v. The City Council of Charleston*, 2 Pet. 449.<sup>42</sup>

It is somewhat difficult to see the distinction between national banks as an agency of government, and railroads, aided to establish post roads and to carry troops and military supplies. Both are instrumentalities of the government. But in the case of railroads express exemption from state taxation seems necessary, and in the case of banks express permission to tax is necessary.

### COMPENSATION

If the seizure of the railways for operation is in the nature of a condemnation of private property for public use, the Act of August 29, 1916, would seem to be fatally defective because a method of compensation was not prescribed. The remedy for the owner is necessary to the validity of such a statute to fulfill the requirements of due process of law. A long line of cases holds that it is a condition precedent to the exercise of the power of eminent domain that the statute make provision for compensation.<sup>43</sup> The compensation need not be fixed prior to the taking; but some method must be provided, though the determination of the amount be subsequent to the seizure.<sup>44</sup> And the compensation may be determined by other methods than a jury trial.<sup>45</sup> This objection to the statute could only be urged, however, by the carriers. And if they saw fit to acquiesce in the taking, they would not be estopped from demanding just compensation under an implied contract in the Court of Claims.<sup>46</sup>

If the statutory remedy is incomplete, or improper, the owner is not debarred from his common-law remedy of trespass or eject-

<sup>42</sup> See also *Owensboro National Bank v. Owensboro*, 173 U. S. 664 (1899); *Third National Bank of Louisville v. Stone*, 174 U. S. 432 (1899); *First National Bank v. Albright*, 208 U. S. 548 (1908); *City of San Francisco v. Crocker, etc. Bank*, 92 Fed. 273 (1899).

<sup>43</sup> *Searl v. School District*, 133 U. S. 553, 562 (1889); *Sweet v. Rechel*, 159 U. S. 380, 398 (1895); *Chicago, Burlington, etc. R. R. v. Chicago*, 166 U. S. 226, 237, 238 (1896), and cases cited.

<sup>44</sup> *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 568 (1898); *Cherokee Nation v. Southern Kansas Ry.*, 135 U. S. 641 (1890).

<sup>45</sup> *Boom Co. v. Patterson*, 98 U. S. 403, 406 (1878); *United States v. Jones*, 109 U. S. 513 (1883); *Backus v. Fort Street Union Depot Co.*, *supra*, note 44.

<sup>46</sup> *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 656 (1884); *Kohl v. United States*, 91 U. S. 367, 374 (1875).

ment.<sup>47</sup> But these common-law remedies may be lost by acquiescence in the taking, and leave only a right to apply for compensation.<sup>48</sup> It may be contended that the act giving to the Court of Claims jurisdiction over implied contracts would provide a method of compensation for any taking by the government. In *United States v. Great Falls Mfg. Co.*<sup>49</sup> the question whether or not the owner could enjoin the government from taking his property when no provision for compensation was made was expressly left open. And in *Union Bridge Co. v. United States*,<sup>50</sup> the act authorizing the Secretary of War to require the removal of a bridge over a navigable stream was attacked for its failure to provide a method of compensation. The court considered the question at length, and determined that there had been no taking of property in the sense of the constitutional inhibition, but the inference is plain that had there been a taking, the absence of a method of compensation would have been fatal.<sup>51</sup>

The pending bill in Congress offers a specific compensation. This is not a legislative matter but one for judicial inquiry.<sup>52</sup> But there is also a provision providing for an adjudication of the carriers' claims if the compensation offered is not accepted.

Senator Underwood has raised the question whether the contract for compensation should not be limited to two years by reason of the limitation on appropriations in Article I, Section 8, Clause 12 of the Constitution. This clause declares Congress shall have the power:

"To raise and support Armies, but no Appropriation of money to that use shall be for a longer term than two years."

If the seizure of the railroads under the Act of August 18, 1916, is the exercise of any power of Congress, other than the power to raise and support armies, the two-year limitation would not apply.

In an opinion of Attorney-General Knox,<sup>53</sup> it is held that the

<sup>47</sup> *Kaukauna Water Power Co. v. Green Bay, etc. Canal*, 142 U. S. 254, 280 (1891).

<sup>48</sup> *State v. Hessenkamp*, 17 Iowa, 25 (1864); *Dunlap v. Pulley*, 28 Iowa, 469 (1870), cited and approved in *Kaukauna Co. v. Green Bay, etc. Canal*, *supra*, note 47.

<sup>49</sup> 112 U. S. 645 (1884).

<sup>50</sup> 204 U. S. 364 (1907).

<sup>51</sup> See also *In re Montgomery*, 48 Fed. 896 (1892); *In re Mandersen*, 51 Fed. 501 (1892).

<sup>52</sup> *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893).

<sup>53</sup> 25 OPINIONS OF THE ATTORNEY-GENERALS, 105, 106.



two-year limitation does not apply to an appropriation for the payment of royalties on account of the construction of guns, etc., extending over a period of more than two years.

"... it is not necessary to extend the meaning of the words 'to raise and support' beyond their ordinary signification in order to include the power to arm and equip armies when they are raised and supported. That power follows as of course from the power to declare war; to raise and support armies; to provide forts, magazines and arsenals; and to levy and collect taxes to provide for the common defence."

The power to declare war might include the power to prepare for war by implication, in the absence of such a specific power. But where the specific power to raise and support armies has a limitation, it seems a strained construction to derive the power to prepare from the power to declare war. The power to levy and collect taxes to provide for the common defense has generally been construed to empower nothing but the levy and collection of taxes. The phrase "to provide for the common defence" is only descriptive of the purpose of the levy and collection of taxes.<sup>54</sup>

The power to take possession of railroads may be derived either from the power to raise and support armies, or the power to establish post roads, or the power to regulate commerce.<sup>55</sup> In the present case, the seizure was clearly the exercise of the war power. This power has an express limitation of two years to the appropriations for carrying it into effect, and that limitation should apply to the pending bill before Congress. It is a limitation more of theory than of fact. If Congress enacts the statute, proposing to compensate the carriers on the basis of an average of net earnings, and the operation of the roads continues longer than two years, the appropriation for the payment of the government's guaranty would have to be renewed. Failing this, the carriers could go into the Court of Claims for compensation.<sup>56</sup> The contract witnessed by the pending bill and the carriers' acceptance of its terms would not be binding upon the government.<sup>57</sup> But a

<sup>54</sup> *United States v. Boyer*, 85 Fed. 425, 430, 432 (1898); STORY, *THE CONSTITUTION*, § 908 *et seq.*

<sup>55</sup> *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 342 (1893); *Chappell v. United States*, 160 U. S. 499, 509 (1896); *Wilson v. Shaw*, 204 U. S. 24 (1907).

<sup>56</sup> *Reeside v. United States*, 2 Ct. of Cl. 1 (1866); *United States v. Russell*, 13 Wall. (U. S.) 623 (1871); *Whiteside v. United States*, 93 U. S. 247 (1876).

<sup>57</sup> *Filor v. United States*, 9 Wall. (U. S.) 45 (1869).

contract for the use of the property would be implied and the damages could be measured in the same way. The measure of damages would not be restricted to the terms of the pending bill, but they would, in all probability, be considered fair and equitable.

The legislation pending in Congress is being enacted upon the assumption that it proceeds from the war powers. Limitations attach to these powers, and it is at best a temporary relief from the dangers that threatened our transportation system. When peace is accomplished, the problem will be still unsolved. It is submitted that regulation under the Commerce Clause might have furnished that unity of operation and control which our military needs made urgent, and might also furnish adequate relief in times of peace. In the past our statutes regulating common carriers have been enacted for the fundamental purpose of preserving competition. Competition has been our economic policy. That policy, so far as railways are concerned, has been a shadow. Competition among carriers has ceased. If we frankly admit the change, and go forward to secure efficiency by unity of control and operation, it can be done by regulating statutes as well as by government ownership. It would mean of course radical changes in legislation. We would have a mandate directing pooling of freight in many instances, instead of a prohibition. We would have a prohibition against circuitous hauls and routing, except under special conditions, instead of carefully keeping open these avenues of waste. We would have an enforced pooling of equipment, under supervision, enforced traffic agreements and enforced combination. The Sherman Act would be turned "upside down and inside out." But the changes can be accomplished by regulation.

Irrespective of the political wisdom of government ownership, it would save the government the vast sums required for compensation. Though regulation may affect property rights, and in some instances may seriously impair values, regulation is not a taking of property. Carriers engaging in interstate commerce assume the risks of regulation. The contingency of regulation is written in their right to engage in interstate commerce.<sup>58</sup> The question of government ownership looms large as a political issue immediately after the war. There was a strong sentiment in Congress for

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<sup>58</sup> *Union Bridge Co. v. United States*, *supra*, note 50; *Louisville & N. R. R. v. Mottley*, 219 U. S. 467 (1911), and cases cited.



retaining in the bill the original clause which provided that the government control and operation should continue until Congress directed otherwise.

A more effective instrument for obtaining government ownership is the power conferred on the President to invest government funds in the obligations of carriers maturing while under governmental control. Let us suppose a carrier with a bonded debt of many millions has outstanding short-term notes. The government purchases them. Is not the immediate effect, if the notes are of any considerable amount, to raise the bonds which are prior liens to par? Is not the only recourse of the government to secure its loan the purchase sooner or later of the prior liens? Some carriers have bonded debts in excess of their value. In such instances the government bids fair to become, willing or unwilling, an owner of the property.

*Henry Hull.*

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A NOTE ON M. HAURIOU. — M. Hauriou is well known to every student of French public law. His "*Précis de Droit Administratif*" is perhaps the most widely used of all such recent text-books. His "*Principes de Droit Public*" is most adequately summarized by him in this volume; but it is perhaps worth while to add that it has a special importance, apart from its intrinsic merits, from its obvious and not unsuccessful effort to reconcile the conflicting theories of such irreconcilable antagonists as MM. Esmein and Duguit. But it is perhaps in another direction that M. Hauriou can lay the greatest claim to the gratitude of the technical lawyer. For nearly twenty-five years he has written the notes on administrative law in "*Sirey*," and in some of them, most notably in those relating to the theory of state responsibility, it is hardly too much to say that he has legislated. His special studies, as, most notably, his essay on Duguit, and his very able analysis of the doctrine of national sovereignty are all of them at once distinguished and suggestive. M. Hauriou has also written on sociology. When it is remembered that this solid production is the work of a busy dean of an important law school, the energy it represents is difficult to exaggerate. The exact bearing of M. Hauriou's theories is no easy task to indicate. He has been profoundly influenced by Herbert Spencer, whose work was just beginning to exercise its full effect on France when he began to write. It is this, perhaps, which explains the search after the discovery of a mechanical equilibrium in the social order which is traceable in all that he writes. It is this, too, which seems to explain his rejection of natural law even in a synthesis in which its unconscious acceptance is barely concealed in the hypothesis of the "institution."<sup>1</sup> Nor is the task

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<sup>1</sup> Cf. the very able criticism of G. PLATON, *POUR LE DROIT NATUREL* (1911).



made easier by M. Hauriou's extraordinary power of reception. No new idea seems to come to the birth without being swept into the wide ambit of his system. No science is too remote for him to examine it in the effort at discovering illustrative analogies. He seems definitely to have rejected the unsatisfactory positivism in which M. Duguit still takes refuge.<sup>2</sup> He insists upon the unchanging character of the categories, order and disorder, justice and injustice, of which the law must take account, even while he denies the permanent character of their content.<sup>3</sup> He has realized that law is preëminently a social science, and that in this aspect its sociological character is fundamental. In this respect, he seems clearly to belong to the realist school of which M. Duguit is perhaps the most distinguished member. But he explains the background of his attitude in an atmosphere of metaphysiological metaphor which M. Duguit would hardly understand. The lawyer meets with some concern such phrases as "social tissue," with its constituent "positive" tissues of the family and property, "metaphysical tissues" such as the law, and "material tissues" such as organization.<sup>4</sup> It is true that these somewhat mysterious entities lead to the recognition of liberty, equality and fraternity as the essential factors of progress;<sup>5</sup> but one is left wondering if the path of proof must of necessity be so complex. Certain conceptions of his thought possess, indeed, a definition less puzzling. He has set out clearly the significance of corporate personality.<sup>6</sup> He has insisted in striking fashion on the necessary submission of the state to objective law. He has shown with high distinction the way in which law emerges as the result of a balance between conflicting and coöperating forces.<sup>7</sup> His work has demonstrated the danger of a régime in which the individual personality is absorbed by the fabric of the state.<sup>8</sup> The somewhat mysterious result of his whole legal edifice is perhaps the outcome of his own eager insistence upon the necessary complexity of social relations, perhaps also from his unwillingness to set out his principles as a system apart from the multitude of facts which tend to obscure their bearing. No student of law, in any case, may afford to neglect an effort so rich in its possibilities and so suggestive in its outcome.

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EFFECT OF CHANGED CONDITIONS UPON EQUITABLE SERVITUDES. — In *Tulk v. Moxhay*,<sup>1</sup> which is the foundation of the law of equitable servitudes, Lord Cottenham evidently thought purely in terms of specific performance. He conceived that he was enforcing the covenant imposing the restrictions against one not a party thereto, who had

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<sup>2</sup> Cf. his *LES IDÉES DE M. DUGUIT, RECUEIL DE LÉGISLATION DE TOULOUSE*, Vol. VII, 15-16. •

<sup>3</sup> Cf. *PRINCIPES DE DROIT PUBLIC* (1910).

<sup>4</sup> Cf. *LA SCIENCE SOCIALE TRADITIONNELLE* (1896), 264.

<sup>5</sup> *Ibid.*, 49 ff.

<sup>6</sup> *PRINCIPES DE DROIT PUBLIC* (1910), 639-93.

<sup>7</sup> *Ibid.*, chap. I.

<sup>8</sup> Cf. especially, *Ibid.*, 366-414 and 471-594.

<sup>1</sup> 2 Phil. 774 (1848).

acquired the property with knowledge thereof, in order to prevent unjust enrichment.<sup>2</sup> But it has been pointed out repeatedly that this reasoning assumes the existence of the rule as the basis for explaining its existence.<sup>3</sup> Hence, although there are decisions which continue to treat the matter from the standpoint of specific performance,<sup>4</sup> the current of authority<sup>5</sup> for some time has perceived that we have here real rights rather than contract rights and has recognized in these restrictions on the use of property imposed by contract a sort of equitable appendix to the common law servitudes to which, as some courts are now doing,<sup>6</sup> we may well give the name of "equitable servitudes."

Suppose the situation which existed at the time the restrictions were imposed, continuance whereof was a presupposition of the restrictions, has radically changed, so that the original purpose may no longer be carried out. Courts have often treated such cases on lines of specific performance, arguing that as it would be inequitable to enforce the restriction under the changed circumstances, doing the plaintiff little substantial good and seriously injuring defendant, a court of equity may properly refuse relief on the balance of convenience.<sup>7</sup> It will have been noted that some of these courts have, in other connections, treated such restrictions as servitudes involving real rights in the covenantees and those claiming under them. The inconsistency of denying relief on a theory of discretion as to specific performance with such a doctrine, since it in substance allows a court of equity in its discretion to deprive a plaintiff of his property,<sup>8</sup> led several courts to retain the injunction suit for assessment of damages, after denial of the injunction<sup>9</sup> or to suggest that damages might be recovered<sup>10</sup> or to award damages on

<sup>2</sup> "The question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." *Id.*, 777-78. See Ames "Specific Performance For and Against Strangers to the Contract," 17 HARV. L. REV. 174, 183.

<sup>3</sup> The latest statement is by Professor Clark, "Equitable Servitudes," 16 MICH. L. REV. 90, 91.

<sup>4</sup> *Wiegman v. Kusel*, 270 Ill. 520, 527, 110 N. E. 884 (1915); *DeGray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 339, 24 Atl. 388 (1892); *Doan v. Cleveland R. Co.*, 92 Ohio St. 461, 112 N. E. 505 (1915); *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. St. 284, 295, 33 Atl. 239 (1895).

<sup>5</sup> *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391, 399, [1906] 1 Ch. 386, 401 ff., 405, 409; *Childs v. Boston & Maine R. Co.*, 213 Mass. 91, 94, 99 N. E. 957 (1912); *King v. Union Trust Co.* 226 Mo. 351, 365, 126 S. W. 415 (1910); *Flynn v. New York, etc. Ry. Co.*, 218 N. Y. 140, 112 N. E. 913 (1916).

<sup>6</sup> *Childs v. Boston & Maine R. Co.*, *supra*.

<sup>7</sup> *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892); *Sanford v. Keer*, 80 N. J. Eq. 240, 83 Atl. 225 (1912); *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741 (1892); *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905); *Orne v. Fridenberg*, 143 Pa. St. 487, 502, 22 Atl. 831 (1891).

<sup>8</sup> See *Whalen v. Union Bag Co.*, 208 N. Y. 1, 101 N. E. 805 (1913). In such cases as *McCann v. Chasm Power Co.*, 211 N. Y. 301, 105 N. E. 416 (1914), plaintiff's property right is legal and he may protect it at law by an action which will prevent acquisition of a prescriptive right by the defendant.

<sup>9</sup> *Jackson v. Stevenson*, *supra*.

<sup>10</sup> *McClure v. Leaycraft*, *supra*.



condition of releasing the servitude.<sup>11</sup> But that course involves another difficulty. If the servitude still exists and the damages are not merely nominal, what authority has a court of equity to compel the dominant owner to sell it to his neighbor against his will for such sum as may be assessed as substantial damages? Surely when a court of equity is called on to protect a servitude from interruption it cannot say to the dominant owner in its discretion, sell out to the servient owner to whom the restriction has now become disproportionately inconvenient.<sup>12</sup> Awarding substantial damages in such case to an unwilling dominant owner amounts to a condemnation of the servitude without legislative authority and for a private rather than a public use.

Yet the judicial instinct that has led to denial of equitable relief in such cases seems sound. The basis of the equitable servitude is the intention of the parties. We turn to this intention to discover whether a servitude was created or a mere personal covenant.<sup>13</sup> For the same reason we should turn to their intention to determine the duration of the servitude. They may have fixed a definite term. But even then it is a reasonable construction to hold that they meant it to endure so long as the purpose of the restriction could be carried out, not exceeding the term fixed.<sup>14</sup> Hence it is submitted the sound view is that the existence of the servitude depends upon the possibility of carrying out the original purpose. If it can be carried out, want of appreciable damage to the dominant owner is not material.<sup>15</sup> If it can no longer be carried out, the same arguments that established its existence as a servitude may be vouched for its termination.<sup>16</sup> In that event there is nothing to protect by an injunction and nothing for which to award damages.

A recent case in which legislation sought to provide expressly for the procedure adopted offhand without consideration in the decisions above referred to has compelled more critical investigation.<sup>17</sup> In that case the statute provided that when in a proceeding for the registration of land the land court should find that enforcement of restrictions upon its use "would be inequitable" it should "register title to the land free from the restrictions as and to the extent required by the equities of the case" and that "if the restrictions are valid though not enforceable" the case should be sent to the Superior Court for assessment of damages. The facts were that the restrictions had been imposed by the petitioner and others in the expectation that the neighborhood would be devoted exclusively to expensive private residences. Afterwards the construction of subways, extension of rapid transit and use of automobiles made more distant areas better available and except for a few houses built on the faith of the restrictions the tract has remained vacant. Under

<sup>11</sup> *Amerman v. Deane*, *supra*.

<sup>12</sup> See *Dent v. Auction Mart Co.*, L. R. 2 Eq. 238, 245 (1866).

<sup>13</sup> See, for example, *Nottingham Brick & Tile Co. v. Butler*, 16 Q. B. D. 778 (1886).

<sup>14</sup> *Association v. Gordon*, 63 N. H. 505, 506, 3 Atl. 426 (1885).

<sup>15</sup> *Peck v. Conway*, 119 Mass. 546 (1876). Nor does it matter that change of circumstances has made the servitude much more inconvenient to the servient owner, so long as the original purpose may be carried out. *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 262 (1913); *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 379 (1909).

<sup>16</sup> See an excellent discussion in *Knight v. Simmonds*, [1896] 2 Ch. 294.

<sup>17</sup> *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243, 117 N. E. 244 (1917).

such circumstances the land court found that it would be inequitable to enforce the restrictions so far as they prevented the erection of apartment houses or buildings for business purposes, but that the removal of the restrictions would result in material damage to those who had already built. Accordingly it registered the title free of the restrictions under the statute. The Supreme Court, reaffirming what is now the established doctrine in Massachusetts, held that the restrictions created real rights in the dominant owners, and as a consequence held that the statute, applied to such a case, deprived the latter of rights in real property for a private use contrary to the Bill of Rights.

Here the original purpose could be carried out for the protection of the houses already built. True the tract was not developing as fast as had been hoped because of supervening events. In consequence, a greatly increased burden was put upon the servient owners, which might be material upon a question of specific performance, but had no relevance upon a question of property. Once the latter view is taken, the decision reached is inevitable. Had the change of condition been such that the original purpose could no longer be carried out, no special statute would be necessary to permit registration of the title free of restrictions that no longer exist. To do so would be no more than removing a cloud cast by the recorded restrictions. Moreover if the tract in question was needed for business purposes for the proper development of the city and the restrictions resulted in the tract remaining vacant and useless, a statute permitting registration of title free of the restrictions upon compensation in order to permit the only practicable use of the land and thus make it available for the general good might be sustained.<sup>18</sup> However this may be, the statute in the present case proceeded on no such theory. It sought to allow the servient owners to relieve themselves of an irksome burden by compelling the dominant owners to make an involuntary sale and raises a strong suspicion of having been made to order for this very case.

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**IMPAIRMENT OF CONTRACTS BY MUNICIPALITIES.**—It has long been settled that municipal legislation may be state action within the constitutional provision forbidding laws impairing the obligations of contracts.<sup>1</sup> It is also decided that some municipal action does not come within the clause.<sup>2</sup> A mere breach of contract by a municipal corporation does not raise a federal question.<sup>3</sup> Two recent decisions by the Supreme Court of the United States are of value in indicating the lines of demarcation between these two positions and, by the dissenting opinions, in showing the reasons for the judicial confusion of mind on the subject.<sup>4</sup> In both of

<sup>18</sup> *Clark v. Nash*, 198 U. S. 361 (1905); *Strickley v. Mining Co.*, 200 U. S. 527 (1906). But see *Salisbury Land Co. v. Commonwealth*, 215 Mass. 371, 379, 102 N. E. 619 (1913).

<sup>1</sup> *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1.

<sup>2</sup> *St. Paul Gas Light Co. v. St. Paul*, 181, U. S. 142.

<sup>3</sup> *McCormick v. Oklahoma City*, 236 U. S. 657.

<sup>4</sup> *Cincinnati v. Cincinnati & Hamilton Traction Co. and the Ohio Traction Co.*, 38 Sup. Ct. Rep. 153.

*The Northern Ohio Traction & Light Co., and the Cleveland Trust Co. v. the State of Ohio*, 38 Sup. Ct. Rep. 196.



these cases there had arisen a dispute as to the duration of the franchises, in the first as to part only. The municipal authorities wishing to reduce the rates and make further regulations directed, in the first case by an ordinance of the city council, in the second by resolution of the board of county commissioners, that the companies make the required reductions and changes or remove their tracks, and required the corporation counsel and prosecuting attorney respectively to take legal action in case of noncompliance. In the first case the ordinance further stated that continued operation would be considered an acceptance of the ordinance.

While in some cases a distinction has been made between resolutions and ordinances on the ground that only the latter are legislative,<sup>5</sup> the Supreme Court has expressly refused to make decisions as to impairment turn upon this point.<sup>6</sup>

The difficulty in these cases arises from the fact that both legislative and administrative powers are vested in city councils and county commissioners, and because it is only when acting in their legislative capacity that their acts can conflict with the constitutional prohibition. Thus an ordinance directing the city treasurer not to pay out money under an alleged contract was held to be an administrative act, and since the only question involved was the validity of the contract, it was for the state and not the federal courts.<sup>7</sup> But an ordinance directing the mayor to notify a water company that the city was under no further liability on an alleged exclusive contract, and ordering an election to authorize the issuance of bonds for a city water plant, was held to be a law impairing the contract, since the city could point to no inherent want of legal validity in it.<sup>8</sup> It is not strange that the authorities are confused as to just where the line should be drawn. The nearest approach to a formulated test in the cases is whether the law deprives one of the benefit of a contract or imposes new duties or liabilities.<sup>9</sup> But such a test is little better than a restatement of the difficulty. Thus if a city repudiates an alleged contract with a water company giving it exclusive rights, and undertakes to build a water-plant itself, this is a law which may impair the contract.<sup>10</sup> Whereas if the city simply denies the contract, or repudiates an award made to one contractor, and gives it to another, there is no federal question.<sup>11</sup> It is submitted that in one case as much as in the other the law aims to deprive the plaintiff of the benefit of his claimed contract, and in neither does it add new duties or liabilities. Such a test loses sight of the real basis of distinction, the difference between administration and legislation. It would seem more helpful to suggest that the line is drawn between those ordinances whereby a municipal corporation attempts to force its will upon the other party by reliance upon its

<sup>5</sup> *Chamberlain v. Evansville*, 77 Ind. 542, 551.

<sup>6</sup> *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179.

<sup>7</sup> *St Paul Gas Light Co. v. St. Paul*, 181 U. S. 142.

<sup>8</sup> *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65.

<sup>9</sup> *Northern Pacific Ry. v. Duluth*, 208 U. S. 583, 591.

<sup>10</sup> *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *Knoxville Water Co. v. Knoxville*, 189 U. S. 435; *Mercantile Trust Co. v. Columbus*, 203 U. S. 311.

<sup>11</sup> *McCormick v. Oklahoma City*, 236 U. S. 657; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462.

sovereign powers of coercion and those where it takes the lawful processes open to any legal person. So where, under a claim that the contract with the company permits it, a city attempts to lower the rates of a public utility, there is uniformly held to be a law impairing the obligation of the contract;<sup>12</sup> also where, having given an exclusive franchise, it repudiates it and attempts to compete itself,<sup>13</sup> or to give a franchise to another.<sup>14</sup> The city here representing the sovereign is using its powers to take away a grant which only sovereign power can give or take away. A striking illustration of this occurred when a city attempted to withdraw a franchise right to double track, and the mayor ordered the arrest of anyone attempting to work on the line.<sup>15</sup> But a city may exercise the legal power which any individual or corporation has to break a contract without violating the federal constitution.<sup>16</sup> Otherwise, if all refusals of its agents to perform were void, every contract would be specifically enforceable against it, so it may allow a claim for the use of hydrants, but deny that the money is paid under a contract for future use, since that is a mere statement of position to prevent estoppel.<sup>17</sup> It may refuse to take action after having given a franchise which promised an affirmative raise in rates every six months, because this merely withdraws its sanction of the raise, and, although a breach of contract, does not prevent the company charging reasonable rates.<sup>8</sup> Also, after giving an exclusive franchise to a water company, excepting the right to license owners contiguous to the river to lay pipes for private use, it may permit an owner separated from the river by land of the city to lay pipes across its land, since this, although a breach of contract, is merely an administrative act.<sup>19</sup> Finally, it may in case of a dispute in regard to a franchise order the removal of tracks from the street and direct the city council to take the proper legal action to enforce the order, but only because it clearly appeared that the attorney did not intend to "take a posse and begin to pull up the tracks."<sup>20</sup> Obviously the ordinance in substance was only a statement of the city's claim and a direction to the attorney to test it in the courts. This is an administrative act open to any individual.

The ordinance and resolutions of the principal cases, however, provided for a reduction of the rates with an alternative threat of legal

<sup>12</sup> *Detroit v. Detroit Citizens' Ry. Co.*, 184 U. S. 368; *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558.

<sup>13</sup> Cases cited under note 10, *supra*.

<sup>14</sup> *City Ry. Co. v. Citizens' Street R. Co.*, 166 U. S. 557.

<sup>15</sup> *Grand Trunk Western Ry. Co. v. City of South Bend*, 227 U. S. 544.

<sup>16</sup> Cases under notes 2 and 11, *supra*. But see two cases in the lower federal courts which seem irreconcilable with the above authorities. *American Waterworks & Guarantee Co. v. Hume Water Co.*, 115 Fed. 171; *Riverside & Q. Ry. Co. v. Riverside*, 118 Fed. 736. In the latter case the city had contracted to supply the railway company with electricity at a given rate. It passed an ordinance notifying the company that it would not go on at that rate. The court held it a law impairing the obligation of the contract. It is submitted that this is merely a default upon a contract such as any private company might make, and that the proper remedy, if any, should have been an action for breach of contract.

<sup>17</sup> *Defiance Water Co. v. Defiance*, 191 U. S. 184.

<sup>18</sup> *Southern Bell Tel. & Tel. Co. v. Birmingham*, 211 Fed. 709.

<sup>19</sup> *New Orleans Waterworks Co. v. La. Sugar Refining Co.*, 125 U. S. 18.

<sup>20</sup> *Des Moines v. Des Moines City Ry. Co.*, 214 U. S. 179. But see *Owensboro v. Cumberland Telephone & Tel. Co.*, 230 U. S. 58.



action to eject the companies from the streets. The alternative by itself, as was seen above, would not have offended against the constitution. But the order to reduce the rates was not a mere statement of the city's claim to have such a right with a direction to litigate it. It was an attempt to exercise the coercive power to reduce rates. The alternative was an alternative only in words. As was pointed out in *Detroit v. Detroit Citizens Ry.*,<sup>21</sup> the law would have been practically self-enforcing, since the public would have refused to pay more than the new rate until the companies had established their rights at law. In the case above the city only claims the right to order a removal, though actually ordering it in form; in the principal cases the city orders a self-enforcing reduction, though in form only claiming the right. Clearly this is a law impairing the obligations of the franchises.

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THE NATURE OF RIGHTS INVOLVED IN AN OIL AND GAS LEASE.—When the owner of a tract of land grants to another the exclusive right to explore and drill for oil and gas on his land, and, if the same be found in paying quantities, to remove it, in consideration of the payment of a royalty, which is generally a certain proportion of the mineral itself, there exists what is commonly known as an oil and gas lease. The determination of the nature of this so-called lease, and of the rights of the parties thereto, has occasioned much diversity and confusion of language on the part of the courts in the states where oil lands are to be found. It is proposed to discuss here the situation which exists when the right of the lessee, which is contingent on the discovery of the mineral, vests, by oil and gas being produced in paying quantities.

First of all it is important to notice what the right of the owner of the land is in the oil and gas beneath his land before he makes the lease. Although for many purposes his right is like a property right, he is not, strictly speaking, the owner of the oil and gas beneath the land, but merely has an exclusive right to drill for it and to reduce it to possession, at which time he gets title to it. The reason for the distinction between a landowner's right to oil and gas and his ownership in solid minerals like coal lies in the "vagrant and fugitive" nature of oil and gas which causes it to flow from one tract of land to another, and makes it possible for the owner of one tract to exhaust the supply from beneath the surrounding land. The fact that the landowner has no ownership, or as many courts put it, has but a qualified ownership in oil and gas not reduced to possession, has been most clearly recognized in cases involving the constitutionality of statutes prohibiting the wasting of one of these fluid minerals in the process of extracting another from the ground. The United States Supreme Court has held that such statutes are not a taking of the surface owner's property without due process of law, because he has no property in the mineral until it is reduced to possession.<sup>1</sup>

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<sup>21</sup> 184 U. S. 368, 379.

<sup>1</sup> *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61. For a discussion of these cases and of the rights of a landowner in underlying oil and gas, see a note in 25 HARV. L. REV. 76.

This analysis of the right of the landowner simplifies the problem of what is the right of the lessee under these so-called leases. The landowner cannot grant any more than he has, and all the lessee gets is a right to drill for and reduce to possession the oil and gas which is from time to time beneath the land in question. Such a right is an incorporeal hereditament, or, more specifically, a *profit à prendre*,<sup>2</sup> exactly analogous to a profit to hunt and fish on the land of another.<sup>3</sup> If an oil lease differs from most profits in that the right to take oil given to the holder of the servitude is exclusive, that is only because of the covenant to that effect in the lease and not because of any fundamental difference between an oil lease and other profits.<sup>4</sup>

The courts, however, in determining the nature of an oil lease, have frequently not started with the premise that the landowner cannot grant more than a right to take oil, but have looked on him as the owner of the oil beneath the surface of his land, just as he is the owner of coal beneath his land,<sup>5</sup> and have undertaken to determine the extent of the right granted from the words of the lease. In this manner three general conclusions have been reached: (1) That the lease is a sale of the oil and gas in place, and the royalty is the purchase price;<sup>6</sup> (2) that the so-called lease is in fact a lease, creating an estate in the lessee, the royalty being rent;<sup>7</sup> and (3) that the lease gives merely a right to go on the land, to drill for and to remove the oil, that is, gives a *profit à prendre* to the lessee.<sup>8</sup> The first of these views, set forth in some of the Pennsylvania

<sup>2</sup> See 29 HARV. L. REV. 788.

<sup>3</sup> See Wickham v. Hawker, 7 M. & W. 63, 79; CO. LITT. 122 a; 2 BL. COMM. 34\*.

<sup>4</sup> Funk v. Haldeman, 53 Pa. 229, 242. In this early case the court makes an accurate analysis of the nature of an oil lease. If subsequent cases in Pennsylvania had followed the language of this case, much of the confusion now existing in that state on this topic would have been avoided. But see Hicks v. American Natural Gas Co., 207 Pa. 570, 577, 57 Atl. 55.

<sup>5</sup> Appeal of Stoughton, 88 Pa. 198, 201.

<sup>6</sup> Wettengel v. Gormley, 160 Pa. 559, 566, 28 Atl. 934; Blakely v. Marshall, 174 Pa. 425, 429, 34 Atl. 564. In Appeal of Stoughton, 88 Pa. 198, 202, the court said, referring to the lease: "Its terms, *inter alia*, were 'the party of the second part to have the sole and exclusive right to bore and dig for oil in said lot, and gather and collect the same therefrom for the term of twenty-one years from the date hereof.' This certainly amounts to an absolute sale of all the oil contained within the land described in the lease, subject only to the royalty therein provided for."

In *In re Brunot's Estate*, 29 Pitts. L. J. (N. S.) 105, the court held that such a lease was a sale, and that the royalties were personalty, going to the executor and not to the heir of the landowner.

<sup>7</sup> Headley v. Hoopenganger, 60 W. Va. 626, 55 S. E. 744, 747. In a reconsideration of Wettengel v. Gormley, *supra*, the court said: "The legal operation of this lease, as between the lessor and the lessee, 'their heirs, executors, or assigns,' was to sever the leasehold from the freehold estate. Thereafter the exclusive right of access to the oil-bearing stratum was in the lessee, whose duty it was to develop and operate the leasehold estate for oil and gas. The exclusive right to cultivate the surface, subject to the easement created upon and over it in aid of the operations of the lessee, was in the lessor. . . . The estates were separate, independent, and in independent hands. The one was personal, an estate for years. The other was real, a fee simple." 184 Pa. 354, 361, 39 Atl. 57.

<sup>8</sup> Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S. W. 837; Osborn v. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122; Brookshire Oil Co. v. Cas-malia, etc. Co., 156 Cal. 211, 103 Pac. 927; Gillespie v. Fulton Oil & Gas Co., 239 Ill. 326; 88 N. E. 192; Beardsley v. Kansas Natural Gas Co., 78 Kan. 571, 96 Pac. 859; Funk v. Haldeman, *supra*; Hicks v. Am. Natural Gas Co., *supra*; Venture Oil



decisions, is clearly erroneous. Not only is a sale of the oil in place impossible because the landowner has no property in the oil until it is reduced to possession, and because he cannot pass title to something which is not ascertained or determined,<sup>9</sup> but he does not purport to sell it. A sale or conveyance of solid minerals in place is quite possible, and is sometimes made,<sup>10</sup> but if the landowner grants a right to remove coal from his land, he does not thereby sell the coal, and no title passes to the grantee until the severance is made.<sup>11</sup> And so it is in the case of these oil leases. The landowner purports to grant only a right to take oil, and not title to the oil before it is taken. The second view, that the oil lease creates an estate in the lessee, is erroneous for the same reason. There is nothing in the language of the so-called lease to justify the conclusion that an estate has been created in the lessee, and it is generally held that ejectment is not the proper remedy of the lessee against someone interfering with his right in the land.<sup>12</sup> By the weight of authority an oil lease creates merely what it purports to create—a right to go on the land and take the oil. Although few cases call this a *profit à prendre* it is difficult to see how a better example of a profit could be found. It is unfortunate that the term "lease" was ever applied to such a transaction, for the situation is just analogous enough to a lease to make the comparison dangerous. The term is, however, universally applied, and must therefore be used, but always with a mental reservation.

The consideration given by the holder of this profit generally consists of two parts. First there is a so-called rent, a cash, or monthly, or annual payment for the privilege of exploring for oil, for delay in beginning operations, and for the "option" held by the lessee in the land until the discovery of oil, at which time his right vests. This rent is payable whether the lessee actually drills for oil or not.<sup>13</sup> Then there is the royalty, which is a certain percentage of the oil produced, or an annual payment for each well sunk. This royalty is frequently called rent, or is said to be like rent.<sup>14</sup> It is analogous to rent in many respects. It runs with the land when the lessor conveys the land to another, unless expressly reserved.<sup>15</sup> It can be assigned apart from the land.<sup>16</sup> Strictly speaking, however, a royalty is not rent, and to call it rent sometimes leads to erroneous conclusions. A rent is a return for the use of land.<sup>17</sup>

Co. v. Fretts, 152 Pa. 451, 456, 25 Atl. 732; Kelly v. Keys, 213 Pa. 295, 62 Atl. 911; State v. South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688.

<sup>9</sup> Blanchard v. Low, 164 Mass. 118, 121, 41 N. E. 118. See WILLISTON ON SALES, § 258.

<sup>10</sup> Caldwell v. Fulton, 31 Pa. 475.

<sup>11</sup> Baker v. Hart, 123 N. Y. 470, 25 N. E. 948.

<sup>12</sup> Funk v. Haldeman, *supra*; Kelly v. Keys, *supra*. Likewise, such lessees are held not to be within statutes relating to landlord and tenant. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 153, 70 N. E. 149, 152.

<sup>13</sup> Kokomo Natural Gas & Oil Co. v. Albright, 18 Ind. App. 151, 47 N. E. 682; Lawson v. Kirchner, 50 W. Va. 344, 40 S. E. 344.

<sup>14</sup> Kissick v. Bolton, 134 Iowa, 650, 112 N. W. 95; Headley v. Hoopgarner, *supra*; Campbell v. Lynch, 94 S. E. 739, 743 (W. Va.); THORNTON, OIL AND GAS, § 221.

<sup>15</sup> Chandler v. Pittsburgh, etc. Co., 20 Ind. App. 165, 50 N. E. 400.

<sup>16</sup> Indianapolis, etc. Gas Co. v. Pierce, 25 Ind. App. 116, 56 N. E. 137.

<sup>17</sup> "Rent is a certain yearly profit in money, provisions, etc., issuing out of lands and tenements, in retribution for the use, and it cannot issue out of a mere privilege or easement." 3 KENT, COMM. 460.

"Note, that a rent cannot be granted out of a piscary, a common, and advowson,

A royalty in an oil lease is a return for the right to take oil from the land.<sup>18</sup> It is submitted that a royalty is not a payment for the use of the whole tract of land, but a payment for the right to take oil from whatever part of the land on which the particular well happens to be located. The payment for the right to use the whole tract to drill on, in so far as there is a separate consideration for that right, is the so-called rent or preliminary payment described above.<sup>19</sup>

The importance of an exact definition of the nature of this return for the profit granted to the lessee in an oil lease is illustrated by cases where the land is, subsequent to the lease, divided into several tracts, which fall into the hands of different persons. A recent case in West Virginia, *Campbell v. Lynch*,<sup>20</sup> is of this sort. The lessor, after making a lease, died intestate, and the land descended to a number of co-heirs. Before the lessee drilled for oil on the land, the heirs brought a bill to partition the land, but did not mention the lease in the bill. The land was partitioned among them, with no reference to the lease, and after the partition the lessee drilled for and extracted oil from the land of some but not all of the heirs. Those on whose land no wells were sunk brought a bill praying that the royalties be divided among all the heirs. The court granted the decree on the ground that the royalties were rent and a payment for the right to use the entire tract of land, and hence belonged to the owners of the whole tract, no matter from what part of the land the oil was taken. That the result reached by the court is equitable, is clear, but the validity of the reasoning may be questioned, especially so far as such reasoning is applicable to other cases. If, for example, the owner of land subject to such a lease conveys part of the land to one person and part to another, with no mention of the lease, it would follow from the reasoning of the court that, since the royalty is a payment for the right to use the whole tract of land and not for the use of a particular part of the land, the royalties must be divided between these grantees in proportion to the amount of land held by each. It has been generally held, however, that each grantee is entitled to the royalties for the oil taken from his land, inasmuch as the royalty is a payment for the taking of the oil.<sup>21</sup> Again, if the owner of land subject to an oil lease divides it into several tracts and devises each tract to a different person, it would seem that the royalties should not be apportioned among the devisees as rent would be apportioned, but that they should go to the particular devisees from whose

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or such like incorporeal inheritances, but out of lands or tenements whereunto the grantee may have recourse to distreynne." CO. LITT. 144 a.

<sup>18</sup> *Kissick v. Bolton*, *supra*.

<sup>19</sup> *Funk v. Haldeman*, *supra*.

<sup>20</sup> *Campbell v. Lynch*, 94 S. E. 739.

<sup>21</sup> *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio, 259, 67 N. E. 494; *Fairbanks v. Warrum*, 56 Ind. App. 337, 104 N. E. 983, 987, citing the Indiana cases on this point; *Osborn v. Arkansas Territorial Oil & Gas Co.*, *supra*. In that case the court said: "Each purchaser from the lessor obtained and owned the gas in that part of the land bought by him, and was entitled to the rentals arising therefrom, and none other. The respective parties have no special equities in these rentals springing from the fact that the lease covered the entire tract . . . The gas obtained from each well was owned by the owner of the tract of land upon which it was sunk, and under the lease the rental therefore was disconnected with the remainder of the land covered by the lease."



land the oil was being taken.<sup>22</sup> It cannot be argued here that since each devisee is precluded from drilling for oil himself by the terms of the lease he should share in the royalties, for the consideration given to the testator in return for a right with reference to the whole tract was a right with reference only to certain parts of the land — those from which oil was being taken. For a person to benefit one part of his estate at the expense of another is no new thing in the law.

Although the reasoning in *Campbell v. Lynch* does not correspond to the true nature of these royalties, the result reached by the court is sound. The decree partitioning the land had no effect whatever on the royalties or the right to receive them. At the time of the partition neither the profit nor the right to royalties was in existence, but each was contingent on the discovery of oil as a condition precedent. There was nothing there to partition but the land. When the right to royalties did vest on the production of oil by the lessee, it was held by the heirs in common, and each was entitled to a partition thereof. It is submitted, however, that if oil were being produced at the time of the partition, the partition of the land with no mention of the royalties would have made the division of the latter among the heirs *res judicata*. It is such questions as these which make it important, in the simpler cases where the correct result is obvious, to define carefully the terms dealt with.

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WHAT CONSTITUTES THE PRACTICE OF LAW. — Several courts in well-considered opinions have concluded that a corporation cannot engage in the practice of law.<sup>1</sup> The practically universal requirement of a license, granted only upon proof of satisfactory character and learning, makes it impossible for a corporation,\* as such, to become a member of the legal profession.<sup>2</sup> Nor will the courts permit a corporation indirectly to practise law through the medium of employees who are licensed attorneys.<sup>3</sup> A lawyer owes complete devotion to his client's interests. To allow him at the same time to serve another master — the corpora-

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<sup>22</sup> But see, *contra*, *Wettengel v. Gormley*, 160 Pa. 559, 28 Atl. 934, reconsidered and affirmed in 184 Pa. 364, 39 Atl. 57. That case, however, can hardly be supported. In the first hearing of the case the court held that the devisees should share in the royalties in proportion to the land held by them, on the ground that the oil lease, because of the vagrant nature of the oil, was like a lease for general tillage, rather than like the right to take solid minerals from the land. In the reconsideration, the court held that the lease created a term for years in the lessee, that the royalty, being rent, was personalty and went intestate under the will which devised the land and did not mention the lease, and that it went to the children of the testator, who were the devisees, in proportion to the amount of land devised to each. If that is the law of the distribution of property after death in Pennsylvania, it is peculiar to that state.

<sup>1</sup> *Matter of Coöperative Law Co.*, 108 N. Y. 479, 92 N. E. 15; *Matter of City of New York*, 144 App. Div. 107, 128 N. Y. Supp. 999. See also *Commonwealth v. Alba Dentist Co.*, 13 Pa. Dist. R. 432; *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N. W. 1078.

<sup>2</sup> See *Matter of Coöperative Law Co.*, 108 N. Y. 479, 483, 92 N. E. 15, 16.

Similarly, since a corporation cannot qualify as a practitioner, it cannot practise dentistry or medicine. *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 60 N. E. 597; *Commonwealth v. Alba Dentist Co.*, 13 Pa. Dist. R. 432; *State Electro-Medical Institute v. State*, 74 Neb. 40, 103 N. W. 1078.

<sup>3</sup> "The relation of attorney and client is that of master and servant in a limited

tion whose employee he is — is destructive of the fundamental fiduciary relationship of attorney and client. For this reason in some states corporations have been expressly forbidden by statute to practise law either directly or indirectly.<sup>4</sup>

In spite of these legal restrictions, however, title insurance companies, trust companies, collection agencies, and other corporations continue to invade fields of activity only recently occupied by the lawyer. The obvious advantages of corporate organization — the opportunity for service over wide areas through branch offices, and the more efficient specialization resulting from a large volume of business — account for this tendency here, as in other branches of economic life. The courts are thus being brought face to face with the task of marking off those activities of the lawyer in which corporations can engage from those in which they cannot. How far may the corporate organization enter without encroaching upon the principle that a corporation cannot engage in the practice of law?

Clearly only those activities of the lawyer which are peculiar to his function in the legal and economic structure are meant to be included in "the practice of law" as here used. The customary business of the average lawyer of the past generation or more furnishes no safe guide in the matter. The ancient function of the advocate, arguing the cause of his master or client before a court of justice, is undoubtedly "practising law" in this narrower sense.<sup>5</sup> Similarly, the preparation of briefs for submission to a court or the commencing of a legal action, is practising law.<sup>6</sup> Rendering advice to a client as to his legal rights and duties is likewise clearly within the peculiar province of the legal profession.<sup>7</sup> But beyond the prosecution of causes in the courts and the rendering of legal advice the question is not so clear. It has been held that an unlicensed person may recover on a contract for services in securing a reduction of a tax claim, on the ground that since no appearance before any court was involved, it did not constitute "practising law."<sup>8</sup> And where proceedings were taken by one not an attorney before a state legislature to secure a pardon for another, it was held that he was not engaging in the practice of law.<sup>9</sup> On the other hand,

and dignified sense, and it involves the highest trust and confidence. It cannot . . . exist between an attorney employed by a corporation to practise law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe the duty of counsel to the actual litigant." *Matter of Coöperative Law Co.*, 198 N. Y. 479, 483, 92 N. E. 15, 16.

<sup>4</sup> N. Y. PENAL LAW (CONSOL. LAWS, c. 40), § 280. See *People v. Title Guaranty & Trust Co.*, 168 N. Y. Supp. 278; *People v. People's Trust Co.*, 167 N. Y. Supp. 767.

<sup>5</sup> *Kaplan v. Berman*, 37 Misc. (N. Y.) 502, 75 N. Y. Supp. 1002; *Cobb v. Judge of Superior Court*, 43 Mich. 289, 5 N. W. 309; *Weir v. Slocum*, 3 How. (N. Y.) 397. See *Ellis v. Bingham County*, 7 Idaho, 86, 60 Pac. 79.

<sup>6</sup> *Hitson v. Browne*, 3 Colo. 304; *McKoan v. Devries*, 3 Barb. (N. Y.) 196; *Bank v. Risley*, 6 Hill (N. Y.), 375; *In re Bailey*, 146 Pac. 1101 (Mont.); *Abercrombie v. Jordan*, 8 Q. B. D. 187; *In re Simmons*, 15 Q. B. D. 348.

<sup>7</sup> *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349.

<sup>8</sup> *Dunlap v. Lebus*, 112 Ky. 237, 65 S. W. 441. See also *Hall v. Sawyer*, 47 Barb. (N. Y.) 166.

<sup>9</sup> *Bird v. Breedlove*, 24 Ga. 623. See also *State v. Bryan*, 98 N. C. 644, 4 S. E. 522.



a corporation or other unlicensed person cannot engage in the business of organizing corporations, involving the furnishing of advice and information, and preparing the necessary papers of incorporation.<sup>10</sup> Nor, according to some courts, can a corporation carry on a general collection business, at least if the corporation also undertakes to institute litigation on claims when necessary.<sup>11</sup> And one court has declared that contracting for compensation to secure the release of a prisoner from a chain-gang is engaging in the practice of law.<sup>12</sup>

Where the question has arisen in regard to the preparation of legal instruments the pronounced tendency of the courts has been to include that entire business within the peculiar province of the lawyer. Thus the recent New York case, *People v. People's Trust Co.*, held that a trust company which provided attorneys *gratis* for persons wishing to draw a will was illegally engaging in the practice of law.<sup>13</sup> In another case the same court held that a corporation cannot draw a bill of sale or chattel mortgage for a client or customer.<sup>14</sup> And the decisions and *dicta* of other courts have been to the same effect.<sup>15</sup>

The soundness of this doctrine, *in toto*, is not altogether apparent. It cannot, of course, be denied that in the case of many legal documents the advice and guidance of the lawyer is highly essential. But the intelligent preparation of such papers as an ordinary bill of sale or a chattel mortgage generally does not require a vast amount of legal learning. Moreover, the entrance of the lawyer into this field of business is comparatively recent.<sup>16</sup> Until the nineteenth century the drawing of commercial instruments, such as ordinary commercial contracts and chattel mortgages, was left to the money-lender and the scrivener.<sup>17</sup> And with the advance toward greater simplicity in such instruments the need of the lawyer's supervision should constantly diminish. Little is to be gained, therefore, by excluding the corporation and unlicensed individual from this sort of business.

The tendency of the courts to keep the corporation out of the present activities of the lawyer, wherever possible, is not entirely commendable. The broad field which the lawyer has entered is only a temporary phenomenon. It includes much that is not essentially legal and that can be done more efficiently and economically outside the profession. The title-insurance companies and the incorporated collection agencies, with their branch offices throughout the country, are certainly

<sup>10</sup> *In re Pace*, 170 App. Div. 818, 156 N. Y. Supp. 641; *Hall v. Bishop*, 3 Daly (N. Y.). 109.

<sup>11</sup> *In re Associated Lawyers Co.*, 134 App. Div. 350, 119 N. Y. Supp. 77; *Buxton v. Lietz*, 136 N. Y. Supp. 829, *aff'd* 139 N. Y. Supp. 46. See also *People v. Schreiber*, 250 Ill. 345, 95 N. E. 189.

<sup>12</sup> *In re Duncan*, 83 S. C. 186, 65 S. E. 210. But here the question arose in regard to one who had been disbarred, and hence the courts would tend to give "the practice of law" a wider interpretation.

<sup>13</sup> 167 N. Y. Supp. 767 (App. Div.).

<sup>14</sup> *People v. Title Guaranty & Trust Co.*, 168 N. Y. Supp. 278 (App. Div.).

<sup>15</sup> *Eley v. Miller*, 7 Ind. App. 529, 535, 34 N. E. 836, 837; *Savings Bank v. Ward*, 100 U. S. 195, 199.

<sup>16</sup> See CHRISTIAN, HISTORY OF SOLICITORS, 1, 39, 90.

<sup>17</sup> ROGER NORTH'S AUTOBIOGRAPHY, 41. In France today much of the drawing of legal documents is done by *notaires* rather than by attorneys or advocates. "The Bench and the Bar in France," 11 AM. L. REV. 672, 680.

desirable institutions. And the courts should avoid placing limitations on corporations and laymen which unnecessarily hamper the freedom of the individual and the efficient development of the economic life of the community.

DOCTRINE OF UNCLEAN HANDS AS APPLIED TO THE PROTECTION OF TRADE NAMES. — "He who comes into equity must come with clean hands." A good illustration of how far this maxim is carried appears in *Howard v. Lovett*,<sup>1</sup> a recent Michigan case, where the defendant appropriated the name of the plaintiff's vaudeville act, which purported to be an exhibition of thought transference, and an injunction was refused on the ground that the act constituted a fraud on the public.

Though taken literally this maxim might be construed as covering any wrongdoing by the plaintiff, it is fundamental that it applies only where the misconduct is in connection with the particular subject which the plaintiff seeks to have litigated.<sup>2</sup> Even when thus qualified, numerous exceptions to the maxim have arisen. For instance, where a conveyance is made in trust by plaintiff to defendant for an illegal purpose, if it is shown that, though the plaintiff's action was illegal, it was instigated by the defendant for the express purpose of defrauding the plaintiff, — that is, where the parties are not *in pari delicto* — recovery has been allowed.<sup>3</sup> Likewise, where the illegal purpose has been abandoned by the plaintiff, a *locus penitentiae* is permitted.<sup>4</sup>

The question has frequently arisen in connection with the protection of a trade-mark where the plaintiff has been guilty of false representations to the public in connection with it. It has sometimes been held that where the misrepresentation does not appear in the trade name or label itself, but only in independent advertising, the fraud on the public is purely collateral, and will be no bar to an injunction.<sup>5</sup> Other cases, however, have required that the good will sought to be protected must not be built up on the misrepresentations. The latter seems a better test as to whether the fraud is collateral.<sup>6</sup> In many jurisdictions where the owner of the trade name has made fraudulent representations in connection therewith, no equitable relief will be given.<sup>7</sup> Where the plaintiff has been guilty of some fraudulent practice in his business, not particularly connected with the trade name, the fraud is clearly collateral, and relief will be given against infringement.<sup>8</sup>

In *Howard v. Lovett* the chief question seems to be as to what is necessary to create a fraud on the public. Closely analogous to these cases are cases at law as to what constitutes a fraudulent representation

<sup>1</sup> 165 N. W. 634.

<sup>2</sup> 1 POMEROY, EQUITY JURISPRUDENCE (2 ed.), § 399.

<sup>3</sup> 1 *Ibid.*, § 403; WOODWARD, QUASI-CONTRACTS, § 138.

<sup>4</sup> *Carll v. Emery*, 148 Mass. 32, 18 N. E. 574.

<sup>5</sup> *Wormser v. Shayne*, 111 Ill. App. 556; *Curtis v. Bryan*, 36 How. Pr. (N. Y.) 33; *Ford v. Foster*, L. R. 7 Ch. 611, (1872).

<sup>6</sup> *Johnson & Johnson v. Seabury & Johnson*, 71 N. J. Eq. 750, 67 Atl. 36.

<sup>7</sup> *Kahler Manufacturing Co. v. Beechore*, 59 Fed. 572; *Hillson Co. v. Foster*, 80 Fed. 896; *Seabury v. Grosvenor*, Fed. Cas. No. 12576.

<sup>8</sup> *Heller & M. Co. v. Shaner*, 102 Fed. 882.



by the seller. In fact, there is some authority that the injunction will be denied only where the misrepresentations would constitute a defense to an action at law.<sup>9</sup> At law, the doctrine of "seller's talk" in advertising his goods is recognized, and though the tendency is toward narrowing this principle, many statements of opinion which are very close to the line of actual misrepresentations are allowed, though less is required for inequitable conduct than for actual fraud. That something of the same principle is recognized in equity may be seen in numerous cases.<sup>10</sup> The case under discussion seems one particularly suited for the application of such a principle. The plaintiff's business is one in which truth as to surrounding circumstances is often disregarded, and the public is well aware of this. It is hardly conceivable that any great number of the public would be deceived by a trick such as the plaintiff's any more than by a magician. Acts of this kind are a common and well-understood part of American vaudeville. The public wants to be deceived as part of the show. The denial of relief in this case pushes the doctrine of "unclean hands" to an extreme point. The judges of a court of chancery, however, are frequently of a loftier moral character than the components of a jury, and this perhaps explains in part why conduct of a more scrupulous character is more often required in equity than at law.<sup>11</sup>

## RECENT CASES

**ADMINISTRATIVE LAW — REVIEW OF ADMINISTRATIVE PROCEEDINGS ON CERTIORARI.** — A statute provided that the state printing board should award the state printing contract to the lowest responsible bidder. (1909, N. Y. LAWS, c. 60, § 6.) The board awarded the contract to the second lowest bidder, and the lowest bidder seeks to have the proceedings reviewed on *certiorari*. *Held*, that the writ will not lie. *People ex rel. Argus Co. v. Hugo*, 168 N. Y. Supp. 25.

By the general common-law rule *certiorari* will lie to review only such proceedings of an administrative body as are judicial in their nature. *Degge v. Hitchcock*, 229 U. S. 162. See 1 BAILEY, HABEAS CORPUS, § 171. This rule is recognized in all jurisdictions except New Jersey. *Treasurer v. Mulford*, 26 N. J. L. 49. In North and South Dakota the New Jersey exception has been established by statute. *State v. Clark*, 21 N. D. 517; *State v. Hughes County*, 1 S. D. 292. The line of demarcation between judicial and nonjudicial proceedings is obscure. For the purposes of the present problem a distinction should be drawn between the questions whether an administrative body in acting

<sup>9</sup> *Ford v. Foster*, *supra*.

<sup>10</sup> *Newbro v. Undeland*, 69 Neb. 821, 96 N. W. 635 (Claims that a hair-restorer is an absolute cure for baldness are mere statements of opinion). *California Fig Syrup Co. v. Worden*, 95 Fed. 132 (Court declined to investigate truth of advertisement that compound is a sure cure for constipation). *Samuel Brothers v. Hostetter Co.*, 118 Fed. 257.

<sup>11</sup> M. D. Chalmers, "Trial by Jury in Civil Cases," 7 L. QUART. REV. 15, 19 ("But the morality of juries is a sublunary, man-in-the-street sort of morality. It is wholly distinct from the sublimated morality of non-jury tribunals such as courts of equity").

has complied with constitutional or legislative provisions as to how it shall act, and whether after it has so complied it may then reach its decision as a matter of personal discretion, or whether, according to the intent of the constitution or statute applicable, it is to be bound by law and the rules of legal procedure in reaching its ultimate finding. Thus in a statute like that in the present case the legislature might well provide that the administrative body shall not pass on the question of responsibility without a hearing accorded to parties interested, even though the ultimate decision as to responsibility in its nature must be left to the untrammelled personal judgment of the board. The former is a question of whether the administrative body has acted in a legal manner, which is always a judicial question open to review by the courts. *New York v. McCall*, 38 Sup. Ct. Rep. 122. But *cf. Local Government Board v. Arlidge*, [1915] A. C. 120. Whether the statute in the principal case requires a hearing is a matter of sound construction. In a recent New Jersey case construing a similar statute such a requirement was found. *Kelly v. Board of Chosen Freeholders of Essex County*, 101 Atl. 422 (N. J.). But since in the interest of expeditious administration of government the letting of a contract for state work should be a summary matter it is submitted that, other things being equal, the construction adopted by the court in the present case is the better one. This result has been reached in other jurisdictions. *Hammer v. Smith*, 11 Ariz. 420; *Newell v. Franklin*, 30 R. I. 258.

AGENCY — CREATION OF AGENCY — NECESSITY OF CONSIDERATION. — Because of an overcharge by the defendant company plaintiff was entitled to a rebate, which could be paid only with the consent of the Interstate Commerce Commission. Defendant informed plaintiff that if he would execute the necessary papers it would procure such consent. Papers were executed and delivered to the defendant, but it failed to act further during the period for securing the rebate. *Held*, that the plaintiff is entitled to damages caused by defendant's failure to secure consent to the rebate. *Carr v. Maine Cent. R. R.*, 102 Atl. 532 (N. H.).

It is the general rule that there may be a recovery for negligent performance of a gratuitous undertaking. *Black v. New York, etc. R. Co.*, 193 Mass. 448, 79 N. E. 797; *Hyde v. Moffat*, 16 Vt. 271; *Dyche v. Vicksburg, etc. R. Co.*, 79 Miss. 361. But there can be no recovery on a gratuitous promise to act. *Benden v. Manning*, 2 N. H. 289. The same general rules apply to gratuitous agency. *Wilson v. Brett*, 11 M. & W. 113; *Baxter v. Jones*, 6 Ont. L. R. 360; *Thorn v. Deas*, 4 Johns. (N. Y.) 84. The reason a person who gratuitously undertakes to perform some service for another finds himself under a legal duty to perform that service with due care is that trust is reposed in him, and he must be true to that trust. See *Coggs v. Bernard*, 2 Ld. Raym. 909, 919. See also Joseph H. Beale, "Gratuitous Undertakings," 5 HARV. L. REV. 222. Having in mind the true reason for the liability and the recognized distinction between nonfeasance and misfeasance, it seems that the proper place at which to draw the line between them is at that point where the agent has so far entered into the transaction as to justify placing trust in him. The plaintiff in the principal case would naturally rely on the defendant when it had gone so far as to secure the materials without which no action could be taken.

ATTORNEY AND CLIENT — PRACTICE OF LAW BY CORPORATION — WHAT CONSTITUTES PRACTICE OF LAW — DRAWING OF LEGAL DOCUMENTS. — A trust company advertised that it would furnish advice in the drawing of wills. The company employed attorneys to whom applicants were directed, no charge being made by the trust company for this service. The company ordinarily was named executor in the will. A statute forbids corporations to practise law. [N. Y. PENAL LAW (CONSOL. LAWS, c. 40), § 280.] *Held*, that the



company is guilty of violating the statute. *People v. People's Trust Co.*, 167 N. Y. Supp. 767.

For a discussion of this case, see Notes, page 886.

ATTORNEY AND CLIENT — PRACTICE OF LAW BY CORPORATION — WHAT CONSTITUTES PRACTICE OF LAW — DRAWING OF LEGAL DOCUMENTS. — A statute made it unlawful for a corporation to "render legal services of any kind" or "to furnish attorneys or counsel." [N. Y. PENAL LAW (CONSOL. LAWS, c. 40), § 280.] Defendant corporation drew a bill of sale and chattel mortgage for a customer, charging its regular published rates for such documents. *Held*, that this constitutes a violation of the statute. *People v. Title Guaranty & Trust Co.*, 168 N. Y. Supp. 278.

For a discussion of this case, see Notes, page 886.

CONFLICT OF LAWS — LEGITIMACY — RECOGNITION OF ISSUE OF POLYGAMOUS MARRIAGE. — The minor son of a resident Chinese merchant sought admission into Hawaii. The boy was issue of a marriage contracted in China by the father while he had a lawful wife in Hawaii. The marriage was lawful and the child legitimate in China. Subsequent to the birth of the son the father divorced his Hawaiian wife and cohabited with the Chinese spouse. *Held*, that the boy is not admissible as a legitimate son of his father. *In re Look Wong*, 4 Haw. 568.

The status of a person as legitimate or illegitimate depends on the law of his domicile of origin, which in the principal case was China, where the boy was legitimate. *In re Andros*, 24 Ch. D. 637. Once fixed, the status attends the individual into whatever country he may go. *Smith v. Kelly*, 23 Miss. 167; *Fowler v. Fowler*, 131 N. C. 169, 42 S. E. 563; *Miller v. Miller*, 91 N. Y. 315. It has been held that marriages which are not "Christian," such as polygamous or incestuous unions, will not be recognized. *In re Bethell*, 38 Ch. D. 220; *Hyde v. Hyde*, L. R., 1 P. & D. 130. The better view is that they should be recognized, though the effect usually given the marriage status need not be accorded it. See BEALE, SUMMARY OF CONFLICT OF LAWS, § 47. See also 26 HARV. L. REV. 537. Even though the validity of the marriage is not acknowledged, it does not follow that recognition of the status of legitimacy should be denied. See *Wall v. Williamson*, 8 Ala. 48, 51. *Contra*, *In re Bethell*, 38 Ch. D. 220. See also BEALE, SUMMARY OF CONFLICT OF LAWS, § 60. To so hold would often do violence to the family relationship by suddenly making strangers in law of even the most devoted parents and dutiful children. In a situation like that of the principal case, it might mean an actual separation of father and son. The decision would seem to be both unfortunate and unsound.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT OF LEGISLATURE TO ALTER CHARTER OF PRIVATE CORPORATION. — The legislature, in granting a charter to a railroad corporation, had reserved the right to alter, amend, or repeal the same. The legislature subsequently passed an act requiring the railroad to carry members of the fish and game commission free of charge. *Held*, that this act deprived the railroad company of property without due process of law and was therefore unconstitutional. *Napier v. Delaware, etc. R. Co.*, 102 Atl. 444 (N. J.).

Where no right to alter, amend, or repeal is reserved at the time of the grant, subsequent amendments are unconstitutional unless coming within the police power. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.), 518. Where such right is reserved, the legislature has full power to repeal the charter. *McLaren v. Pennington*, 1 Paige (N. Y.), 102; *Greenwood v. Freight Co.* 105 U. S. 13. See *Ferguson v. Miners', etc. Bank*, 3 Sneed (Tenn.), 609, 628. If the right to repeal is conditional, the legislature is to determine whether the condition is

fulfilled. *Crease v. Babcock*, 40 Mass. 334; *Erie, etc. R. Co. v. Casey*, 26 Pa. 287; *Miners' Bank v. United States*, 1 Morris (Iowa), 482. One court has held that "the power to destroy does not imply a right to cripple or to maim." *Sage v. Dillard*, 15 B. Mon. (Ky.) 340. But is difficult to see any reason why the legislature, having full power to take back its grant, cannot modify it at its pleasure, though it is doubtless true that, as a matter of policy, the right should be exercised with moderation. See 2 KENT, COMMENTARIES, 3 ed., 306; ANGELL AND AMES, CORPORATIONS, 11 ed., § 766. The court felt itself concluded by former decisions. *Delaware, etc. R. Co. v. Board of Public Utilities*, 85 N. J. L. 28, 88 Atl. 849 (member of state water-supply commission); *Pennsylvania R. Co. v. Herrmann*, 89 N. J. L. 582, 99 Atl. 404 (secretary to the governor). The New Jersey rule seems to be that, even where there is an unqualified reservation of the right to alter, amend, or repeal, subsequent alterations to be constitutional must be (1) regulative of rights and duties with which the corporation has been invested, and, (2) promotive of the public welfare. The soundness of the decision is doubtful.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACTS — MUNICIPAL CORPORATIONS. — A dispute having arisen between the plaintiff company and the defendant city as to the company's franchise right upon certain streets, the city council passed an ordinance to the effect that the company could continue to operate on the disputed streets only on condition of a reduction of fares and certain extensions of transfer privileges; that continued operation should be construed as an acceptance of the ordinance; and that in case of failure to accept, the city solicitor should take the proper legal steps to eject the companies from the street. This is a bill brought in the federal court to declare the ordinance void and to restrain the city from enforcing it. *Held*, that the city be enjoined from taking any steps to enforce the ordinance (except the institution of necessary court proceedings) prior to final adjudication of controversies involved, and from ever setting up a claim that the company's continued operation is an acceptance of the ordinance. *City of Cincinnati v. Cincinnati & Hamilton Traction Co.*, 38 Sup. Ct. Rep. 153.

For discussion of this case, see Notes, page 879.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT — MUNICIPAL CORPORATIONS. — The plaintiff claimed that its franchise was perpetual. The county commissioners claimed that it was at will. They accordingly passed a resolution directing the company to reduce its rates or remove its tracks, and directed the prosecuting attorney to take the proper legal action in case of refusal. The Supreme Court of Ohio held that the franchise was at will. *Held*, that this was such a law as raised a federal question, that the franchise was not revocable at will and that the law violated its obligations. *Northern Ohio Traction & Light Co. v. State of Ohio*, 38 Sup. Ct. Rep. 196.

For a discussion of this case, see Notes, page 879.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — PETITION FOR RECALL OF JUDGE AS CONTEMPT. — The Constitution of Colorado, in authorizing the recall of judges, provides that the recall petition "shall contain a general statement . . . of the grounds on which such recall is sought, which statement is intended for the information of the electors . . ." (COLO. CONST. ART. XXI, § 1.) While two criminal cases were pending, the defendant circulated a recall petition, describing in bitter language the conduct of the judge in these cases, in admitting the one prisoner to bail, and refusing that privilege to the other. For this, contempt proceedings were instituted against the defendant. *Held*, that he was not guilty, for the statement was privileged. *Marians v. People*, 169 Pac. 155 (Colo.).



It is well settled that a publication, although not made in the presence of the court, which tends to interfere with the administration of justice by bringing the judge into disrepute, is contempt of court. *State v. Morrill*, 16 Ark. 384. See 1 BAILEY, HABEAS CORPUS, 218. Truth of the statement is no defense. *Paterson v. Colorado*, 205 U. S. 454. *Contra, McClatchy v. Superior Ct. of Sacramento Co.*, 119 Cal. 413, 51 Pac. 696. See 11 HARV. L. REV. 543. It can be argued that although the constitution gave the right to circulate the recall petition, that right, like the right of freedom of speech or of the press, must be exercised in such a manner as not to interfere with the administration of justice. See *State v. Morrill*, 16 Ark. 384, 403, 407. The argument, however, that the provision for recall necessarily and expressly provides for the publication of the grounds on which the recall is sought, and that such publication is therefore no contempt, seems more sound. It is no contempt for counsel to set forth in a petition for change of venue the bias of the judge before whom the case was called. *In re Smith*, 54 Col. 486, 131 Pac. 277. It has been held no contempt for a newspaper to call a judge running for re-election, corrupt and partial, although there were cases pending before him at the time. *State v. Circuit Ct. of Eau Claire Co.*, 97 Wis. 1, 72 N. W. 193. The constitutional provision that a judge may be put to an election at any time, coupled with the public interest in ascertaining the fitness of a person running for office, outweighs the public policy in favor of the uninterrupted administration of justice. The criticism that this results in the possibility of intimidating courts in the exercise of their duty must be directed against the institution of the recall of judges rather than against the reasoning of this case.

CORPORATION — DISTINCTION BETWEEN A CORPORATION AND ITS STOCKHOLDERS — DISREGARDING THE CORPORATE FICTION. — Under a railroad lien law a sub-contractor was required to give, within a specified period, notice of his intention to file a lien. No such notice was required of a contractor. The officers and directors of a corporation formed to operate a railroad, incorporated a construction company to build the line. The construction company contracted with the plaintiff to build the line. *Held*, that as to the railroad company, the plaintiff is the principal contractor. *Seymour v. Woodstock, etc. Co.*, 117 N. E. 729 (Ill.).

It is usually said that the corporate fiction will be disregarded when it is necessary to disregard it to prevent fraud or to attain a just result. *United States v. Milwaukee, etc. Co.*, 142 Fed. 247; *Bank v. Trebein*, 59 Ohio St. 316, 52 N. E. 834. See 1 MORAWETZ, CORPORATIONS, 2 ed., § 227; 3 COOK, CORPORATIONS, 7 ed., §§ 663, 664. Such a rule, it is submitted, is objectionable. It tends to loose and indefinite rules of law for business transactions. See *Gallagher v. Germania, etc. Co.*, 53 Minn. 214, 219, 54 N. W. 1115, 1116. It threatens the loss of valuable features of corporate organization. See *Moore, etc. Co. v. Towers, etc. Co.*, 87 Ala. 206, 212, 6 So. 41, 44. The rights of creditors may be affected by the rule. *In re Rieger*, 157 Fed. 609. The opinion in the principal case exemplifies the confusion which results from such a rule. The court speaks of looking "at the substance of things," and says that "consideration will not be given to corporate forms and fictions," and then decides the case upon the ground of agency. It is submitted that in most, if not all, of the cases in which the corporate fiction is disregarded the same result can be reached, as was reached in the principal case, upon legal principles which leave the separate corporate entity idea intact. Cf. *Bank v. Trebein, supra*; *Gonville's Trustee v. Patent Carmel Co.*, [1912] 1 K. B. 599. Cf. also *Beal v. Chase*, 31 Mich. 490; *Booth v. Seibold*, 37 Misc. (N. Y.) 101, 74 N. Y. Supp. 776.

CORPORATIONS — STOCKHOLDERS — LIABILITY ON STOCK IMPROPERLY ISSUED FOR SERVICES. — A promoter rendered services to a corporation. He

subscribed for and was issued fifty shares of stock. Notwithstanding a vote of the stockholders that stock should be issued only for cash, the directors voted that the promoter be given the fifty shares in payment for his services, which were worth more than the stock. The promoter sold the stock. The corporation now sues the promoter for the par value of the stock. *Held*, that the corporation may not recover. *Union German Silver Co. v. Bronson*, 102 Atl. 647 (Conn.).

The promoter, as a subscriber, owed the corporation for the stock. There was no common-law release of this obligation. It is doubtful whether the mere vote of the directors would be enough to excuse the subscriber from his obligation to pay. The promoter had no enforceable claim prior to the vote of the directors. No charter or statutory provision had changed that rule. A corporation may adopt by express or implied adoption obligations incurred for its benefit. *Van Noy v. Central, etc. Ins. Co.*, 168 Mo. App. 287, 153 S. W. 1090; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216. *Cf. Koppel v. Massachusetts Brick Co.*, 192 Mass. 223, 78 N. E. 128. See 3 COOK, CORPORATIONS, 7 ed., § 651. See also H. S. Richards, "Liability of Corporations on Contracts made by Promoters," 19 HARV. L. REV. 97. There can be no implied adoption where the corporation has no opportunity to reject the benefits conferred. The use of the term "ratification" is unfortunate. Ratification presupposes a principal existing at the time of the agent's action. Directors generally are allowed to pay the reasonable value of services rendered by promoters. *Smith v. New Hartford Water Co.*, 73 Conn. 626, 48 Atl. 754. See EHRICH, PROMOTERS, § 165; ALGER, PROMOTERS AND PROMOTION OF CORPORATIONS, § 218; 1 LINDLEY, COMPANIES, 6 ed., 196. Had they not been inhibited, the directors might have compromised the promoter's claim by giving him stock. The court reaches a rough-and-ready sort of justice by saying that the corporation by bringing suit has waived any irregularity in the issue of the stock, and that this makes the adoption by the directors effective. The opinion is not convincing on the point of the promoter's defense to his obligation on his stock subscription.

EQUITY — JURISDICTION — PROTECTION OF RIGHTS OF PERSONALITY. — Plaintiff claiming to be an alien not subject to the Conscription Act, sought an injunction restraining defendants, members of a local draft board, from certifying him for military service. *Held*, that equity has no jurisdiction to "enforce mere personal rights as distinguished from property rights." *Angelus v. Sullivan*, 246 Fed. 54.

In support of its statement respecting equity jurisdiction the court cites cases which may be divided into two main classes. In the first class are cases in which an injunction was granted because the court could find interference with a property right or a breach of trust. *In re Debs*, 158 U. S. 564; *Truax v. Raich*, 239 U. S. 33; *Corliss v. Walker*, 57 Fed. 434; *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97. It is apparent that such cases are not authority as decisions that equity has no jurisdiction to enforce personal rights. The second class is made up of cases in which the court is asked to protect political interests, and this class includes a majority of the cases cited by the court. It is fair to say that the courts are more seriously troubled by the fact that no legal rights are involved in this class of cases, than by the fact that only a right of personality is violated. Some courts apparently recognize the possibility of real legal rights of a political nature coming into existence, so refuse to say broadly that equity has no jurisdiction. *Winnett v. Adams*, 71 Neb. 817, 99 N. W. 681. Another kind of authority that does not commend itself is that of a case overruled by a statute of the same jurisdiction. *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442. See N. Y. CONSOL. LAWS, c. 6, §§ 50, 51. If the authority of decisions is lacking on the juris-



diction of equity to protect rights of personality a dictum expressed with the problem clearly in mind seems preferable. *Vanderbilt v. Mitchell*, *supra*. See 21 HARV. L. REV. 54. The court's broad statement, which it seems was not absolutely necessary to a decision, is unfortunate, for it has no very firm standing either on authority or principle. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 343.

EQUITABLE EASEMENTS — CONSTITUTIONAL LAW — EFFECT OF CHANGED CONDITIONS UPON EQUITABLE SERVITUDES. — A statute conferred jurisdiction on a court to determine whether or not "equitable restrictions arising under contracts, deeds, or other instruments limiting or restraining the use or the manner of using land" were enforceable. If such enforcement were found to be inequitable, the court should register the titles to the land free from the restrictions. If the restrictions, however, were valid, though thus unenforceable, and it was found that any person or property entitled to the benefits of the restrictions would be damaged by the non-enforcement, such damages should be assessed and the registration of this unrestricted title be conditioned on the payment of these damages by the petitioner. Land belonging to the petitioner was subject to building restrictions, put on for the benefit of adjoining land belonging to the respondent, in the expectation that this would be a residence district. The neighborhood, however, became suited only to business purposes, and a petition was brought for the registration of title free from these restrictions. *Held*, that the statute as applied to these facts was unconstitutional, in that it provided for the taking of private property for a private purpose. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 243, 117 N. E. 244.

For a discussion of this case see Notes, page 878.

EVIDENCE — PROOF OF FOREIGN LAW — A QUESTION FOR THE COURT. — Defendant negligently caused plaintiff mental anxiety and distress, resulting in physical suffering. The act was committed in Ontario. *Held*, that foreign law is a question of fact for the trial court; that the question is not what has been previously held in the foreign jurisdiction, but what would the decision be if the case arose there today. *Hansen v. Grand Trunk Ry.*, 102 Atl. 625 (N. H.).

The decision of a lower court of the foreign jurisdiction is not conclusive evidence of the foreign law. *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522. See 16 HARV. L. REV. 452. But the decision of the highest court is generally so regarded. *Schmaltz v. York Mfg. Co.*, *supra*; *Sealy v. M. K. & T. Ry.*, 84 Kan. 479, 114 Pac. 1077. It is conceivable, however, that even such an adjudication may be erroneous, or may have become inapplicable and obsolete. This seems to be the attitude of the court in the principal case. Nor is their position unwarranted. There is a previous decision of the Privy Council on the question here involved. *Victorian Ry. Com. v. Coullas*, 13 A. C. 222. It has been severely criticized and expressly repudiated, though no opportunity has arisen to limit or overrule it. See *Dulieu v. White*, [1901] 2 K. B. 669. The holding that where the evidence of foreign law includes conflicting expert testimony, the question is nevertheless for the court, is quite modern. Where the problem is simply the construction of a statute or the interpretation of consistent decisions, it is generally agreed that this is within the province of the court. *Bradley v. Bentley*, 85 Vt. 412, 82 Atl. 669. See *Bank of China v. Morse*, 168 N. Y. 458, 470, 61 N. E. 774, 777. But where the decisions are conflicting, some courts hold that the question is for the jury. *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207. The increasing weight of authority, however, is that in such a situation the question is for the court. *Collins v. Norfolk & W. Ry. Co.*, 152 Ky. 755, 154 S. W. 37;

*Christiansen v. Graver Tank Works*, 223 Ill. 142, 79 N. E. 97; *Frasier v. Charleston & W. C. Ry. Co.*, 73 S. C. 140, 52 S. E. 964. Where the evidence of foreign law includes conflicting expert testimony, there is considerable authority that the question must be submitted to the jury. *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947; *Harrison v. Atl. Coast Line R. Co.*, 168 N. C. 382, 84 N. E. 519. It would seem that more accurate results are to be obtained by submitting the question to the court in any event. This was the position taken in the principal case. Cf. *Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834.

**INFANTS — AVOIDANCE OF CONTRACT DURING MINORITY.** — Workmen's Compensation Act provides all contracts of hiring, including those of minors, shall be presumed to have been made with reference to the act. (1911, N. J. PUB. LAWS, c. 95.) Plaintiff, an infant, having been injured in the course of his employment due to the negligence of his employer, seeks to disaffirm his contract and recover for negligent injury. *Held*, that he may not recover. *Young v. Sterling Leather Works*, 102 Atl. 395 (N. J.).

Contracts of an infant as a rule are merely voidable at his option. *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813. But a contract for necessities is valid so far as it is executed. However, the resulting obligation seems rather of a quasi-contractual nature. See W. A. Keener, "Quasi-Contract," 7 HARV. L. REV., 57, 72-73. But see *Cooper v. State*, 37 Ark. 421, 425. Contracts for services have generally not been included within the category of necessities, and accordingly some courts have refused to declare them binding. *Gaffney v. Hayden*, 110 Mass. 137. Since the rule allowing infants to avoid their contracts is intended to be for their benefit, other courts have held a contract cannot be avoided if upon consideration of the whole agreement it appears the infant derives a manifest advantage. *Clements v. London, etc. R.*, [1894] 2 Q. B. 482. This rule has sometimes been restricted to executed contracts. *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923. But the doctrine permitting an infant to avoid his contracts does not extend to contracts to do that which he was bound by law to perform. *Baker v. Lovett*, 6 Mass. 78. See CO. LITT. 172 a. Nor does it apply to contracts entered into under statutory authority or direction. *People v. Mullin*, 25 Wend. (N. Y.) 697; *United States v. Bainbridge*, 1 Mason (U. S.), 71.

**INSURANCE — INSURANCE AGENTS — WAIVER OF CONDITION BY BROKER ACTING FOR INSURED.** — The insured had a Florida broker to take care of all its insurance. This broker applied for a policy to the defendant, a Pennsylvania insurance company not doing business in Florida. The defendant made inquiries of the broker as to the condition of the property, mailed the policy to the broker, and paid the broker a commission out of the premium. A condition of the policy was broken by the insured with the assent of the broker. A Florida statute provided that any person in Florida, who received money on account of any contract of insurance, or who in any wise made any contract of insurance for an insurance company, was to be deemed an agent of such insurance company to all intents and purposes. (1914, FLA. COMP. LAWS, § 2765.) *Held*, that the defendant was chargeable with the broker's assent. *American Fire Ins. Co. v. King Lumber Co.*, 77 So. 168 (Fla.).

The case must turn upon the relation between the broker and the defendant. A broker, employed to procure insurance, should ordinarily be regarded as the agent of the person who employed him. *Allen v. German American Ins. Co.*, 123 N. Y. 625, 25 N. E. 309; *Parrish v. Rosebud Mining Co.*, 140 Cal. 635, 74 Pac. 312; *Ben Franklin Ins. Co. v. Weary*, 4 Brad. (Ill.) 74; *United Firemen's Ins. Co. v. Thomas*, 92 Fed. 127. See 2 BIDDLE, INSURANCE, § 1077. The fact that he receives a commission out of the premium is not enough to make him an agent of the insurer. *McGraw Co. v. German Fire Ins. Co.*, 126 La. 32, 52 So. 183



The contract was therefore a Pennsylvania contract, and the law of Florida would have no effect. *Northampton, etc. Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Commonwealth, etc. Ins. Co. v. Knabe Co.*, 171 Mass. 265, 50 N. E. 516; *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757. Cf. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226; *Hooper v. California*, 155 U. S. 648. Furthermore, the United States Supreme Court has construed section 2765 of the Florida statutes as not raising special agents with limited authority into general agents. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613. It would seem, therefore, that the insurer should not have been charged with the broker's knowledge and assent in this case.

**MINES AND MINERALS — OIL LEASE — EFFECT OF PARTITION OF OIL LAND ON THE RIGHT TO RECEIVE ROYALTIES.** — The owner of land gave an "oil lease" to another, granting him the exclusive right to explore for oil on the land, and if the same be found, to remove it, in consideration of the payment of a royalty of one-eighth of the oil produced. The landowner died, and, before the lessee drilled for oil the heirs brought a bill for the partition of the land, and the land was accordingly partitioned among them. Nothing was said in the bill or in the decree about the oil lease. The lessee then drilled for and produced oil on the land of some, but not all, of the heirs, and those heirs on whose land no oil was produced brought a bill to have the royalties divided among all the heirs. *Held*, that the royalties should be so divided. *Campbell v. Lynch*, 94 S. E. 739 (W. Va.).

For a discussion of this case, see Notes, pages 884-85.

**QUASI-CONTRACTS — TAXATION — MONEY PAID UNDER DURESS OR COM-PULSION OF LAW.** — A statute imposing an annual tax upon each company doing business in the state provided that if not paid when due five per cent should be added to the amount of the tax, together with interest to constitute a lien on the company's realty with the state. Plaintiff paid the tax under protest to prevent imposition of the penalty, and without waiving the right to claim no such tax was due. *Held*, that payment was made under duress and could be recovered. *Underwood Typewriter Co. v. Chamberlain*, 102 Atl. 600 (Conn.).

The rule is well settled that taxes voluntarily paid, even though the payment was made under protest, cannot be recovered. *Bank of Kentucky v. Stone*, 88 Fed. 383, *affd.* 174 U. S. 799; *Railroad Company v. Commissioners*, 98 U. S. 541. Under what circumstances the payment will be regarded as involuntary the courts are not agreed upon. Generally they have held that it must appear that the payment was made to release the person or property from detention, or in consequence of a threat of immediate arrest or seizure of goods. *Preston v. Boston*, 12 Pick. (Mass.) 7; *Lange v. Saffell*, 33 Ill. App. 624; *Detroit v. Martin*, 34 Mich. 170. It is but a proper qualification of this doctrine to regard as involuntary a payment made to avoid the onerous penalties bound to attach if the tax is not paid, and to prevent a costly interference in the business. Authority supports this view. *Ratterman v. Express Co.*, 49 Ohio St. 608, 32 N. E. 754; *Atchison, etc. Ry. Co. v. O'Connor*, 223 U. S. 280; *Strange Co. v. City of Merrill*, 134 Wis. 514, 115 N. W. 115.

**SURETYSHIP — SURETY'S DEFENSES: ABSENCE, EXTINCTION, OR SUSPENSION OF THE PRINCIPAL'S OBLIGATION — FRAUD ON PRINCIPAL NO DEFENSE TO SURETY.** — A creditor, by fraud, induced the debtor to give him a certain bond. The surety on the bond was ignorant of the fraud. *Held*, that the fraud on the principal was no defense to the surety. *Ettlinger v. National Surety Co.*, 58 N. Y. L. J. 751.

Ordinarily a defense to the principal is a defense to the surety. *Griffith v.*

*Silgreaves*, 90 Pa. 161. See BRANDT, SURETYSHIP, 3 ed., § 163. There are, however, several well-recognized exceptions. Thus, in a proper case the Statute of Limitations may bar action against the principal, while the right to proceed against the surety remains in full force. *Villars v. Palmer*, 67 Ill. 204. See 15 HARV. L. REV. 497. Discharge of the principal by operation of law, incapacity of the principal, or a defense of the principal known to the surety when he made his contract, will not generally give the surety a defense. *Wolf v. Stix*, 99 U. S. 1; *Cochrane v. Cushing*, 124 Mass. 219; *Yale v. Wheelock*, 109 Mass. 502; *Elliott v. Brady*, 192 N. Y. 221; *Plummer v. People*, 16 Ill. 358. But cf. *Osborn v. Robbins*, 36 N. Y. 365. To these well-founded exceptions the New York court assumes to add the case of fraud upon the principal in the creation of the principal obligation. The surety is not permitted to set this up in total or partial defense, on the ground that a contract induced by fraud creates a valid, subsisting obligation, binding until rescinded, and subject to rescission by the principal alone. There is some authority in accord with this view. *Henry v. Daley*, 17 Hun (N. Y.), 210. See *Evans v. Keeland*, 9 Ala. 42, 43. Cf. *St. Louis Perpetual Ins. Co. v. Homer*, 9 Met. (Mass.) 39; *Hiner v. Newton*, 30 Wis. 640. The clear weight of authority, however, is *contra*. See CHILD, SURETYSHIP, § 133. Some courts give the surety a complete defense. *Bennett v. Carey*, 72 Iowa, 476, 34 N. W. 291; *Putnam v. Schuyler*, 4 Hun (N. Y.), 166. See *Whitcomb v. Schultz*, 223 Fed. 268, 278. Other courts apparently would permit the surety to set up the fraud merely by way of counterclaim. See *Stratman v. Stookey*, 3 Ill. App. 336; *Seldner v. Smith*, 40 Md. 602; *Jarratt v. Martin*, 70 N. C. 459. Where the principal has already rescinded the contract it is everywhere conceded that the surety has an absolute defense. *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Macey, etc. Co. v. Heger*, 195 Pa. 125, 45 Atl. 675. Since the surety on payment will be subrogated to a materially different right from that which he had a right to expect, it would seem that he should be given a complete defense, even where the principal has not yet repudiated the contract. Cf. *Swire v. Redman*, 1 Q. B. D. 536; *Railton v. Mathews*, 10 Clark & F. 934.

SURETYSHIP — SURETY'S DEFENSES: SURRENDER OR LOSS OF SECURITIES — LOSS THROUGH ACT OF CREDITOR AND OPERATION OF LAW. — Plaintiff, the indorsee of a promissory note, sued the maker and attached his property. The attachment was dissolved by the maker's discharge in bankruptcy, in the petition for which plaintiff had joined. Plaintiff sues the indorser. *Held*, that he is liable. *Howard National Bank v. Arbuckle*, 102 Atl. 476 (Vt.)

By the weight of authority and on principle, the voluntary release of an attachment lien on the debtor's property discharges the surety. *Maquoketa v. Willey*, 35 Iowa, 323; *Spring v. George*, 50 Hun (N. Y.), 227. *Contra*, *Barnes v. Clark*, 46 N. H. 514; *Montpelier Bank v. Dixon*, 4 Vt. 587. See 1 BRANDT, SURETYSHIP, 3 ed., § 494. The result reached by the principal case is unquestionably correct in a jurisdiction like Vermont which takes the minority view. Its consistency with the majority rule involves more difficult considerations. A surety's liability is unaffected by bankruptcy proceedings in which the creditor assents to a resolution for accepting a composition. *Guild v. Buller*, 122 Mass. 408; *Ex parte Jacobs*, L. R. 10 Ch. 211. This is so even where the assent is absolutely requisite to secure the debtor his discharge. *Browne v. Carr*, 7 Bing. 508. Furthermore, a creditor may exercise an option under the bankruptcy law to give up his security and prove for his full claim, or he may institute the proceedings and yet hold the surety. *Rainbow v. Juggins*, 5 Q. B. D. 422; *Thornton v. Thornton*, 63 N. C. 211. That a subsidiary effect of the discharge in proceedings instituted by the creditor is the dissolution of an attachment lien should not justify application of the voluntary release rule, *supra*. Despite the nature and extent of the creditor's participation, the dis-



charge and dissolution are effected by operation of law and should afford but a personal defense to the debtor.

**TAXATION — PROPERTY SUBJECT TO TAXATION — FOREIGN-OWNED CARS ENGAGED IN INTERSTATE COMMERCE.** — A state tax was levied on tank cars owned by a foreign manufacturing corporation and used in the state in distribution of the corporation's products in interstate business. None of the cars were used in the state exclusively. *Held*, that the tax is valid. *Vera Chemical Co. v. State*, 102 Atl. 463 (N. H.).

A state tax on the privilege of operating foreign cars engaged in interstate traffic within the state is invalid as an unlawful interference with interstate commerce. *Pickard v. Car Co.*, 117 U. S. 34. But the fact that property is used in interstate commerce does not render it immune from its fair share of the burdens of government. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18. The tax in the present case is a tax on property, and the difficulty of an interference with interstate commerce is not presented. But a property tax can be imposed only on property having a permanent *situs* within the territory of the sovereign imposing it. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596. No particular car here had a permanent *situs* in the taxing state, and if the tax was levied arbitrarily on such cars as happened to be in the state at the date of the tax levy, the case is quite unsupportable. But if the tax was levied on the average number of cars always in the state, it can be justified as a tax on a constant aggregate of shifting units. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70. The case is not clear on this point.

**TORTS — UNUSUAL CASES OF TORT LIABILITY — ACTION FOR INDUCING BREACH OF CONTRACT TO MARRY.** — The complaint alleged that the defendants induced plaintiff's fiancé to break his engagement with her by threatening to have him placed in a sanitarium and by making false statements as to plaintiff's character. The defendant demurred. *Held*, that plaintiff had no cause of action. *Homan v. Hall*, 165 N. W. 881 (Neb.).

The cause of action for slander was barred by the statute of limitations, which is one year for libel and slander and four for other torts. See 1909, NEB. ANN. STAT., §§ 1012, 1014, 1015. But it is a general rule that an action will lie for interference with contract rights. *Bowen v. Hall*, 6 Q. B. D. 333; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869. See William Schofield, "Principle of Lumley v. Gye," 2 HARV. L. REV. 19, 23. See also 16 HARV. L. REV. 299. Even vaguer rights, such as the right to an expectancy or to free business relations, have been protected. *Kelly v. Kelly*, 10 La. Ann. 622; *Lewis v. Bloede*, 202 Fed. 7; *Tarleton v. Magawley*, Peake 205. The principal case would seem to be no exception on principle, and as the allegations of the complaint negative any possible defense of privilege the decision seems difficult to support. Only one analogous case has been found. *Leonard v. Whetstone*, 34 Ind. App. 383, 68 N. E. 197. This is in accord with the principal case and like it is based on a statement of Judge Cooley, made in the discussion of another subject and supported by no authority. See COOLEY, TORTS, 2 ed., 277.

**TRADE-MARKS AND TRADE NAMES — PROTECTION APART FROM STATUTE — EFFECT OF FRAUDULENT ADVERTISING BY PLAINTIFF ON RIGHT TO INJUNCTION.** — Defendant was using the name of plaintiff's vaudeville act for her own act. Plaintiff's act claimed to be an exhibition of thought transference, but was really only a trick. In his advertising plaintiff had published a false account of his life. Plaintiff asks for an injunction. *Held*, the injunction should be refused. *Howard v. Lovett*, 165 N. W. 634 (Mich.).

For discussion of this case, see Notes, page 889.

**WILLS — REVIVAL AND REPUBLICATION — EFFECT OF REPUBLICATION ON LAPSED LEGACIES.** — After the death of a legatee under her will, testatrix executed a codicil containing no reference to the legacy in question. By statute the lineal descendants of a predeceasing legatee take the bequest. (CAL. CIVIL CODE, § 1310.) Estate proceedings were brought to determine *inter alia* the rights of a son of the legatee. *Held*, that as the codicil republished the will, the son does not take. *In re Matthews' Estate*, 169 Pac. 233 (Cal.).

As a general rule, the execution of a codicil operates to republish the will. *In re Campbell*, 170 N. Y. 84, 62 N. E. 1070; *Wait v. Belding*, 24 Pick. (Mass.) 129. However, a contrary intent will vary the rule, and such intent may be implied from circumstances. *Alsop's Appeal*, 9 Pa. 374. See 1 JARMAN, WILLS, 5 Am. ed., 364. A charitable bequest is not republished if thereby illegalized. *Appeal of Carl*, 106 Pa. 635; *Estate of McCauley*, 138 Cal. 432, 71 Pac. 512. It is submitted that wherever the effect is to render the legacy void, and where no intent is expressed, the fair implication supports an intent not to republish. In the converse case of an adeemed legacy, the execution of a codicil does not cause a revival thereof. *Hopwood v. Hopwood*, 7 H. L. C. 727; *Paine v. Parsons*, 14 Pick. (Mass.) 318. Even assuming this to be an improper interpretation of the doctrine of republication, it does not follow that the principal case is sound. Under statutory provisions, identical in substance with that herein involved, the majority of jurisdictions refuse to apply the otherwise settled rule that a legacy to a deceased person is void. *Winter v. Winter*, 5 Hare, 306; *Minter's Appeal*, 40 Pa. 111. *Contra*, *Twitty v. Martin*, 90 N. C. 643. See 2 WOERNER, AMERICAN LAW OF ADMINISTRATION, § 435. Hence the present case does not seem consistent either with principle or with the better rule of the authorities.

## BOOK REVIEWS

**THE LAW OF EMINENT DOMAIN.** A Treatise on the Principles which affect the Taking of Property for Public Use. By Phillip Nichols. Second Edition. Two volumes. Albany: Mathew Bender and Company. 1917. pp. cclii, 1577.

This edition, which contains nearly three times as many pages as the first, published eight years ago, is in fact a wide extension of the scope of the earlier book. The first edition was avowedly confined largely to the principles of constitutional law underlying and limiting the power of eminent domain and its exercise. The author has added to the second edition a great mass of material relating to the measure of compensation and the procedure in condemnation cases. Nearly twenty thousand cases are cited. Such examination as it has been possible for the reviewer to make indicates that most of the more important English cases have been cited. Because of constitutional and statutory provisions which so largely govern the exercise of this power in the United States, the treatment is based almost entirely upon American law. While the discussion of principles and of the leading concepts is intelligent and helpful, the book is primarily for the bar and for practical use in brief making. It would seem that the work in its present form is at least as useful as any now published. There is opportunity for a scholarly and original examination of such fundamental conceptions as "Public Use," "Public Purpose," "Servitudes," "Police Power," and "The Doctrine of Necessity." It is not surprising, however, that a practitioner's book should confine itself to a consideration of the expressed results of court decisions. This, it is believed, the present book has done with accuracy and thoroughness.

HENRY M. BATES.



ZOLINE ON FEDERAL APPELLATE JURISDICTION AND PROCEDURE. By Elijah N. Zoline. Revised by Stephen A. Day. New York: Clark Boardman Co., Ltd.

The amount of litigation in the federal courts is increasing. "The Federal Reporter," founded in the early eighties, already exceeds 240 volumes. This number substantially equals the reports of all the superior federal courts up to that time and also the reports of the Supreme Court of the United States from the founding of the Republic to date. The practice in the federal courts of first instance conforms to a certain extent to the practice of the states in which those courts sit. The appellate jurisdiction and procedure of the federal courts is governed by the federal rule alone. Thus knowledge of the state appellate jurisdiction and procedure is no guide to that of the federal courts. The work in question furnishes that guide.

The rules as to appellate jurisdiction and procedure are frequently technical. It is essential that the practitioner should be able swiftly to locate the statute, rule, or decision which determines his precise point. In such a subject reasoning by analogy is open to peculiar dangers. The large space devoted to the subject of "Appeal and Error" in the Digest of the Federal Reporter and Supreme Court of the United States indicates how many are the possible pitfalls and the high percentage of casualties. Excellence of arrangement and adequate indexes are the first requisites of a work on such a subject.

The present work fulfils both requirements. The text is divided into nineteen chapters. Each chapter deals with a particular subject or phase of the subject. Each paragraph is numbered and entitled. At the head of each chapter is an index which refers to each paragraph by number. These chapter tables of contents are gathered together to form the general table of contents. An adequate subject index is placed at the back of the volume. In addition there is a table of cases indexed with reference to the page or pages on which the case is cited. An appendix of forms duly indexed adds to the convenience of the book. With these aids the practitioner is enabled to locate his precise point with a minimum of effort.

The text is unusually clear and lucid. The sentences and the paragraphs are short. The subject does not lend itself to the theoretical discussion which makes the peculiar value of a book like Gray's "Perpetuities." But the author has read and digested his material. He has not contented himself with reproducing a series of headnotes for which he supplies the connectives. The result is a great gain in clearness and a consequent saving of time. The lawyer who uses this book materially decreases the chance that his case will perish in that great American desert named "Appeal and Error."

EDWIN H. ABBOT, JR.

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INTERNATIONAL LAW AND PRACTICE. With Appendixes containing Hague Conventions of 1907, Declaration of London, 1909 (with Drafting Committee's Report), and Materials concerning Branches thereof susceptible of Adjustment on the Termination of the War (Supplemental to "Problems of International Practice and Diplomacy"). By Sir Thomas Barclay, London. Boston. 1917. pp. xvi, 216.

The above title gives an idea of the character of this book. It is in the main a collection of material which would be very serviceable at any international conference. With the exception of seventy-five pages, the appendixes above mentioned make up the book. The appendixes include such material as has behind it support sufficient to make it necessary that any international conference give the material consideration, even though, in some instances, it has not yet been embodied in conventions, and even when embodied in conventions, the conventions may not have been adopted by formal state ratification.

The seventy-five pages of text with wide margin for notes compare the work of the First and Second Hague conferences, consider the proposed Convention for an International Prize Court, and the Declaration of London as related to the Prize Court Convention, and discuss other problems which may confront the Third Hague Conference, or any other international conference after the war. Such important unsettled questions as the law relating to aircraft, the occupation of unoccupied territories, and leased territory, are mentioned with constructive suggestions.

It was and is the hope of Sir Thomas Barclay that this book be of service in facilitating international agreements. He says: "To sneer at The Hague court, at arbitration, at peace methods, at international law generally because the most terrible war the world has ever seen has broken out in spite of them, is just about as reasonable as to sneer at engineering, architecture and the science of building generally, because an earthquake or an inundation has destroyed some of man's finest work. The short sight of practical mediocracies, however, will always appeal to other short-sighted mediocracies just as sheep will follow their own bell-wether, and their sneers are of no ultimate effect.

"Wars are explosions of national anger and, while the excitement lasts, nations are just about as sensible as individuals in the midst of a violent quarrel. That the excitement will exhaust itself and that men will return to a normal state of mind and see things in their proper proportions is as certain as the play of action and reaction in the course of things mundane in general."

To the superficial observer such words may seem unjustified, but the book itself is offered as forming a partial justification for the belief. G. G. W.

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LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825. By Ralph Harlow. Yale University Press.

Mr. Harlow has written a useful and competent monograph upon an important subject of which little enough is known. He has realized that legislative progress, like that of the law, is "secreted in the interstices of procedure," and what he has written constitutes a really valuable essay in the technique of parliamentary government. He has realized that in a matter such as this the reality is likely to be highly different from the theoretic forms, and if he has made no striking discoveries, he has at any rate painted a convincing picture. His book illustrates the great extent to which the life of a political assembly is dependent upon its forms, and how different those forms well may be in the hands of different leaders. He shows that the period of Clay's leadership marks a real turning-point in the history of Congress, because he was the first man who was not only Speaker, but also the leader of a majority party who consciously used his office to magnify that party. He illustrates with no little vividness of detail the way in which the history of legislative methods is a slow departure from the traditional English system. He makes plain how much importance is to be ascribed to the presence or absence of able men in either chamber of Congress. It is interesting to watch the curious fluctuations in the standing-committee system, and to realize how much of their power has depended upon the disappearance of the excessively legalistic spirit of the first twenty-five years of the Union. He shows with clearness that the real secret of the triumph of the committee system in Congress was the way in which it was able to go behind the impossible theory of the separation of powers and provide a suitable, even an efficient, avenue of communication between the Cabinet and Congress. He makes us understand how vital was the influence of Hamilton in insisting upon the rigid organization of his party. He has many minor details, such as the story of the Boston junto (Chapter II) and its analogue in New York. The basic fact which here emerges is the constant struggle



between the lower house and the executive; and the way in which, by means of the *junto*, that house was able to attempt, and even to succeed in, an administrative interference from which size would otherwise have debarred it. Finally it is interesting to see how small an influence the Revolution exerted upon traditional methods. All that seems to have been done was to adopt a mechanism felt to be adequate to a new spirit. Here, as elsewhere, what stands out prominently is the fundamental conservatism of 1776. It is, at the same time, a suggestive fact, for it shows how little difference in traditional outlook separated America from Great Britain, and how easily a wise generosity like that of Burke might have anticipated the federalism of the nineteenth century.

The defect of Mr. Harlow's book is the defect of many similar essays of the younger American historians. He does not see, or he does not emphasize, the fundamental bearing of its subject. Mr. Harlow is always cautious and sober and well informed. He is always painstaking and his basic accuracy is beyond reproach. But he will not take a leap in the dark. He will not see how closely his theme is related to fundamental problems of our own time; or, if he sees the connection, he fails to make use of it. If he had brought his volume into contact with the epoch-making books of Redlich and Ostrogorski, if he had studied his subject in the light of certain fascinating suggestions of Sir Courtenay Ilbert and Mr. Graham Wallas, we might have had an essay which no student of law could avoid examining. What judgment, for instance, would Mr. Harlow pass upon the separation of powers? Is there any sense in which it was, even within his period, a useful dogma? How far was the committee system satisfactory as a link between legislature and executive? Is the American speakership more satisfactory in its functioning than the English? What, above all, of the problem of size? Is there a point above which a chamber is impossible, and below which it ceases to be representative? What fundamental rules emerge for the conduct of debate? Is the House of Commons as a committee liable to produce a better bill than Congress in its several committees? How would Mr. Harlow meet the problem of drafting? Here, clearly, are the questions in which the lawyer is interested. He realizes that we have entered upon an age in which, important as necessarily must be the fundamental character of legislation, the real problem will be that of applying it. Nothing else and nothing less is implied in the swing of the balance of the constitutional pendulum from legislature to executive. Mr. Wilson, for instance, has, at least for the moment, a power of proclamation which closely resembles the right of the Local Government Board in England to issue provisional orders. Does his study make Mr. Harlow think that such a blank draft on principles is in fact a satisfactory method? It is greatly to be hoped that Mr. Harlow will embark upon the study of these questions.

One last remark may be hazarded. This book makes clear the impossibility of studying the problems of law apart from the men who make it. Madison, Hamilton, Jefferson, Clay — the personality of each one of these is written large upon the technique of American institutions. It would be an admirable thing if some lawyer gifted with courage were to undertake a study of the Constitution with that in mind. He could give us the cases and the statutes, but he could also give us something more. He could make us understand the ultimate causes of the direction Marshall gave to the Supreme Court; and he could soberly estimate the part played by length of tenure in the character of American constitutional law. It is worth while, for instance, to imagine what might have happened if the appointment to the Chief Justice's position had been in Jefferson's hands, instead of in so stern a federalist's as his predecessor. Maitland has somewhere pointed out that the greatness of Stubb's history lies in its skilful mingling of narrative and criticism. It is a fabric that American lawyers have still to weave.

H. J. L.

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## JURISDICTION OVER DEBTS FOR THE PURPOSE OF ADMINISTRATION, GARNISHMENT, AND TAXATION

WHILE physical power is recognized as the foundation of jurisdiction,<sup>1</sup> and many important rules of law are based on this principle as, for example, the rules that service by publication does not warrant a personal judgment against a nonresident,<sup>2</sup> and power of control over the *res* constitutes sufficient basis for jurisdiction *in rem*,<sup>3</sup> and without such control of the *res*, a judgment *in rem* is not valid,<sup>4</sup> still this fundamental principle has not always been kept clearly in mind, and the failure to do so has produced a complex and confused state of the law where simplicity only need exist. This is especially true of the law as respects jurisdiction over debts. Control over the *res* will give jurisdiction *in rem*, though its owner is an absent nonresident and not served personally with process. Thus jurisdiction *in rem* is exercised

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<sup>1</sup> In *McDonald v. Mabec*, 243 U. S. 90, 91 (1917), where it is held a personal judgment rendered upon service by publication is void, Holmes, J., says: "The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind."

<sup>2</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877); *McDonald v. Mabec*, 243 U. S. 90 (1917).

<sup>3</sup> 27 HARV. L. REV. 107.

<sup>4</sup> *The Belgenland*, 114 U. S. 355 (1885), 27 HARV. L. REV. 107; *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905).



by admiralty courts over vessels,<sup>5</sup> and by equity courts, through the aid of statutes, over land<sup>6</sup> situated within the boundary of their sovereign without regard to jurisdiction over the persons having interests therein. In other words, where the state has power of control over the *res*, it has not only the power which every state unrestricted by constitutional inhibitions has to destroy the rights, powers, and immunities as respects that *res* of an owner over whose person it has no jurisdiction, but such power, when exercised in accordance with the accepted principles of jurisdiction *in rem*, is respected in other states on common-law principles, and is not objectionable as violating any constitutional guaranty of the owner.<sup>7</sup> While power of control is the foundation upon which jurisdiction rests, it is not incumbent upon courts to take jurisdiction in every instance where such power exists. Policy or restrictions of the federal constitution may stand in the way. Thus, for practical reasons, ancillary administration would not be granted in a state where property of the decedent was merely in transit through that state, though such state would have power to grant such administration. Or it may be that due process of law requires the courts of a state where property is located to refuse jurisdiction unless there has been notice by publication to the absent non-resident owner.<sup>8</sup> Or it may be that the requirement of due process of law would not be met by a state levying a tax upon property merely in transit through the state, though the state would have power to levy such tax except for the constitutional prohibition.<sup>9</sup>

Jurisdiction over tangible property is dependent upon the physical presence of the property, for it is at such place that the power of control exists. But the important thing to observe is, that it is the power of control that is the basis of jurisdiction, and not location, and it is this power of control which gives whatever significance there is to the legal concept, "*situs*."<sup>10</sup>

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<sup>5</sup> *The Belgenland*, 114 U. S. 355 (1885).

<sup>6</sup> *Arndt v. Griggs*, 134 U. S. 316 (1890).

<sup>7</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877); *Arndt v. Griggs*, 134 U. S. 316 (1890).

<sup>8</sup> *Arndt v. Griggs*, 134 U. S. 316 (1890).

<sup>9</sup> *Hays v. Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854); *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905).

<sup>10</sup> *Situs* is said to be the basis of jurisdiction over property. When referring to tangible property, the word is used to designate the place where it is located. To use "*situs*" in respect to tangible property as meaning anything else than actual location, as for example the place where the property will be considered as having its

It is evident that the law for purposes of jurisdiction is not interested in the spatial quality of property, that is, the fact that the property has extension, or occupies space, except in so far as that quality affords the state the power of control over it. If the location, or situs, of tangible property gave no power of control, or if control could be exercised independently of situs, then we should never have "situs" mentioned in connection with jurisdiction over property. Where the property is tangible in form, power of control, and location coincide.<sup>11</sup>

Even here it is evident that it is power of control and not location that is the basis of jurisdiction. For the mere fact that the property is within the territory during the litigation is not enough; control must be taken at the time litigation is begun.<sup>12</sup>

Where the property is intangible, however, this element of location is absent, but power of control may still exist and constitute the basis of jurisdiction. The failure to observe that it is this element of control, and not the quality of occupying space, that gives "situs" its significance, has led to the greatest confusion in the decisions relating to jurisdiction over intangible property in the form of debts. A variety of views, mostly untenable, has developed as a result of the attempt to use "situs" in the sense of location as applicable to debts. One view locates it, by means of the fiction *mobilia sequuntur personam*, at the creditor's domicile;<sup>13</sup> another at the debtor's domicile;<sup>14</sup> a third, considering it a light and nimble thing, finds that it may be located by legislative fiat at the debtor's domicile;<sup>15</sup> a fourth considers a debt, since it is intangible, as being without situs;<sup>16</sup> a fifth, as having its situs determined in each case by the purpose involved;<sup>17</sup> a sixth, that it has

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situs for legal purposes, when such place differs from its actual location, is to introduce fiction without any justifiable excuse. This only serves to conceal truth and lead to confusion. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596 (1854), is an example of a case where "situs" is used in a fictional sense, and there is exhibited an insufficient grasp of the principles of jurisdiction.

<sup>11</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877).

<sup>12</sup> *Pennoyer v. Neff*, 95 U. S. 714 (1877).

<sup>13</sup> *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300 (1872).

<sup>14</sup> *Bragg v. Gaynor*, 85 Wis. 488, 55 N. W. 919 (1893).

<sup>15</sup> MINOR, CONFLICT OF LAWS, 287.

<sup>16</sup> "The true view would seem to be that a chose-in-action, not being corporeal has no situs for any purpose." BEALE, CASES ON CONFLICT OF LAWS, Vol. III, 507, § 25.

<sup>17</sup> 16 HARV. L. REV. 63, note.



two situs, an actual one at the domicil of the debtor, and a legal one at the domicil of the creditor;<sup>18</sup> a seventh, that where the debt is in the form of a bond, note, or other specialty, its situs is where the instrument is;<sup>19</sup> and an eighth, which seems to be the more accurate view, that the situs of a debt is wherever the debtor can be found.<sup>20</sup>

Bearing in mind this elemental fact that physical power is essential to jurisdiction over property and considering situs as the place where power of control can be exercised, let us in the light of the jurisdiction that is exercised over tangible property, consider the problems of jurisdiction over debts for the purpose of administration, garnishment, and taxation.

## I. JURISDICTION OVER DEBTS FOR PURPOSES OF ADMINISTRATION

A debtor may be sued wherever process may be served upon him. This fact justifies the decisions which allow an administrator to sue a foreign debtor who comes within the jurisdiction in which the administrator is permitted to sue. Power to collect the debt exists there, as there is power of control over the debtor. If an administrator wishes to recover property or debts outside the state, he must be granted ancillary administrative power.<sup>21</sup>

Ancillary administration will be granted by the courts of a state where the tangible property of a nonresident decedent is located. Power of control over the property both demands and justifies this procedure.

In like manner ancillary administration will be granted by the courts of a state where a debtor of a nonresident decedent is domiciled. Power of control over the debtor is required to give the necessary power of control over the debt.

As no administration would be granted by the courts of a state through which a chattel is in transit, so no administration will be granted where a debtor is present within the state only temporarily. The reason for the refusal to take jurisdiction in such cases is not that there is a lack of power to exercise jurisdiction, but for the

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<sup>18</sup> MINOR, *CONFLICT OF LAWS*, § 121.

<sup>19</sup> *Bacon v. Hooker*, 177 Mass. 335, 337, 58 N. E. 1078 (1901).

<sup>20</sup> *Harris v. Balk*, 198 U. S. 215 (1905).

<sup>21</sup> Unless a state expressly grants that power to a foreign executor or administrator by statute as is done in some states. See REV. STAT. OF ILL. 1915-16, chap. 3, § 42.

practical reason that the administrator cannot be sure of reducing his claim to possession in that state.<sup>22</sup> Where the property is permanently located or where the debtor has his domicile, there the court has jurisdiction all the time, and if administration is granted, the administrator can be practically certain of making use of the powers granted him.

## II. JURISDICTION OVER DEBTS FOR PURPOSES OF GARNISHMENT

We have seen that power of control over the debtor is the foundation of jurisdiction over debts for purposes of administration. As tangible property must have a more or less permanent situs for purposes of administration, so in case of a debt sufficiently permanent situs is found where the debtor is domiciled. It is at such place that power of control of a necessary duration exists.

Tangible property may be attached in any state where it lies.<sup>23</sup> So the possessor of a chattel may be garnisheed in any state where he holds the chattel. This is true though the goods happen to be merely in transit through the state.<sup>24</sup> If the goods have not come into the state, or have passed through, the possessor is not subject to garnishment.<sup>25</sup> The temporary physical presence of the tangible chattel affords the state power of control over it of a duration sufficient for the purpose of garnishment, and as jurisdiction over the debtor affords the state a similar power of control over the debt, on principle we should expect to find in that case also temporary jurisdiction over the debtor sufficient for garnishment proceedings. And so we do actually find it. It has been so held in a series of comparatively recent cases by the United States Supreme Court.<sup>26</sup> Jurisdiction in these cases has been placed upon the ground that

<sup>22</sup> 27 HARV. L. REV. 114, 115; *Saunders v. Weston*, 74 Me. 85 (1882); *Pinney v. McGregory*, 102 Mass. 186 (1869); *Stearns v. Wright*, 51 N. H. 600 (1872); *Fox v. Carr*, 16 Hun (N. Y.), 434 (1879); *Barrett v. Barrett*, 170 Ky. 91, 185 S. W. 499 (1916).

<sup>23</sup> *Bowen v. Pope*, 125 Ill. 28, 17 N. E. 64 (1888); *King v. Vance*, 46 Ind. 246 (1874); *Melhop v. Doane*, 31 Iowa, 397 (1871); *Downer v. Shaw*, 22 N. H. 277 (1851).

<sup>24</sup> 27 HARV. L. REV. 107, 113.

<sup>25</sup> *Western R. R. Co. v. Thornton*, 60 Ga. 300 (1878); *Montrose Pickle Co. v. Dodson, etc. Mfg. Co.*, 76 Iowa, 172, 40 N. W. 705 (1888); *Sutherland v. Second National Bank*, 78 Ky. 250 (1880); *Pennsylvania R. R. Co. v. Pennock*, 51 Pa. 244 (1865); *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 19 N. W. 72 (1884). These cases, with others, are cited in 27 HARV. L. REV. 113.

<sup>26</sup> *Chicago, R. I. & P. Ry. Co. v. Sturm*, 174 U. S. 710 (1899); *Harris v. Balk*, 198 U. S. 215 (1905); *Louisville & Nashville R. R. Co. v. Deer*, 200 U. S. 176 (1906).



"power over the person of the garnishee, confers jurisdiction on the courts of the State where the writ issues."<sup>27</sup>

While these decisions of the United States Supreme Court, holding that a judgment obtained in a court having jurisdiction over the person of the garnishee only, are good against the defendant, a nonresident debtor-creditor, upon whom service was not obtained, and are entitled to full faith and credit in the other states of the Union, these holdings do not require the courts of the state in which garnishment proceedings against a nonresident defendant are originally brought to take jurisdiction. They have nevertheless settled the law in favor of taking jurisdiction in such cases. Where statutes authorize such proceedings, there is no reason for the courts adopting a hostile attitude and interpreting them as not intending such operation, or refusing to take jurisdiction in such case.<sup>28</sup>

Though the law is settled in harmony with the doctrine of *Harris v. Balk*, strong objections have been urged against it by Professor Joseph H. Beale, one of America's ablest writers on the Conflict of Laws.<sup>29</sup> These objections must now be examined. There are several of them. One, that it is a departure from the custom of London as to Foreign Attachment upon which our statutory process of foreign attachment or garnishment is based; another, that it loses sight of the original conception of garnishment as a proceeding *in rem*, and substitutes for it the conception of garnishment as a transitory personal action against the garnishee; another, that a debtor cannot be discharged of his debts to foreign creditors in a garnishment proceeding since he cannot in an insolvency proceeding; and other objections are, that it is unjust both to the garnishee and to the principal defendant.<sup>30</sup>

Undoubtedly our practice in garnishment proceedings has gone beyond the custom of London as to Foreign Attachment in that our law does not require the garnishee to be a resident of, or the debt payable in the jurisdiction where the proceeding is begun, as does the custom of London. The custom does, however, have this

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<sup>27</sup> *Harris v. Balk*, 198 U. S. 215, 222 (1905).

<sup>28</sup> See cases collected in 19 L. R. A. 577; 67 L. R. A. 209; 3 L. R. A. (N. S.) 608; 20 L. R. A. (N. S.) 264; 1915 F. L. R. A. 880.

<sup>29</sup> 27 HARV. L. REV. 107-44.

<sup>30</sup> *Ibid.*, 107, 115, 116, 120-22.

fundamental likeness to our practice; it permits debts due the nonresident defendant to be appropriated to the payment of debts due the plaintiff without personal service upon the defendant.<sup>31</sup>

But surely it is not seriously contended that our practice as to garnishment is unwarranted because our legislatures have had the temerity to depart from the custom of London as it existed perhaps three centuries ago, and it cannot be concluded that these statutes have departed from the custom without observing the end such departure sought to accomplish, — the application of valuable assets of the debtor, which could not otherwise be reached, to the payment of his debts. It is very likely these statutes were framed with the deliberate purpose of covering debts wherever payable, and of catching the garnishee whether a resident or not. Professor Beale nowhere urges that the custom of London goes too far. In fact, he urges that the fault in our practice lies in its departure from the custom, but his contention stated later herein, that the court of the debtor's domicil has no power to reach the debt due the foreign debtor-creditor without jurisdiction over his person, would, had it been heeded, have prevented the custom from ever arising. There never could have been garnishment of debts in such case without personal service upon the defendant, the foreign debtor-creditor.

Furthermore, Professor Beale's assertion that to allow an action against the garnishee wherever found, involves an abandonment of the idea of the action as one *in rem*, and a treatment of it as a transitory personal action against the garnishee, is based upon the assumption that the debt cannot have a situs with the debtor. If the situs of the debt is wherever you can get service upon the debtor (garnishee), because that is where you can exercise control over the debt, then there exists in that place the basis for jurisdiction *in rem*. Professor Beale admits, as every thoughtful lawyer must admit, that power of control over the debt gives jurisdiction, and jurisdiction *in rem*, too, but he would say you get no power

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<sup>31</sup> "Under these proceedings (custom of London) without personal service upon the defendant, debts due the defendant, which were not subjects that could be reached by a *fi. fa.* at law, were subject to his (plaintiff's) claim." *Haber v. Nassits*, 12 Fla. 589, 609 (1869).

Our proceedings by attachment against absent and absconding debtors are borrowed from what is called a foreign attachment under the custom of London. *Welsh v. Blackwell*, 14 N. J. L. (2 Green) 344, 346 (1834).



of control over the debt by having jurisdiction over the debtor alone. He says:

"The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. Like other such relations it may, of course, be controlled by the law, or by the courts as instruments of the law; but the control must be obtained by making use of the relation. In order to control the relation the court must have the power to control both parties to it. Any court which has both debtor and creditor may compel a release from the creditor, and an assignment of the action of the creditor. In other words, if a debt is to be legally assigned or discharged it requires the action of both parties, and especially the creditor, and the court which has to apply such a process must do so through its control over both parties."<sup>32</sup>

We agree in part with Professor Beale in this statement; we admit that a debt has no existence anywhere, that it consists of a relation between debtor and creditor, and that this relation is subject to control by the courts. But we take issue with him as to the place where the courts may exercise that control for purposes of garnishment. Ownership of tangible property consists of a relationship<sup>33</sup> perhaps somewhat different from the relationship between creditor and debtor, because of the difference in the elements related. In the case of tangible property, the direct relationship between the owner and the thing is without significance because the *res* has no rights, powers, privileges, or immunities which it may exercise against the owner or any will to assert them. The relationship is of importance only as it affects some third person or persons. In the case of a debt, the relationship between the creditor and debtor has two aspects of significance for the law; one, the direct relationship between the creditor and the debtor, *i. e.*, the right *in personam* which the creditor has against the debtor, and the correlative duty of the debtor to the creditor, and the other, its relationship to third persons, *i. e.*, to the world. In this latter aspect, the law has come to treat this right of the creditor as it relates to third persons as a property right. The debt is an asset of the creditor, in the same way in which any tangible property he owns is an asset.

In garnishment proceedings we are dealing with the rights of

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<sup>32</sup> 27 HARV. L. REV. 107, 115-16.

<sup>33</sup> AMES, LECTURE ON LEGAL HISTORY, 212.

a third person to treat the debt due a creditor as assets, and to apply it as he would assets of a tangible sort to the payment of debts due him. In garnishment proceedings it is submitted that the doctrine of our courts is sound in considering jurisdiction over the debtor (garnishee) alone as sufficient basis of jurisdiction *in rem* over the debt. The analogy of the attachment and garnishment of chattels warrants this conclusion.

We have seen that tangible property may be attached in any state where it lies, and that the possessor of a chattel may be garnisheed in any state, regardless of the fact that the owner resides outside the state, and is not served with process. Here is a basis for jurisdiction *in rem*, or rather *quasi in rem*, and the courts have found no difficulty in severing the relationship of the owner to the property, without having the owner before it, and such decisions have been held not to violate any constitutional guaranty.<sup>34</sup>

Jurisdiction over the debtor gives as complete control over the debt as the physical presence of a piece of tangible property gives the court power of control over it. The court, having exclusive jurisdiction over the debtor, has power to appropriate the debt in the same way that a court having jurisdiction over tangible chattels may appropriate them to the payment of the debtor's debts. In either case the restrictions on the court's power to do as it pleases with the chattel or debt do not arise from a lack of control, but are imposed by the constitution or out of considerations of policy.

Professor Beale contends that since a debtor cannot be discharged of debts which he owes to foreign creditors in an insolvency proceeding had at his domicile, a debtor cannot have a debt which he owes to a foreign creditor made the subject matter of a garnishment proceeding. But this is a *non sequitur* for two reasons. First, the two proceedings are not alike in all particulars, and secondly, if they were, it does not necessarily follow that garnishment should be treated as insolvency is treated rather than the reverse.

While the power of control over the debtor is the same in each proceeding, they differ so far in other particulars that it may be argued they should be treated differently. In the case of a discharge in insolvency we deal directly with the *contract right* between

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<sup>34</sup> *Cooper v. Reynolds*, 10 Wall. (U. S.) 308 (1870), approved in *Pennoyer v. Neff*, *supra*. Statutes authorizing attachment of the goods of a foreign owner on notice by publication, exist in most of the states, and their validity has not been questioned.



the debtor and creditor, and not as a piece of property or assets of the creditor, which a third person comes against, while in attachment or garnishment of a debt, we are treating the creditor's right as a piece of property the same as tangible property, and are seeking to apply it to the payment of the debtor's debts to a third person. There may be warrant for establishing a rule of law, as is done in attachment and garnishment cases, which seeks to prevent debtors with property from escaping the payment of just debts, that could not be urged for a rule of law, as is the case in insolvency proceedings, that aided a debtor in embarrassed circumstances to escape the payment of his debt to a creditor. A state insolvency law discharging debts owing to foreign creditors might be regarded as unconstitutional on the ground of an "implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 498), possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. (U. S.) 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer v. Neff*, 95 U. S. 714), possibly upon some vaguer ground."<sup>35</sup> But to take the view of the earlier United States Supreme Court cases, that a contract made and to be performed in the state of the debtor's domicile could not be discharged in an insolvency proceeding by the courts of that state as against a foreign creditor on the ground that "when . . . the States pass beyond their own limits, and the rights of their own citizens and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States,"<sup>36</sup> would make all jurisdiction *in rem* unconstitutional. It would make statutes authorizing attachment or garnishment of chattels within a state for the purpose of applying them to the payment of a foreign debtor's debt, as well as the doctrine of *Harris v. Balk*, unconstitutional. For in jurisdiction *in rem* and *quasi in rem*, states pass beyond their own limits and determine the rights of citizens of other states.

<sup>35</sup> Quoted from *Phoenix National Bank v. Batcheller*, 151 Mass. 589, 592, 24 N. E. 917, 918 (1890).

<sup>36</sup> This was the ground of decision in *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 218 (1827), as sanctioned and stated in *Baldwin v. Hale*, 1 Wall. (U. S.) 223, 231 (1863).

Furthermore, even if it were admitted that insolvency and garnishment proceedings are wholly analogous, there would seem to be at least as much basis for urging that insolvency proceedings should affect the rights of the absent nonresident creditor as proceedings in garnishment do, as for urging the reverse. Consideration of the relative antiquity of the two doctrines<sup>37</sup> and of power of control over the debtor as giving control over the debt as the determining factors sanction this view. It will be observed, too, in this connection that under the English law a discharge of a debt in insolvency or bankruptcy proceedings had at the debtor's domicile, where that is the place of contracting and performing, will operate as a discharge everywhere, and that this English rule was early followed in this country<sup>38</sup> and departed from out of deference to the opinion of the United States Supreme Court upon the ground that a judgment by a state court holding that a discharge of a debt in insolvency proceedings within the state would bar an action by a foreign creditor, would be reviewable by the United States Supreme Court on the ground that it violated some constitutional guaranty of the creditor.<sup>39</sup> Westlake suggests that a discharge in bankruptcy, in the bankrupt's state, would, if we had a perfect cosmopolitan system of bankruptcy, bar suits in other states.<sup>40</sup> It would seem to be proper and even desirable that a discharge in insolvency in the state of the debtor's domicile should operate as a discharge of all his debts, including those owing to foreign creditors, where the creditors were properly safeguarded and given ample opportunity to file their claims and to secure their allowance and *pro rata* payment.

Professor Beale's argument that it is unjust to the garnishee debtor because he cannot be protected from suit by the defendant in a foreign jurisdiction applies with equal force to the case of a garnishee in possession of a chattel, in which case Professor Beale says, "there is no difficulty whatever and no difference of opinion

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<sup>37</sup> As we have seen, our practice as to foreign attachment is based upon the custom of London which dates back perhaps three centuries, whereas the leading case holding in accord with our present doctrine as to insolvency was not decided until less than a century ago. That is the case of *Ogden v. Saunders*, 12 Wheat. (U. S.) 132, 218, decided in 1827.

<sup>38</sup> *Scribner v. Fisher*, 2 Gray (Mass.), 43 (1854); *Felch v. Bugbee*, 48 Me. 9 (1859).

<sup>39</sup> *Phoenix National Bank v. Batcheller*, 151 Mass. 589, 24 N. E. 917 (1890).

<sup>40</sup> PRIVATE INTERNATIONAL LAW (2 ed.), § 224 (1880).



in the cases."<sup>41</sup> Of course, the argument can have no weight in the United States, where the garnishee is protected by the full-faith-and-credit clause of the federal constitution.

The interesting case of *Ward v. Boyce*,<sup>42</sup> which Professor Beale cites to show that even the United States Supreme Court could not protect the garnishee against the obligation to pay the debt again, is not peculiar to the garnishment of debts. A comparison of the facts of that case with a parallel situation in the case of the garnishment of chattels will make it evident that there is no injustice in that decision peculiar to our practice of garnishment of debts. In *Ward v. Boyce*, the defendant (garnishee) by trustee process was made to pay to the plaintiff, in Vermont, a debt which a Vermont court found he owed to an absent husband, and he was not protected against a suit by the wife of the absent husband, who proved to the satisfaction of a New York court that the defendant owed her instead of her husband. If instead of owing a debt to the wife, the defendant had held possession of a chattel of hers in Vermont, and had allowed it to be taken and applied in payment of the husband's debts upon the supposition that it was the husband's property, will it be contended that he will be protected by reason of the Vermont proceeding from a suit by the wife in New York? Frankly it is impossible to see how the doctrine of *Harris v. Balk* will cause greater injustice to the debtor who is garnisheed than the admittedly proper doctrine of the garnishment of chattels will cause to the garnished possessor of chattels.

Professor Beale presents forcibly the argument that the garnishment process subjects the nonresident principal defendant to fraudulent and doubtful claims without redress. He says:

"An owner of property may determine the situs of the property he owns, and may justly be subjected to the action of the courts within whose territory his property is found. The creditor, however, has no power to fix the personal presence of his debtor at one place or another. For all the creditor can do, the debtor may travel where he will. It is therefore unjust to submit the creditor's claim to the accident of the debtor's presence in one state or another. Yet, according to the current doctrine, if the debtor is traveling a thousand miles away from the creditor's domicil, he may there be garnished and be compelled to pay a claim

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<sup>41</sup> HARV. L. REV. 107, 113.

<sup>42</sup> 152 N. Y. 191, (1897), cited in 27 HARV. L. REV. 107, 121.

which is alleged to be a legal claim against the creditor. To be sure if the creditor happens to have notice of the suit, which can usually be obtained only by careful reading of the newspaper published where the suit is brought, he has a right to defend himself; but unless the claim as made in the garnishment proceeding is a very large one it will hardly pay him to travel across the country in order to meet the charge, taking with him his evidence. Without doing so, his effort to disprove the claim, however groundless it may be, is practically hopeless; the absentee is always wrong, just as surely in court as in the outside world. He may send on his deposition but a deposition is of very little force against the actual living testimony of the plaintiff. He may employ counsel, but counsel is helpless without witness. Garnishment, therefore, is practised at the present day as a safe and easy instrument of fraud."<sup>43</sup>

It must be borne in mind that Professor Beale admits that the practice of attachment and garnishment of tangible chattels, wherever found, though the owner is absent and a nonresident, is sound and proper.<sup>44</sup> The only difference between attachment and garnishment of a tangible chattel and of a debt, as respects any injustice that may be done the owner or creditor, is that in the case of a tangible chattel the owner has more power to fix its situs than the creditor has to fix the personal presence of the debtor. So far as the defendant's chances of getting notice of suit being brought are concerned they are even greater in the case of the garnishment of a debt than in the case of the attachment of a tangible chattel, for the doctrine of *Harris v. Balk* requires the garnishee to give his creditor notice if he is to avail himself of the judgment and payment thereunder, whereas no such requirement is made in a case of the attachment of tangible property. Professor Beale's statement that the creditor can usually get notice of the suit "only by careful reading of the newspaper published where the suit is brought," is, therefore, inaccurate. So far as the hopelessness of disproving a wholly fraudulent claim the case of attachment and garnishment of tangible chattels and of debts are on a par. And so far as the writer has been able to ascertain the actual instances of fraud and trumped up claims that have crept into garnishment proceedings because of the fact that the debtor may move about

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<sup>43</sup> 27 HARV. L. REV. 107, 121-22.

<sup>44</sup> In 27 HARV. L. REV. 107, 113, he says: "In the case of a tangible chattel there is no difficulty whatever and no difference of opinion in the cases."



freely without the creditor's being able to fix his presence are rare. It is believed that Professor Beale's statement, though skilful, is exaggerated. Further, his statement does not touch the soundness of the principle that the court which gets jurisdiction over the debtor has jurisdiction to apply the debt the garnishee owes the absent defendant in satisfaction of the plaintiff's claim. Whether it is advisable to have statutes authorizing the proceeding is purely a matter of policy. Whether it is better policy to permit absent and absconding debtors to escape the payment of just debts than to subject the debtors to the possibility (which experience has shown to be slight) of trumped up and fraudulent claims, is entirely a question of legislative policy. The fact that the proceeding of garnishment against foreign debtors has been so generally established in this country, would indicate which is considered the better policy.

### III. JURISDICTION OVER DEBTS FOR THE PURPOSE OF TAXATION

As power of control over tangible property and over the debtor was seen to be the foundation of jurisdiction over such property and debts for purpose of administration, so power of control over tangible property and over the debtor is seen to be the foundation of jurisdiction over such property and debts for the purpose of attachment and garnishment. As a more or less permanent situs of tangible property is required for purpose of administration over the property, so domicil of the debtor (a thing of a more than temporary character) is required for purpose of administration over the debt. But as a temporary situs is sufficient for attachment and garnishment of tangible property, so the temporary presence of the debtor is sufficient for the garnishment of debts.

For the purpose of taxation in respect to tangible property we find power of control is likewise essential to give jurisdiction, because in the American states the theory prevails that the right of the state to exact a tax rests upon the existence of a protection, service or benefit rendered as an equivalent for the tax exacted, and though the state where the owner resides has control over his person, yet protection, service, or benefit to him in respect to his property can only be rendered by the state which has that power of control over the property. Where such power of control

is absent and therefore where the state has not given such protection, the exaction of a tax is unconstitutional on the ground that it is taking property without due process of law.<sup>45</sup>

Since power of control over the property is what makes possible protection to the property, and since protection, potentially at least, is rendered wherever such power of control exists, we should expect on principle to find the courts supporting any tax imposed by a state having power of control over the property, unless the property was in the state so short a time that the protection rendered would make the taking of a tax arbitrary or confiscatory under our Constitution. Temporary presence is not enough;<sup>46</sup> mere transit through the state will not warrant the imposition of a tax. We find that a property tax may be levied upon real property, both tangible and intangible, and upon tangible personal property, by the state where it is permanently located. That is the state that has power of control over the property,<sup>47</sup> and such state is the only one that can tax it. A tax imposed by the state of the owner's domicile in which the property is not located is taking property without due process of law.<sup>48</sup>

Protection or benefit given is also the principle that is sought to be applied in the succession tax. A succession tax by the state where the property is located is universally upheld. This is true

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<sup>45</sup> *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 202 (1905). In that case it was said: "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, or in the creation and maintenance of public convenience in which he shares, such, for instance, as roads, bridges, sidewalks, pavements and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an exaction than a tax, and has been repeatedly held by the court to be beyond the power of the legislature and a taking of property without due process of law."

<sup>46</sup> *Hays v. Pacific Mail S. S. Co.*, 17 How. (U. S.) 596 (1854); *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905).

<sup>47</sup> *Illinois Central Ry. Co. v. Greene*, 244 U. S. 555 (1917); *Delaware, etc. R. R. Co. v. Pennsylvania*, 198 U. S. 341 (1905); *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905); *In re Estate of Swift*, 137 N. Y. 77, 32 N. E. 1096 (1893). See cases collected in 1 WHARTON (3 ed.), 165; XII AMERICAN LAW AND PROCEDURE, § 173.

<sup>48</sup> *Delaware, etc. R. R. Co. v. Pennsylvania*, 198 U. S. 341 (1905); *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 195 (1905).



whether it is the transmission of real or personal property that is taxed.<sup>49</sup> A tax at such place no matter which of the existing views we may take of the succession tax, whether we consider it a tax upon the property itself, or upon the privilege of transmitting it, or of acquiring it, or upon the transfer of it, seems sound. It accords with the principle of a protection, benefit, or privilege given as an equivalent for the tax. For the state where the property is located in its ultimate analysis, is the state which has the power of control over and gives force to the privilege to transmit or acquire and makes effective the transfer.

Of course, if the tax were levied upon the privilege of receiving possession and of enjoying the property of its equivalent, or receiving and enjoying the income thereof, the state of the distributee's domicile would be the one having power of control and the one making effective the privilege, and should therefore be the one to levy such tax.<sup>50</sup>

But it is also held that a succession tax may be levied at the domicile of the decedent as respects personal property located outside the state.<sup>51</sup> And such tax has been based too upon the theory that it is for a benefit or privilege extended by the state exacting the tax. It is asserted that the *res* taxed is the privilege of transmitting property, and for that reason the state of the domicile of the decedent, which grants the privilege of transmitting the property, should have jurisdiction to tax. But is it not the state of the situs of the property that makes the privilege effective, rather than that of the domicile of the decedent, and should it not be the state to levy the tax? Suppose A dies domiciled in New York State, owning land and chattels in Ohio, and his heirs are domiciled in New Jersey, and the sovereign states of New York and New Jersey say that this property shall or shall not go to B, C, and D, but the state of Ohio says the exact contrary, that it shall not or it shall go to B,

<sup>49</sup> *Matter of Swift*, 137 N. Y. 77; 32 N. E. 1096 (1893); *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176 (1898); *Weaver's Estate v. State*, 110 Iowa, 328, 81 N. W. 603 (1900); *Stanton's Estate*, 3 Pa. Dist. Rep. 371 (1894); *Eidman v. Martinez*, 184 U. S. 578 (1902); *Allen v. National State Bank*, 92 Md. 509, 48 Atl. 78 (1901).

<sup>50</sup> *People v. Union Trust Co.*, 280 Ill. 170, 117 N. E. 385 (1917); *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908). (Held subject to the tax when brought into the state.)

<sup>51</sup> *In re Swift Estate*, 137 N. Y. 77, 32 N. E. 1096 (1893); *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *State ex rel. Smith v. Probate Court of Ramsey Co.*, 124 Minn. 508, 145 N. W. 390 (1914).

C, and D. Is it not evident that both New York and New Jersey are helpless in the matter except in so far as Ohio submits to their wills? No one can make an effective claim to the property in Ohio except as the state of Ohio sanctions it, and a claim sanctioned by the state of Ohio will be effective no matter what New York or New Jersey may have to say about it.

Again it is said in explanation of the practice which sustains a succession tax imposed by the state of the domicil of the decedent on foreign personal property, but not on real property, that it results from the fact that the law of the owner's domicil is the one that is applied to regulate the devolution of personal property, but not that of real property.<sup>52</sup>

The fact that the law of a particular state is applied to determine the rights of parties ought never to be confused with the question of jurisdiction. That the law of the decedent's domicil is applied to determine devolution to personality seems to furnish no basis of jurisdiction for that state to impose a tax. There is no protection, privilege, or benefit extended or conferred by such state. In its ultimate analysis, it is the state where the property is located that controls and makes effective its devolution,<sup>53</sup> though for convenience that state may apply the rules of law existing in the state of the decedent's domicil in so doing. It has also been urged that by reason of the fiction *mobilia sequuntur personam*, personal property has its situs at the domicil of the owner. But this is admittedly a fiction and certainly gives no actual power of control over the property to the state of the owner's domicil. It is a fiction, too, that has been rejected in the case of a property tax upon chattels outside the state imposing the tax, on the ground that such tax constitutes the taking of property without due process of law and is therefore unconstitutional.<sup>54</sup> It seems difficult if not impossible to find any sufficient ground upon which to justify an inheritance tax at the decedent's domicil upon property having a foreign situs. Justice Gray's opinion in *In re Estate of Swift*<sup>55</sup> that "the theory of sovereignty, which invests the state with the right and the power

<sup>52</sup> *Dammert v. Osborn*, 141 N. Y. 564, 35 N. E. 1088 (1894); *Estate of Swift*, 137 N. Y. 77, 88, 32 N. E. 1096 (1893).

<sup>53</sup> In Illinois by statute tangible property of a decedent domiciled elsewhere goes according to the Illinois law. *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61 (1892).

<sup>54</sup> *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

<sup>55</sup> 137 N. Y. 77, 84, 32 N. E. 1096, 1097 (1893).



to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property," states the true ground upon which jurisdiction to impose a succession tax must rest.

While in the succession tax cases there is disagreement as to which state furnished the protection or privilege, there is complete agreement in both the property and succession tax cases on the more fundamental proposition that jurisdiction to tax rests in the state which furnished such protection or privilege. And as we have seen, that state is necessarily the one which has power of control over the property.

Let us now pass from the consideration of taxation upon tangible property to a consideration of the question of which states should tax debts.

It is submitted that, following the analogy of taxation upon tangible property and the principle that a tax is taken as an equivalent for protection, service, or benefit given by the taxing power, the state of the debtor's domicil is the one and the only one which should exact the tax on debts. Where the debts are in the form of a specialty which is held in another state and the convenient theory or fiction is adopted that an obligation represented in a mercantile specialty shall be treated as wholly merged in that specialty, then the tax should be levied only where the specialty is located.

In spite of principle and weighty authority in support of the taxing of debts at the debtor's domicil, it still seems to be generally conceded that the fiction *mobilis sequuntur personam* is properly applicable to intangible personal property in the form of debts and that they are taxable at the creditor's or owner's domicil.<sup>56</sup>

<sup>56</sup> *Darnell v. Indiana*, 226 U. S. 390 (1912); *Selliger v. Kentucky*, 213 U. S. 200 (1909); *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 69 (1911); *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409 (1906); *Bristol v. Washington County*, 177 U. S. 133 (1900); *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, 109 N. E. 891 (1915); *Welch v. Boston*, 221 Mass. 155, 109 N. E. 174 (1915); *Frothingham v. Shaw*, 175 Mass. 59, 55 N. E. 623 (1899).

A succession tax imposed by the state of the domicil of a decedent creditor is very common. *State ex rel. Smith v. Probate Court of Ramsey Co.*, 124 Minn. 508, 145 N. W. 390 (1914); *In re Swift Estate*, 137 N. Y. 77, 32 N. E. 1096 (1893). (Held subject to tax when brought into the state.) *McCurdy v. McCurdy*, 197 Mass. 248, 83 N. E. 881 (1908); *People v. Union Trust Co.*, 280 Ill. 170, 117 N. E. 385 (1917).

Some cases deny the power to tax at the creditor's domicil. *Bridges v. Mayor & Council of Griffin*, 33 Ga. 113 (1861). The court here held that a debt was not taxable

A tax at both the debtor's and creditor's domicil is considered constitutional.<sup>57</sup>

The tax upon debts at the domicil of the creditor has been based upon several grounds. By the fiction *mobilia sequuntur personam*, the debt has been regarded as having a situs at the creditor's domicil. But this fiction can hardly be urged as a ground or justification for the tax. It is rather a form of stating a result reached and an admission of the nonexistence of a reason. The fiction has been repudiated in the case of a property tax levied at the owner's domicil upon tangible chattels outside the state;<sup>58</sup> and the maxim is no less a fiction when applied to debts than when applied to tangible chattels, and gave way even when applied to debts, both in *Blackstone v. Miller*, where Justice Holmes pointed out, "When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way,"<sup>59</sup> and in *Liverpool Insurance Co. v. Orleans Assessors*,<sup>60</sup> where Justice Hughes said, "The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil." The maxim is wholly inadequate as a principle upon which to rest the tax. This has been felt by more thoughtful lawyers and they have sought to state more substantial grounds in support of the practice of imposing the tax at the creditor's domicil. It has been said,<sup>61</sup> "It is difficult to see how this relation [the debt]<sup>62</sup> can be property

at the domicil of the creditor which was the city of Griffin. The court said "that unless the persons who owe the debts reside in Griffin, they are not properly within the city."

Tax at debtor's domicil sustained; see *Tappan v. Merchants' National Bank*, 19 Wall. (U. S.) 490 (1873); *In re Tiffany's Estate*, 143 App. Div. (N. Y.) 327, 128 N. Y. Supp. 106 (1911); *Armour Packing Co. v. Mayor of Savannah*, 115 Ga. 140, 41 S. E. 237 (1902); *National Fire Insurance Co. v. Board of Assessors*, 121 La. 108, 46 So. 117 (1908).

<sup>57</sup> *Blackstone v. Miller*, 188 U. S. 189 (1903).

<sup>58</sup> *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224 (1861); *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905).

<sup>59</sup> 188 U. S. 189, 206 (1903). See also *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395 (1907), where it is said the fiction must not be allowed to obscure the truth.

<sup>60</sup> 221 U. S. 346, 354 (1911).

<sup>61</sup> Professor James Parker Hall's "Treatise on Constitutional Law," XII AMERICAN LAW AND PROCEDURE, § 176.

<sup>62</sup> Brackets and words included are those of the present writer.



where the debtor lives, for his obligation to pay is quite the reverse of being valuable to him, and, for similar reasons, the obligation does seem to be property where the creditor lives. This common-sense view of the matter has been accepted by the courts, and it is generally held that a debt, pure and simple, is not taxable as *property* at the residence of the debtor. On the other hand, generally speaking, debts are taxable as property at the residence of the creditor."

While this view seems plausible, it assumes that because the debt is valuable to the creditor it is taxable at the creditor's domicil. But if debts are property at the domicil of the creditor because they are valuable to him, then why are not real estate and chattels property at the owner's domicil and taxable at that place? Are they less valuable to the owner at his domicil because they have corporeality elsewhere? Yet we have seen that a tax upon foreign chattels levied at the owner's domicil is unconstitutional as taking property without due process of law, and logically is this not as applicable to a tax upon debts levied at the creditor's domicil as it is to a tax on foreign chattels?

A "third explanation of the power of taxing it [the debt] at the domicil of the creditor is that as it adds to the creditor's wealth, the power that may tax the creditor personally may exact the tax from him based on the ability which this power over the debtor gives him to pay the tax."<sup>63</sup> As an original proposition this explanation would perhaps be invulnerable, but our Supreme Court has taken the view that a tax upon foreign tangible property levied at the owner's domicil is unconstitutional because it is taking property without due process of law. It is only the state of the situs that protects and benefits the property, and therefore, the only one that has furnished the *quid pro quo* for the tax.<sup>64</sup> The situation is parallel to that of debts. Tangible property, no matter where located adds to the owner's wealth and ability to pay in the same way that a creditor's power over his debtor does. As the state of the situs of tangible property protects and makes valuable the property to an owner, so in the case of debts the state of the debtor's domicil in the same way protects and makes the debts valuable to

<sup>63</sup> 27 HARV. L. REV. 107, 114.

<sup>64</sup> Union Transit Co. v. Kentucky, 199 U. S. 194 (1905); Delaware, etc. Ry. Co. v. Pennsylvania, 198 U. S. 341 (1905); Ill. Cent. Ry. Co. v. Greene, 244 U. S. 555 (1917).

a creditor. So long as we base taxation on the theory that it is a *quid pro quo* for protection or benefit given, and hold a tax unconstitutional where such protection or benefit does not obtain, we must reject any theory which makes ability to pay the basis of the right to exact the tax.

There is considerable<sup>65</sup> and high authority in support of a tax at the debtor's domicile on the ground that power of control over the debtor furnishes the basis of jurisdiction for levying the tax. In *Blackstone v. Miller*,<sup>66</sup> the United States Supreme Court held that the state of New York could levy a succession tax upon a debt, in the form of a deposit, due an Illinois testator, from a New York debtor. In that case, Justice Holmes, who gave the opinion of the Court said,

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States v. Perkins*, 163 U. S. 625, 628, 629; *McCulloch v. Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co. v. Sturm*, 174 U. S. 710. See *Wyman v. Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for

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<sup>65</sup> *Bridges v. Mayor and Council of Griffin*, 33 Ga. 113 (1861); *Armour Packing Co. v. Mayor of Savannah*, 115 Ga. 140, 41 S. E. 237 (1902); *Tappan v. Merchants National Bank*, 19 Wall. (U. S.) 490 (1873); *National Fire Insurance Co. v. Board of Assessors*, 121 Iowa, 108, 46 So. 117 (1908); *State Board v. Comptoir National Bank*, 191 U. S. 388 (1903); *People v. Barker*, 23 App. Div. (N. Y.) 524, 48 N. Y. Supp. 553 (1897); *Metropolitan Life Ins. Co. of New York v. New Orleans*, 205 U. S. 395 (1907).

Succession tax cases: *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122 (1905); *In re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931 (1907); *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148 (1915); *Borden v. Burrill*, 221 Mass. 212, 109 N. E. 153 (1915); *In re Adams' Estate*, 167 Iowa, 382, 149 N. W. 531 (1914); *State ex rel. Graff v. Probate Court of St. Louis County*, 128 Minn. 371, 150 N. W. 1094 (1915).

<sup>66</sup> 188 U. S. 189, 205 (1903).



our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional consideration on one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way."

It is now well established that the state of the debtor's domicil may levy a succession tax upon debts due a nonresident decedent creditor.<sup>67</sup>

Power of control over the debtor is admitted to furnish the basis of taxation in other cases besides those involving the succession tax. Privilege taxes as well as other forms of taxation rest on this principle of power of control and the furnishing of a *quid pro quo* by the state imposing the tax.<sup>68</sup>

Where a privilege tax is imposed by the state of the debtor's domicil and is measured by the amount of the debts owed to a foreign creditor who is carrying on business within the state as

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<sup>67</sup> *In re Adams' Estate*, 167 Iowa, 382, 149 N. W. 531 (1914); *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372 (1899); *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148 (1915); *Borden v. Burrill*, 221 Mass. 212, 109 N. E. 153 (1915); *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122 (1905); *In re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931 (1907); *State ex rel. Graff v. Probate Court of St. Louis County*, 128 Minn. 371, 150 N. W. 1094 (1915).

<sup>68</sup> *In Equitable Life Society v. Pennsylvania*, 238 U. S. 143, 147 (1915), where it was held that the state of Pennsylvania could levy a tax of two per cent on gross premiums of life insurance received from business done in that state and not be taxing property beyond its jurisdiction, it was observed that though the premiums were paid directly to the insurance company outside the state, and though the state had no constitutional power to prevent the insurance company making the contracts and could not therefore be said to permit them of her own will, still the tax was upon a privilege actually used, and the state furnished the *quid pro quo* by protecting the lives insured.

is the situation in numerous cases,<sup>69</sup> jurisdiction to levy such tax rests upon the fact that the state has power of control over the debtor and through that means extends protection or benefit to the foreign creditor. Thus in *Liverpool Insurance Co. v. Orleans*,<sup>70</sup> a tax levied by the state of Louisiana upon amounts due a New York corporation by its policy-holders in the state for premiums upon which a credit had been extended was sustained upon the ground that control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil because of the power over the debtor. In that case Hughes, J., who gave the opinion of the court said:

"The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement. *Blackstone v. Miller*, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

Of course it is not sought to convey the impression that a privilege tax may be sustained as a property tax levied upon debts. For example, if an insurance corporation is taxed for the privilege of doing business in a state, and the amount of the tax is determined by the amount of the debts due the corporation from residents of the state imposing the tax, an attempt to collect a tax upon

<sup>69</sup> *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395 (1907); *State Board v. Comptoir National Bank*, 191 U. S. 388 (1903); *Finch v. York County*, 19 Neb. 50, 26 N. W. 589 (1886); *People v. Barker*, 23 App. Div. (N. Y.) 524, 48 N. Y. Supp. 553 (1897).

<sup>70</sup> 221 U. S. 346, 354 (1911).



debts due the corporation, after the corporation has ceased to do business in the state, is unconstitutional, for such tax would result in inequality and unfairness, as all creditors would not be taxed uniformly. To sustain a tax for the privilege of doing business in a state, business must be done in that state.<sup>71</sup> On the basis of a power of control analogous to that exercised over the debtor, the stock of national banks and of corporations may be taxed at the place where the bank is located or the corporation incorporated without regard to the residence of the owner.<sup>72</sup> The registered bonds of a state kept by a nonresident at his domicil may be taxed by the state, for the state cannot be sued on the bonds in the federal courts; it can be impleaded only in its own courts, and the bond can be transferred only by bringing it to the proper registration officer of the state and there complying with the law of the state respecting transfer of registration.<sup>73</sup>

It would seem that ordinary bonds on this principle of power of control over the debtor should be held taxable at the domicil of the debtor though the owner holds the bonds elsewhere, for it is that state, through its control over the debtor, that makes the obligation of the debtor of value to the creditor, but it was held by the United States Supreme Court in *State Tax on Foreign-Held Bonds*,<sup>74</sup> that the state of Pennsylvania could not tax an Irish bondholder on the bonds of a Pennsylvania railway secured by a mortgage on its property. The court accepted the fiction *mobilia sequuntur personam*,<sup>75</sup> which was later repudiated by the United States Supreme Court, when applied to tangible chattels in *Union Refrigerator Transit Co. v. Kentucky*.<sup>76</sup> The court in *State Tax on Foreign-Held Bonds* thought that such tax was unconstitutional because it was an attempt to tax the debts as property of the debtors. The court said, "Debts . . . are not property of the debtors, in any sense; they are obligations of the debtors, and

<sup>71</sup> *Provident Savings Association v. Kentucky*, 239 U. S. 103 (1915).

<sup>72</sup> *Tappan v. Merchants' National Bank*, 19 Wall. (U. S.) 490 (1873); *Borden v. Burrill*, 221 Mass. 212, 109 N. E. 153 (1915) (succession tax); *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372 (1899) (succession tax); *In re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122 (1905) (succession tax).

<sup>73</sup> *Bliss v. Bliss*, 221 Mass. 201, 109 N. E. 148, 150 (1915).

<sup>74</sup> 15 Wall. (U. S.) 300 (1872).

<sup>75</sup> "Debts belong to the creditors . . . and follow their domicil wherever that may be." 15 Wall. (U. S.) 300, 320 (1872).

<sup>76</sup> 199 U. S. 195 (1905).

only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms." It is evident that the court wholly misconceived the Pennsylvania statute; there was no attempt to tax debts as assets of the debtor. It is difficult to understand how anyone would so conceive of debts. The mere fact that the tax was levied at the debtor's domicile certainly does not justify that conclusion. The tax was a tax upon the creditor but levied at the debtor's domicile. Not only was the reasoning of the court wholly unsound, but the case has been practically overruled by the United States Supreme Court in *Savings Society v. Multnomah County*, and similar cases<sup>77</sup> and in *Blackstone v. Miller*.<sup>78</sup> In *Savings Society v. Multnomah County* the court held that notes given by Oregon debtors secured by mortgage upon Oregon land, though held by citizens of California, were taxable by the state of Oregon. The attempt the court made in the latter case to distinguish *State Tax on Foreign-Held Bonds*, on the ground that there the tax was upon the interest due to the bondholders and not upon their interest in the mortgage, is not warranted by the facts of the case. It was as much the interest in the mortgage that was taxed in the one case as in the other. Taxes like that sustained in *Savings Society v. Multnomah County* are not uncommon and have always been upheld.<sup>79</sup> Holmes, J., attempted to distinguish *Blackstone v. Miller*, where it was held that power of control over the debtor conferred jurisdiction to tax the debt against a foreign creditor at the debtor's domicile from *State Tax on Foreign-Held Bonds*, upon the ground that bonds and negotiable instruments are more than mere evidences of debt, but by a tradition from archaic times constitute the debt.

It may be desirable that courts adopt the theory that debts in the form of specialties shall be taxable at the place where the instrument is located, and if that theory is adopted consistency would require that the debts should not be taxed at the domicile of the debtor also, for the theory is that the debt is merged in the specialty. Of course, even if that view of specialties is taken it

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<sup>77</sup> 169 U. S. 421 (1898); *Bristol v. Washington County*, 177 U. S. 133 (1900).

<sup>78</sup> 188 U. S. 189 (1903).

<sup>79</sup> *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589 (1886); *In re Rogers' Estate*, 149 Mich. 305, 112 N. W. 931 (1907).



must be recognized that it is only a theory, and that the ultimate power of control which rests in the state having jurisdiction over the debtor, and which is a sufficient basis for jurisdiction over the debt, can never by any fiction or theory be taken from a state without its consent. The decisions, however, will not justify the distinction taken by Justice Holmes in *Blackstone v. Miller*. While it may be that *Buck v. Beach*,<sup>80</sup> which held that mortgage notes, made by a debtor in Ohio, payable in Ohio and secured by a mortgage in Ohio, the owner of which resided in New York, were not taxable in Indiana where they had been sent for safe-keeping, is reconcilable with *Wheeler v. New York State*,<sup>81</sup> which upheld a succession tax by New York upon promissory notes belonging to a nonresident where they were found in the state of New York, on the ground that in *Buck v. Beach* the notes held not taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either state, and were really not in Indiana hands for business purposes. Still that does not go to the length to which Justice Holmes goes in *Blackstone v. Miller* in order not to overrule *State Tax on Foreign-Held Bonds*, in saying the debt has been so completely merged in the specialty that an attempt to tax it at the debtor's domicile is unconstitutional. Courts never have gone, and on correct principle never can go, that far in their actual decisions toward recognizing the theory of a merger of the debt into the specialty. The situation is now ripe for a decision by the United States Supreme Court squarely overruling *State Tax on Foreign-Held Bonds*.

Finally there seems to be no reason that can be urged in support of a property or succession tax upon debts at the creditor's domicile that cannot be equally urged to support such a tax against an owner at his domicile on foreign-held real and tangible personal property. The owner's title to foreign property is for the state where he resides an intangible thing similar to his right to have payment of a debt. For purposes of jurisdiction foreign real property and tangible personalty are choses in action as much as debts are.<sup>82</sup>

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<sup>80</sup> 206 U. S. 392 (1907).

<sup>81</sup> 233 U. S. 434 (1914).

<sup>82</sup> Ames in his lecture, "The Nature of Ownership," speaking of the interest of the disseisee, says: "For as we have seen, this interest, being a *chose in action*, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law." AMES, LECTURES ON LEGAL HISTORY, 192.

If the property or debtor is outside the jurisdiction there seems to be no essential difference in the power of control over the property from that over the debt or in the protection afforded to the owner of the property from that afforded the owner of the debt by the sovereign of his domicil. If, therefore, a tax at the owner's domicil cannot be supported in case of foreign-owned real estate and chattels it is difficult to see how it can be supported on other than historical grounds against a creditor at his domicil on debts owed by a foreign debtor.

On the other hand, every reason which goes to support the taxation of real and tangible personal property at its situs can be urged in support of a tax upon debts against the creditor at the debtor's domicil. The real reason why tangible property is taxable at its situs is not that it occupies space there, but that the sovereign where it is located can exercise control over it there, and thus afford it the protection for which the tax is exacted. In like manner the sovereign of the debtor's domicil has control over the obligation, by having jurisdiction over the debtor and protects it, and the debtor, and makes the debt valuable to the creditor. It profits the foreign creditor as respects the debt in the same way it does the foreign owner of tangible property within its jurisdiction. And in like manner such state and such state alone should be the one to levy the tax.<sup>83</sup>

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<sup>83</sup> While from an economic standpoint debts should not be taxed as they do not represent wealth still a tax at the domicil of the debtor has several economic advantages over the present method. It will prevent duplication in taxation — a very desirable result — and the present notorious method of tax evasion practiced by concealment of the identity of the creditor in debts secured by trust deeds on real estate will be avoided and there will be no greater likelihood of concealment of debts in general under a system of taxing debts at the domicil of the debtor than at the domicil of the creditor.

So far as shifting the burden of taxation from creditor to debtor is concerned a tax collected at the creditor's domicil will be as objectionable in that respect as one collected at the debtor's domicil. The interest rate will be affected in either instance if the tax upon debts is made effective.



## INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.<sup>1</sup> IV

### II. REGULATIONS OF INTERSTATE COMMERCE (*continued*)

#### 2. *Taxes not Discriminating against Interstate Commerce* (*continued*)

##### A. TAXES ON PRIVILEGES (*concluded*)

##### (d) *Recent Supreme Court Decisions on California and Massachusetts Statutes*

IN the preceding installment of this discussion it was said that the similarity between the business of the complainants in the California case of *Albert Pick & Co. v. Jordan*<sup>2</sup> "and that of the Crane Company in *Looney v. Crane Co.*<sup>3</sup> makes it certain that, on writ of error, the judgment of the California court would be reversed by the United States Supreme Court."<sup>4</sup> This venturesome prediction was made in ignorance of the fact that on June 4, 1917, the judgment of the California court had been affirmed by the Supreme Court.<sup>5</sup> Benevolent readers may find some excuse for this oversight in the circumstance that the Supreme Court wrote no opinion, and therefore its decision did not find its way into the digests.<sup>6</sup> More justification, however, is necessary for the error in judgment.

The opinion of the California court, by Judge Henshaw, did not

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<sup>1</sup> For preceding installments of this discussion see 31 HARV. L. REV. 321-72 (January, 1918), *Ibid.*, 572-618 (February, 1918) and *Ibid.*, 721-78 (March, 1918).

<sup>2</sup> 169 Cal. 1, 145 Pac. 506 (1915).

<sup>3</sup> 245 U. S. 178, 38 Sup. Ct. Rep. 85 (1917).

<sup>4</sup> 31 HARV. L. REV. 776.

<sup>5</sup> *Albert Pick & Co. v. Jordan*, 244 U. S. 647, 37 Sup. Ct. Rep. 741 (1917).

<sup>6</sup> Malevolent readers will be glad to know that the decision came to the writer's attention through no diligence of his own, but through the fact that it was cited in the brief for the Commonwealth in *International Paper Co. v. Massachusetts*, 38 Sup. Ct. Rep. 292 (1918), a copy of which was furnished him through the courtesy of Wm. Harold Hitchcock, Assistant Attorney General of Massachusetts, who prepared and argued the cases for the Commonwealth discussed in this article.

recite the provisions of the statutes under which the excises in issue were levied. It referred to "the annual corporation license-tax" as one "founded on the total capital stock";<sup>7</sup> it pointed out that the Western Union Company, if it had undertaken to do business in California, would have been compelled to pay a fee of \$10,000 for filing with the Secretary of State a copy of its charter as it was required to do, in addition to an annual license tax of \$250;<sup>8</sup> and it saw no significance in the fact that the Massachusetts tax sustained in *Baltic Mining Co. v. Massachusetts*<sup>9</sup> was by statute limited to \$2,000.<sup>10</sup> No mention was made of any provision in the California statute prescribing a maximum which the imposition should not exceed. The opinion proceeded on a theory quite inconsistent with that announced by the Supreme Court in *Looney v. Crane Co.*<sup>11</sup>

The Supreme Court, in affirming the judgment of the California court, contented itself with filing the following memorandum opinion:

"June 4, 1917. Per Curiam: Judgment affirmed with costs, upon the authority of *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 60 L. Ed. 617, 36 Sup. Ct. Rep. 261."<sup>12</sup>

The Botkin Case thus relied upon by the Supreme Court involved the Kansas statute as amended following the decision of *Western Union Telegraph Co. v. Kansas*.<sup>13</sup> The amended statute limited the annual imposition to \$2,500. Moreover the complainant in the Botkin Case was a domestic corporation. The complainant in *Albert Pick & Co. v. Jordan*<sup>14</sup> was an Illinois corporation resisting a California tax. *Kansas City, M. & B. R. Co. v. Stiles*,<sup>15</sup> decided on December 4, 1916, had made it clear that a domestic corporation could be subjected to a tax which the Western Union Case had declared could not be imposed on a foreign corporation, and

<sup>7</sup> *Albert Pick & Co. v. Jordan*, 169 Cal. 1, 14, 145 Pac. 506 (1915).

<sup>8</sup> *Ibid.*, 169 Cal. 1, 13, 145 Pac. 506 (1915).

<sup>9</sup> 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).

<sup>10</sup> *Albert Pick & Co. v. Jordan*, 169 Cal. 1, 18, 145 Pac. 506 (1915).

<sup>11</sup> Note 3, *supra*.

<sup>12</sup> Note 5, *supra*.

<sup>13</sup> 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

<sup>14</sup> Notes 2 and 5, *supra*.

<sup>15</sup> 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916). See 31 HARV. L. REV. 599-600.



thus had made inapplicable to controversies respecting foreign corporations, precedents sustaining identical taxes on domestic corporations. Clearly then the Supreme Court was not justified in asserting that the Botkin Case<sup>16</sup> answered the contentions of the complainant in the Pick Case,<sup>17</sup> unless Pick and Company were a domestic corporation, and unless in addition the excises of which it complained were levied under statutes which set some limit to the amount which might be charged.

It is conceivable that on June 4, 1917, when the Pick Case was decided, the Supreme Court was of the opinion that foreign corporations not engaged in transportation were subject to any exactions which might be imposed on domestic corporations. But even then, if it was aware that the California exaction was measured by total capital stock with no maximum limitation, it should have rested the Pick Case on the authority of the Stiles Case<sup>18</sup> rather than the Botkin Case.<sup>19</sup> And if on June 4, 1917, the Supreme Court harbored the idea that foreign corporations not engaged in transportation might be subjected to taxes measured by total capital stock, that idea was definitely cast out on December 10, 1917, when *Looney v. Crane Co.*<sup>20</sup> was decided.

It is doubtless true, however, that the Kansas tax involved in *Kansas City, Ft. S. & M. R. Co. v. Botkin*<sup>21</sup> might be exacted from a foreign corporation. But this is because Kansas set a fixed limit to its demands, however large the capital of the corporation. In citing the Botkin Case as conclusive of the point at issue in the Pick Case, the Supreme Court must therefore have thought either that the California statutes limited the exactions which might be imposed thereunder, or else that the absence of such a limit was immaterial. The latter hypothesis seems inconsistent with *Looney v. Crane Co.*<sup>22</sup> But it may not be, as will be pointed out later.

If the Supreme Court thought that the California exaction was limited in amount, however large the capital of the corporation in question, it was in error. The Pick Case originated in a petition by the foreign corporation for a mandate against the secretary of state, directing him to accept and file certain papers without pay-

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<sup>16</sup> 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).

<sup>17</sup> Note 5, *supra*.

<sup>19</sup> Note 16, *supra*.

<sup>21</sup> Note 16, *supra*.

<sup>18</sup> Note 15, *supra*.

<sup>20</sup> Note 3, *supra*.

<sup>22</sup> Note 3, *supra*.

ment of the fee exacted by subdivision 4 of section 409 of the Political Code, or of the corporation license tax of 1905. The annual license tax was limited in amount. It began at \$10 for corporations with capital of \$10,000 or less, and rose to \$200 for corporations with capital not exceeding \$5,000,000. But all corporations having a capital in excess of \$5,000,000 paid only \$250, however large their capital.<sup>23</sup> But the fees to be paid for filing with the secretary of state a copy of the corporate charter increased indefinitely, and the filing of the charter and payment of the fee were conditions prerequisite to the right to do local business within the state. Corporations with a capital between \$500,000 and \$1,000,000 had to pay \$100. If the capital stock exceeded \$1,000,000, the statute called for "\$50 additional for every \$500,000 or fraction thereof of capital stock over and above \$1,000,000."<sup>24</sup> Thus corporations had to pay \$100 for every \$1,000,000 of capital stock. As was stated in the opinion of the California court, the Western Union Telegraph Company under this statute would have been compelled to pay \$10,000 in California, as against the \$20,100 which it had to pay under the Kansas statute involved in *Western Union Telegraph Co. v. Kansas*.<sup>25</sup>

Thus one of the statutes complained of by Albert Pick and Company imposed a fee graduated according to capital stock, with no maximum limit. This fee, however, under the terms of the statute had to be paid but once. On this ground the statute might be distinguished from the Texas statute in *Looney v. Crane Co.*<sup>26</sup> which called for recurrent payments each decade. But to sanction such a distinction would do violence to *Western Union Telegraph Co. v. Kansas*,<sup>27</sup> since the Kansas statute there involved called only for a single payment for filing a copy of the corporate charter. A provision in the Kansas statute to the effect that any corporation applying for a renewal of its charter should comply with the act to the same extent as provided for the chartering and organizing of new corporations, was not referred to in the opinion

<sup>23</sup> The statutory provision for the annual license fee is quoted in *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 279-80, 125 Pac. 236 (1912).

<sup>24</sup> The statutory provision for the filing fee is quoted in *H. K. Mulford Co. v. Curry*, 163 Cal. 276, 279, 125 Pac. 236 (1912).

<sup>25</sup> Note 13, *supra*.

<sup>26</sup> Note 3, *supra*.

<sup>27</sup> Note 13, *supra*.



of the court and seems to be drawn to apply to domestic rather than to foreign corporations. It would seem therefore that the Western Union Case held squarely that a fee for filing a copy of the corporate charter could not be demanded even once, if it was measured by the total capital stock, with no maximum limit.

It is not to be lightly assumed that the Supreme Court in affirming the California judgment without opinion meant to depart from this prior ruling. No objection can be raised to the affirmance of the judgment, for the petitioner sought to compel the filing of its papers without paying either the filing fee or the annual license tax. The latter was properly demanded by the state, since its amount was limited to \$250. The petitioner, therefore, was not entitled to judgment on its demurrer to the answer of the secretary of state. But the opinion of the state court had sanctioned the requirement of the unlimited filing fee as well as of the limited annual license fee. The Supreme Court, therefore, in affirming the judgment below, without rendering an opinion, has given the California court reason to believe that its opinion as well as its decision was warranted. The Supreme Court has thus left a loophole for further controversy, which might have been closed by an opinion indicating the specific grounds on which it sustained the court below.

The filing fee demanded of the petitioner was only \$100, as its capital did not exceed \$1,000,000. Such a fee is a moderate one to exact from a corporation of any size, particularly if it is to be demanded only once. As a specific charge it would seem not open to question. But the Supreme Court seems to have regarded a fee assessed on a vicious basis as thoroughly tainted by its associations, even though in other company or as a specific charge it would be deemed without fault. The inference, then, that the Supreme Court in sustaining the California court in the Pick Case<sup>28</sup> deliberately sanctioned the measure adopted by the California statute for fixing the amount of the filing fee, cannot be accepted. The only grounds on which such sanction could be legi-

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<sup>28</sup> It is of course possible that, as the Pick Case was presented to the Supreme Court, the objection to paying the \$100 filing fee was not urged. But as the record is presented by the statutes, the opinion of the California court, and the memorandum opinion of the Supreme Court, there is nothing to show that the issues presented to the Supreme Court differed from those passed upon by the state court.

timately based are inconsistent with the implications to be drawn from the combination of the Western Union Case with the case of *Locomotive Co. of America v. Massachusetts*.<sup>29</sup> The former stands for the ruling that a single charter fee is subject to the same restrictions as an annual license fee. The latter holds that a corporation may complain of the removal of the statutory maximum limit to the annual imposition, even though the presence or absence of such limit does not affect the amount demanded from it.

The Locomobile Case<sup>30</sup> was one of three decisions handed down by the Supreme Court on March 4, 1918. All three involved the exactions required of foreign corporations by the Commonwealth of Massachusetts. *Cheney Brothers Co. v. Massachusetts*<sup>31</sup> dealt with the Massachusetts statute of 1909 which had been applied in *Baltic Mining Co. v. Massachusetts*.<sup>32</sup> The complaining corporations were those against whom judgments were rendered by the Supreme Court of the Commonwealth in *Marconi Wireless Telegraph Co. v. Commonwealth*,<sup>33</sup> considered in the previous installment of this discussion.<sup>34</sup> The judgments of the court below were sustained, with the single exception of that rendered against the Cheney Brothers Company.

The issue presented to the Supreme Court was whether the several corporations were engaged in local commerce which was separate and distinct from their interstate commerce. The Cheney Brothers Company kept no stock of goods in Massachusetts. Its Boston office was headquarters for salesmen, and samples were kept there. All orders obtained by salesmen in Massachusetts were subject to approval by the home office in Connecticut, and were filled from stock kept outside of Massachusetts. Collections were made from the home office in Connecticut, and from that office were paid the salaries of the Massachusetts salesmen and the rent of the Boston office. The Supreme Court held that there was nothing done in Massachusetts "that can be regarded as a local business as distinguished from interstate commerce."<sup>35</sup> The

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<sup>29</sup> 38 Sup. Ct. Rep. 298 (1918).

<sup>30</sup> Note 29, *supra*.

<sup>31</sup> 38 Sup. Ct. Rep. 298 (1918).

<sup>32</sup> Note 9, *supra*.

<sup>33</sup> 218 Mass. 558, 106 N. E. 310 (1914).

<sup>34</sup> 31 HARV. L. REV. 741-45 (March, 1918).

<sup>35</sup> 38 Sup. Ct. Rep. 295, 296 (1918).



display of samples in Boston was said to be merely a means for carrying on interstate commerce. The inference or assumption relied on by the state court, to the effect that Massachusetts salesmen took some orders from Connecticut purchasers which were filled from the Connecticut mill, was said not to give any warrant to Massachusetts to tax the corporation, on the ground that it was engaged in local as well as interstate business. "In such cases," said Mr. Justice Van Devanter, "it is doubtless true that the resulting sale is local to Connecticut, but the action of the Boston office in receiving the order and transmitting it to the home office partakes more of the nature of interstate intercourse than of business local to Massachusetts and affords no basis for an excise tax in that state."<sup>36</sup>

Among the corporations held subject to the excise tax was the Locomobile Company of America, a West Virginia corporation manufacturing automobiles in Connecticut, and doing in Massachusetts, in addition to interstate commerce, "an extensive local business . . . in repairing cars of its own make and use, and also in selling second-hand cars taken in partial exchange for new ones."<sup>37</sup> The excise in question was levied under the Act of 1909, which fixed the amount by taking one-fiftieth of one per cent of the total capital stock until the tax amounted to \$2,000. A simple computation will reveal that the only corporations which could derive any benefit from this provision for a maximum are those whose capital is in excess of \$10,000,000. In 1913, when the excise was levied, the Locomobile Company had a capital of \$5,000,000, and the tax of \$1,000 demanded from it was in no way affected as to its amount by the provision in the statute that no tax should exceed \$2,000.

In 1914 Massachusetts passed the following statute:

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one-hundredth of one per cent of the par value of its author-

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<sup>36</sup> 38 Sup. Ct. Rep. 295, 296 (1918).

<sup>37</sup> 38 Sup. Ct. Rep. 295, 297 (1918).

ized capital stock in excess of ten million dollars as stated in its annual certificate of condition."<sup>38</sup>

The section fifty-six referred to was the provision applied to the Locomobile Company in the Cheney Brothers Case.<sup>39</sup> Inasmuch as the measure adopted for assessing the excise exacted by the Act of 1914 was the amount which the capital stock exceeded \$10,000,000, the Locomobile Company, though belonging to the class of corporations required by the Act of 1914 to pay the additional excise, did not come within the clutches of the measure by which the amount of the tax was determined. The Act of 1914 could not, therefore, operate in any way to the disadvantage of the Locomobile Company, unless during the preceding year its capital stock had more than doubled.

No such doubling had taken place. The authorized capital had been increased from \$5,000,000 to \$6,500,000, so that the excise assessed in 1915 was \$300 larger than that assessed in 1913. But the Locomobile Company was still \$3,500,000 away from the fangs of the Massachusetts statute of 1914. The Supreme Court of Massachusetts sustained the \$1,300 tax of 1915<sup>40</sup> on the au-

<sup>38</sup> St. 1914, c. 724, 1. The section is quoted in *International Paper Co. v. Massachusetts*, 38 Sup. Ct. Rep. 292 (1918).

<sup>39</sup> Note 31, *supra*. The section is quoted in *International Paper Co. v. Massachusetts*, 38 Sup. Ct. Rep. 292, 293 (1918). It reads as follows:

"Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars." Before the enactment of the Act of 1914, the Act of 1909 had been limited in respect to the corporations to which it is applicable by the decision of the Supreme Court of Massachusetts in *Attorney General ex rel. Commissioner of Corporations v. Electric Storage Battery Co.*, 188 Mass. 239, 74 N. E. 467 (1905). The interpretation of the state court was summarized by the Supreme Court of the United States in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 84, 34 Sup. Ct. Rep. 15 (1913), as follows:

"Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business, which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce, or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce."

<sup>40</sup> *Locomobile Company of America v. Commonwealth*, 228 Mass. 117, 117 N. E. 5 (1917).



thority of *Baltic Mining Co. v. Massachusetts*.<sup>41</sup> Chief Justice Rugg, in the concluding sentence of the opinion, observed: "Since no part of the excise here challenged was levied under the terms of St. 1914, c. 724, that statute need not be considered."<sup>42</sup>

But the Supreme Court of the United States took a different view. Mr. Justice Van Devanter declared that the "tax is of a designated per centum of the entire authorized capital, and was imposed after the maximum limit named in St. 1909, c. 490, Part III, § 56, was removed by St. 1914, c. 724, § 1."<sup>43</sup> He held therefore that "as thus changed the statute is in its essence and practical operation indistinguishable from those adjudged invalid in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, and *Looney v. Crane Co.*, 245 U. S. 178."<sup>44</sup>

This construction of the Massachusetts excise system was possible only because the \$2,000 maximum in the Act of 1909 afforded no protection to a corporation whose capital was less than \$10,000,000, and because the Act of 1914 imposed an additional unlimited excess measured by capital in excess of that amount. There was no hiatus between the two taxes. The second took hold where the first let go. It was therefore good realism to insist that the second removed the maximum limit contained in the first. Massachusetts after 1914 had a taxing system which made the excises on foreign corporations increase indefinitely *pari passu* with increase of their capital stock. The practical result would have been the same had the Act of 1914 designated as the corporations subject to its demands, not those named in the Act of 1909, but only corporations having a capital in excess of \$10,000,000. It would have been substantially the same had the class been designated as those corporations having a capital in excess of \$10,100,000, or had the maximum in the Act of 1909 been lowered to \$1,900. Either of these devices would have created a gap between the two demands of the state. But such lacunæ might well be disregarded on the principle of *de minimis non curat lex*. A steadily growing corporation would find in them too brief a respite.

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<sup>41</sup> Note 9, *supra*.

<sup>42</sup> 228 Mass. 117, 122, 117 N. E. 5 (1917).

<sup>43</sup> *Locomotive Company of America v. Massachusetts*, 38 Sup. Ct. Rep. 298 (1918).

<sup>44</sup> *Ibid*.

We must concede that it was a sensible practical judgment which characterized the Massachusetts tax as one based on total capital stock, with no maximum limitation. Yet the situation resulting from the two contemporaneous decisions of the Supreme Court, in both of which the Locomobile Company was a complainant, exhales an atmosphere of artificiality. On the very same day the court sustains one excise measured by the total capital stock of the Locomobile Company, and declares invalid another whose amount is determined by the identical measure so far as the complainant was concerned. Both excises according to the state court were levied under the same statute. True, the statutory situation had been changed in the interim by the provision in the Act of 1914 imposing an additional excise measured by the capital in excess of \$10,000,000. Those who bow to the authority of arithmetic must concede that this additional excise had the effect of removing the maximum of \$2,000 contained in the Act of 1909. But the result reached by the Supreme Court is that a corporation which did not benefit from the \$2,000 maximum, and which could not under the facts of the case before the court be injured by its removal, nevertheless reaps from such removal the boon of immunity from previously valid demands.

This seems strange fruit to pick from the stock of realism. But on closer analysis it may appear that the fruit is from another tree. The artificiality was introduced when it was held in the *Baltic Case* that a tax on small corporations, measured by their total capital stock, was valid because a tax on their larger competitors or neighbors would be a specific charge of \$2,000. The result of the *Locomobile Case* really questions the soundness of the *Baltic Case*. Yet the *Locomobile Case* cannot be said to shake the authority of the *Baltic Case*, since the *Baltic Case* was unanimously reaffirmed in the *Cheney Brothers Case* decided on the same day as the *Locomobile Case*. Quite plainly the Supreme Court has no present intention of receding from the *Baltic Case*.

The present state of the law can best be justified by being formulated as follows. Foreign corporations conducting within a state a local business which is distinct from their interstate business are subject to taxation for such exercise of their corporate functions. This taxation may take the form of a specific charge of a reasonable amount. \$2,000 is a reasonable amount, whatever the size of the



corporation, and whatever the volume of the local business. If the state wishes to relieve corporations with small capital from the payment of the full \$2,000, it may do so by giving what is in effect a sliding discount determined by the extent to which their capital stock falls short of \$10,000,000, or some other properly designated sum. "If the maximum is no more than the amount which might be imposed as a flat charge on all seeking admission for domestic business, the reference to total capital stock may be regarded as an act of grace towards those who can benefit from it."<sup>45</sup>

It may be added that, even if the maximum were more than might be imposed as a flat charge on all, the court may properly regard this defect as cured by a provision for a discount in favor of those on whom it would be improper to impose the maximum. In such a provision it may find a sufficient reason for treating the question whether the maximum might be imposed on all as a purely hypothetical one, into which it need not enter in order to determine the dispute before it. This line of reasoning undoubtedly has curves which to some may make the line look like a circle. The premise on which the argument is built seems to be kicked out from under, after it has served its initial purpose. The difficulty can perhaps be avoided if we say that what maximum is reasonable varies with circumstances. Call this reasonable maximum,  $X$ .  $X$  may be larger where it is not the measure for taxes on small corporations than where it is. If in some cases the state provides that the tax shall be  $X - Y$ , and in others  $X - Z$ , then  $X$  may be regarded as reasonable provided it is suitable for all those cases for which it is made the sole measure. Even with this line of approach, it may well be urged that the court should consider the reasonableness of  $Y$  and  $Z$ . "Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them."<sup>46</sup>

Perhaps after all the composite photograph of the decisions cannot be put in a logical frame. To many minds this would necessitate the conclusion that some of the decisions are "wrong." This easy way out of difficulties has its train of worshippers. But it would afford little solace to those corporations whose taxes were

<sup>45</sup> 31 HARV. L. REV. 777.

<sup>46</sup> *Ibid.*, 612.

sanctioned by the decisions thus thrown into the discard. These entities, if they reasoned, might face with less rebellion the unescapable facts, by following the implication of Mr. Justice Holmes's statement that "we are to look for a practical rather than a logical or philosophical distinction."<sup>47</sup> And those whom William James was wont to call the "tough-minded" will easily follow the lure of the same bait.

From this angle, the decisions since 1910 may be looked at as modifications of the earlier doctrine that the power of the state over the local business of foreign corporations is unlimited. The earlier doctrine has not been abandoned to the extent of insisting that the exaction of the state must be nicely adjusted to the amount of local business carried on therein. Though the old arbitrary power has been throttled, the state still has some latitude in fixing the amount of its exaction. The tax falls on a proper subject, and its amount, like that of all excise taxes, may be fixed by more rough-and-ready methods than could be used in assessing *ad valorem* taxes on property. All that is required is that the methods selected shall not palpably and necessarily exact tribute from sources which lie within the protection of the commerce clause and the due-process clause. A maximum limitation on the demand is a safeguard against such covert invasion of forbidden territory by excises on large corporations. There is still the possibility that the limit set may not suffice to prevent excises on small corporations from encroaching on the area in which such small corporations are entitled to shelter. But this danger is greatly minimized if small corporations are assessed on a basis which is likely in most cases to give them the advantage of the circumstances which would make the maximum levy infringe their constitutionally protected interests.

As to the dangers which are not wholly averted, it can only be said with Mr. Justice Holmes that "constitutional law, like other mortal contrivances, must take some chances."<sup>48</sup> Courts cannot project the lines of constitutional limitations with the same delicate tracery with which they might draft statutes. Judges should be loath to declare invalid a fiscal system which is an exercise of constitutional power, merely because in some stray instances it may

<sup>47</sup> *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908). The passage is quoted more at length in 31 HARV. L. REV. 602.

<sup>48</sup> *Blinn v. Nelson*, 222 U. S. 1, 7, 32 Sup. Ct. Rep. 1 (1911).



operate in a manner that might be deemed unconstitutional if specifically devised for the particular case. Common law, statutes, and constitutional interpretation alike must at times, for the sake of a desirable degree of stability and generality, sacrifice the precision of adjustment that might be attained by kaleidoscopic or tessellated variations or modifications of the law to meet the peculiar demands of every conceivable situation. The Supreme Court has sacrificed generality in recognizing that a suitable maximum may remedy the vice of the measure of total capital stock. If it stops there, and declines to examine the balance sheets of every contentious taxpayer, it simply establishes a point beyond which for practical reasons it will not go. Whether or not these considerations furnish sufficient justification for the tenuousness of the logical distinction between the Baltic Case and the Cheney Brothers Case on the one hand, and the Locomobile Case on the other, they may at least explain where they do not justify.

Those who agree that the General Court of Massachusetts sought to subject foreign corporations to excises measured by their total capital stock without any qualification, and thus to accomplish what *Looney v. Crane Co.*<sup>49</sup> had forbidden, may still criticize the result of the Supreme Court's decision in the Locomobile Case.<sup>50</sup> It will be noted that the Supreme Court of the United States insisted that the Massachusetts statute of 1914 was a material element in the case before it, although the Massachusetts court had declared that it "need not be considered."<sup>51</sup> Thus the Supreme Court holds that the two statutes of Massachusetts are inseparable, although the Massachusetts court had clearly implied the contrary. The reason for the Supreme Court's attitude appears more clearly from its opinion in *International Paper Co. v. Massachusetts*,<sup>52</sup> decided on the same day as the Locomobile Case.

The International Paper Case involved an excise of \$5,500 on a foreign corporation having an authorized capital of \$45,000,000. Of this \$5,500, \$2,000 was levied under the Act of 1909, and \$3,500 under the Act of 1914. It will be remembered that the Massachusetts court on September 13, 1917, had sustained the entire

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<sup>49</sup> Note 3, *supra*.

<sup>50</sup> Note 43, *supra*.

<sup>51</sup> Note 42, *supra*.

<sup>52</sup> 38 Sup. Ct. Rep. 292 (1918).

exaction.<sup>53</sup> The Supreme Court declares the whole levy invalid. In considering the Massachusetts legislation, Mr. Justice Van Devanter says:

"While the legislation under which the tax was assessed and collected was enacted in part in 1909 and in part in 1914, its operation and validity must be determined here by considering it as a whole, for the opinion of the state court not only holds that the 'maximum limitation' put on the tax by the part first enacted 'is removed' by the other, but treats the two parts as exacting a single tax based on the par value of 'the entire authorized capital' and computed as to ten million dollars thereof at the rate of one fiftieth of one per cent and as to the excess at the rate of one one-hundredth of one per cent."<sup>54</sup>

And near the end of the opinion, the statement, that "since 1914 the Massachusetts law has been in its essential and practical operation like those held invalid"<sup>55</sup> in the Western Union Case and the Looney Case, is prefaced by the clause: "Accepting the state court's view of the change wrought by the later statute."<sup>56</sup> Thus the Supreme Court relies on the interpretation of the state court to reach the conclusion that the Act of 1909 is so amalgamated with the Act of 1914 that, if the latter cannot stand, the former must fall also.

No such question was passed upon by the Massachusetts court in the International Paper Case,<sup>57</sup> for that court held both statutes constitutional, and therefore was not called upon to inquire whether the Act of 1914 was separable from the Act of 1909. But in its opinion in the Locomobile Case,<sup>58</sup> it declared plainly enough that the Act of 1914 had no bearing on the validity of the Act of 1909. From this it is certain that the Massachusetts court would hold the two statutes separable whenever a decision of the controversy before it required consideration of the point. No one can doubt that the Massachusetts court, if it had thought that the Act of 1914 was inapplicable to foreign corporations engaged partly in interstate commerce, would have held that the frustrated attempt of the

<sup>53</sup> *International Paper Co. v. Commonwealth*, 228 Mass. 101, 117 N. E. 246 (1917). See 31 HARV. L. REV. 745-54.

<sup>54</sup> 38 Sup. Ct. Rep. 292, 293 (1918).

<sup>55</sup> 38 Sup. Ct. Rep. 292, 294 (1918).

<sup>56</sup> *Ibid.*

<sup>57</sup> Note 53, *supra*.

<sup>58</sup> Note 40, *supra*.



General Court of the Commonwealth did not operate to render inapplicable to such corporations the earlier Act of 1909. Yet the Supreme Court in effect assumes the contrary, by its failure to give specific consideration to the question whether the two statutes were separable. It seems to decline to go into the question on the ground that the state court had decided it against the contention of the complainants.<sup>59</sup>

Doubtless no one will be more surprised at this eventuation than the judges of the Massachusetts supreme court. Their disposition of the International Paper Case did not require them to consider whether one part of the tax could be held good if the other was declared invalid. And their analysis of the combined effect of the two statutes was not directed to any such issue. Moreover, in the Locomobile Case they insisted that the Act of 1909 stood entirely on its own legs. Yet the Supreme Court, without giving independent consideration to the question, relies on other statements of the Massachusetts court, wholly unrelated to the question of separability, to reach the conclusion that an unconstitutional addition to the Act of 1909 must be given the effect of invalidating the prior statute, though that is its sole effect.

Though the Supreme Court accepts the judgment of the state court on the question whether different provisions in state statutes are separable or not,<sup>60</sup> it forms its independent judgment when the state court has not spoken on the point.<sup>61</sup> The test which it applies is whether it can reasonably be believed that the legislature would

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<sup>59</sup> This cannot be the result of mere inadvertence, for the brief for the Commonwealth in the Locomobile Case contains the heading: "The New Statute (St. 1914, c. 724) has no Bearing upon the Rights of this Petitioner." Under this heading it was argued:

"If for any reason this new statute is unconstitutional as a whole, or if, by reason of particular circumstances in individual cases, any tax imposed under it upon any corporation subject to its terms is void, the system of taxation established by section 56 remains unaffected. Therefore the additional tax imposed by this statute is plainly separable from the tax imposed under section 56, and a decision that any tax under the statute of 1914 is invalid cannot affect taxes assessed upon any corporation whose authorized capital stock does not exceed \$10,000,000. This in substance is the ruling of the Supreme Judicial Court of Massachusetts in the case at bar. The ruling of that court that these two statutes are entirely separable will, of course, be followed here as purely a matter of statutory construction."

<sup>60</sup> *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. Rep. 110 (1896).

<sup>61</sup> *International Text Book Co. v. Pigg*, 217 U. S. 91, 112-13, 30 Sup. Ct. Rep. 481 (1910), holding provisions inseparable; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 120-21, 30 Sup. Ct. Rep. 496 (1910), holding provisions separable.

have enacted the valid part without the part which is declared invalid.<sup>62</sup> In *Winona and St. Peter Land Co. v. Minnesota*,<sup>63</sup> for example, the question was whether a statute imposing back taxes on real and personal property could be enforced as to real property if it was invalid as to personal property. The Supreme Court, speaking through Mr. Justice Brewer, expressed its approval of the decision of the state court as follows:

"It seems to us, also, that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained."<sup>64</sup>

So the question which the Supreme Court should have asked and answered in the International Paper Case was whether it could reasonably be believed that the General Court would have wished to tax the complainant \$2,000 if it could not tax it \$2,000 plus \$3,500. The question in the Locomobile Case was whether it could reasonably be believed that the General Court would have wished to continue to apply to the complainant the Act of 1909 if it could not apply to others the Act of 1914. To borrow a familiar form of statement, it can safely be said that "to ask the question is to answer it."

The result reached by the Supreme Court illustrates the hard saying that "from him that hath not shall be taken away even that which he hath."<sup>65</sup> As exegesis of a puzzling passage of Scripture, the decision may be welcomed. It may be a wholesome warning to the states not to encroach on forbidden ground, lest their trespasses cost them their own freeholds. But apart from its moral values, the result was a curious and unnecessary one. Before the passage of the Act of 1914, the Act of 1909 was without fault. The Act of 1914 did not purport to amend the Act of 1909. It refers to its predecessor only to spare itself from enumerating specifically the corporations to which it applies.<sup>66</sup> The Supreme Court holds that

<sup>62</sup> *Southwestern Oil Co. v. Texas*, note 61, *supra*, loc. cit.

<sup>63</sup> 159 U. S. 526, 16 Sup. Ct. Rep. 83 (1895).

<sup>64</sup> 159 U. S. 526, 539, 16 Sup. Ct. Rep. 83, 88 (1895).

<sup>65</sup> Matthew 25: 29.

<sup>66</sup> The Act of 1914, by saying "every foreign corporation subject to the tax imposed by section fifty-six" etc., in effect adopts the interpretations of the Massachusetts



the Act of 1914 cannot be enforced against corporations engaged partly in interstate commerce. As to them it is void and of no effect. Yet it is given the important effect of vitiating the Act of 1909 in so far as it applies to corporations engaged partly in interstate commerce. The Supreme Court places the burden of this result on the shoulders of the Massachusetts court, because that court in analyzing and sanctioning the combined effect of the two statutes says rightly that the maximum limitation contained in the former is removed by the latter. But in thus characterizing the effect of the latter on the former, Chief Justice Rugg of the Massachusetts court was talking arithmetic, not law. His arithmetic was correct only if the Act of 1914 was valid and enforceable. He correctly described what Massachusetts sought to do. But it failed to accomplish its desires, because the Supreme Court forbade. The situation about which the state court was talking turns out not to exist. Yet what Chief Justice Rugg said about that situation, the Supreme Court treats him as saying about another situation which he never had in mind. By such thought transference the Massachusetts court is held responsible for the position that the Massachusetts excise system after 1914 was a unit which must stand or fall as a unit, although that court had stated specifically that in determining the constitutionality of enforcing the Act of 1909 after the enactment of the Act of 1914, the latter statute "need not be considered."<sup>67</sup>

Plainly enough the Supreme Court misapprehended the position of the Massachusetts court. And the state court must be held immune from most, if not all, of the responsibility for the blunder. It may perhaps be criticized for its failure to appreciate the likelihood that the Act of 1914 would come a cropper when it reached the Supreme Court. Had the Supreme Court handed down its decision in *Looney v. Crane Co.*<sup>68</sup> three months earlier, the Massachusetts court would have been clearly advised that the unlimited measure of total capital stock was an improper one to apply to foreign corporations engaged partly in interstate commerce, even

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court as to what corporations are subject to section fifty-six. See note 39, *supra*. It was doubtless because of these interpretations of the court, that the Act of 1914 referred to the "corporations subject to the tax imposed" by the Act of 1909, and did not read, as did the Act of 1909, "every foreign corporation."

<sup>67</sup> Note 42, *supra*.

<sup>68</sup> Note 3, *supra*.

though that commerce was not some form of transportation. Yet, even as the situation stood in September, 1917, the Massachusetts court had ample warning of the strong probability that the Supreme Court would insist that a maximum limitation was a *sine qua non* in a statute using total capital stock as a basis for assessing excises on foreign corporations combining local and interstate commerce. However strong the state court's anticipations to the contrary, it would have done well to have appreciated the possibility of disillusionment, and to have guarded against the unfortunate result which ensued. This it might easily have done by devoting separate consideration to the levy on the International Paper Company under the Act of 1909 and to that under the Act of 1914, thus making it unmistakably clear to the Supreme Court that it did not think that the General Court of Massachusetts wished to exempt foreign corporations from excise taxes entirely, in case it would not be permitted to subject corporations having a capital in excess of \$10,000,000 to the additional excise imposed in 1914.

The legal result of the Supreme Court's decision in the International Paper Case<sup>69</sup> and the Locomobile Case<sup>70</sup> is that all excise taxes levied by Massachusetts on foreign corporations engaged partly in interstate commerce during the years 1914, 1915, 1916, and 1917 were unconstitutional interferences with interstate commerce. For so the Supreme Court has declared. It happens that most of the foreign corporations doing business in Massachusetts during the last quadrennium have paid their excises without protest,<sup>71</sup> so that the results of the Supreme Court's declarations are less extensive than they might have been. Taxes which could be regarded as constitutional only "upon the theory that our dual system of government has no existence"<sup>72</sup> have been paid and cannot be recovered, yet the government at Washington still lives. This contradiction between the law and the facts raises nice questions as to the conceptualist attitude which partitions governmental power in the United States between two authorities, each "sovereign" in its respective sphere, each impotent in the sphere of the other, and

<sup>69</sup> Note 52, *supra*.

<sup>70</sup> Note 43, *supra*.

<sup>71</sup> From information derived from Wm. Harold Hitchcock, Esq., Assistant Attorney General of Massachusetts.

<sup>72</sup> *Looney v. Crane Co.*, 245 U. S. 178, 187, 38 Sup. Ct. Rep. 85 (1917). The passage is quoted more at length in 31 HARV. L. REV. 603-04.



the sphere of each wholly distinct from that of the other. It makes a pretty mental picture, but the subject of the picture never sat for it.

Since the decision of the Supreme Court in the Locomobile Case, Massachusetts has confessed the error of its ways and has brought forth fruits meet for repentance by repealing the offending Act of 1914.<sup>73</sup> This will doubtless restore the Act of 1909 to favor with the Supreme Court from now on, in spite of the fact that the opinion in the Locomobile Case referred to it as "indistinguishable from those adjudged invalid"<sup>74</sup> in the Western Union Case and those following it, thus implying that the Act of 1909 too was "invalid." But this *usus loquendi* is probably a short-cut expression having reference only to the particular situation before the court for adjudication. So far as the decisions of the Supreme Court have yet gone, the Act of 1909 might all the time have been applied to foreign corporations whose business within the state is entirely local commerce or manufacture. And even if the Supreme Court is now of opinion that the due-process clause protects foreign corporations from excises measured by their total capital stock, whether they are engaged in interstate commerce or not, and that therefore the Act of 1909 was entirely unenforceable so long as the Act of 1914 was on the statute books, it may still recognize that the "invalidity" of the Act of 1909 was due entirely to its association with the Act of 1914, and that the dissolution of the connection between them will restore the Act of 1909 to its pristine purity. Yet after the court's decision in the Locomobile Case, the general Court of Massachusetts might have done well, *ex majore cautela*, to accompany its repeal of the Act of 1914 with an express reenactment of the Act of 1909, and thus to deprive the Supreme Court of any opportunity to declare that the Act of 1909 was so dead that it could not be raised to life by the repeal of the Act of 1914.<sup>75</sup>

<sup>73</sup> Chapter 76, General Code, Act of 1918; in effect March 18, 1918.

<sup>74</sup> 38 Sup. Ct. Rep. 298 (1918).

<sup>75</sup> While such a procedure would have made the future secure, it might be taken as a confession which would operate to the disadvantage of the Commonwealth in the few pending cases to recover excises levied under the Act of 1909 during the period between the enactment and the repeal of the Act of 1914. Those cases are of course on all fours with the Locomobile Case. Nevertheless it is still open to the state court to declare that the Act of 1914 was always separable from the Act of 1909, and on that ground to sustain taxes levied under the Act of 1909 after 1914.

As was to be anticipated, the Supreme Court had no difficulty in reaching the conclusion that the International Paper Company was entitled to be excused from payment of the excise measured by its total capital in excess of \$10,000,000. The only possible distinction which could be drawn between the question presented and that settled in the Looney Case lay in the fact that the International Paper Company was engaged in manufacturing in Massachusetts. It will be remembered that the Massachusetts court seemed to attach some weight to this, observing that "the local manufacture of paper is disconnected with the interstate business of the petitioner except as an artificial relation has been established by the petitioner,"<sup>76</sup> and relying on cases holding that manufacture is not commerce.<sup>77</sup> The Supreme Court makes no mention of this possible distinction between the power of the state over foreign corporations whose business within the state consists largely of manufacturing and that over those whose entire local business is technically commerce. Mr. Justice Van Devanter contents himself with summarizing the propositions to be deduced from the line of cases beginning with the Western Union Case and ending with the Looney Case, and then saying of the Looney Case:

"That case and those which it followed and affirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable."<sup>78</sup>

With this disposition of the cases from Massachusetts, it seems clear that the statute of Virginia applied by the Virginia court in *General Ry. Signal Co. v. Commonwealth*,<sup>79</sup> and the statute of Ten-

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The state court is not bound by the Supreme Court's erroneous interpretation of its previous utterance. The Supreme Court, on the other hand, will be bound by a definite and unescapable declaration from the state court that the offending Act of 1914 was entirely separate and distinct from the Act of 1909. Thus the state court can prevent the recurrence of the fatality which happened in the *Locomotive Case*, without laying itself open to the charge of attempting to give retroactive effect to the repeal of the Act of 1914.

<sup>76</sup> *International Paper Co. v. Commonwealth*, 228 Mass. 101, 112, 117 N. E. 246 (1917). See 31 HARV. L. REV. 749.

<sup>77</sup> See 31 HARV. L. REV. 746.

<sup>78</sup> 38 Sup. Ct. Rep. 292, 295 (1918).

<sup>79</sup> 118 Va. 301, 87 S. E. 598 (1916). See 31 HARV. L. REV. 756-59.



nessee applied by the Tennessee court in *Atlas Powder Co. v. Blue*,<sup>80</sup> will meet with a similar fate when they reach the Supreme Court. There is a possibility that the local business of the particular complainant in the Virginia case might be regarded by the Supreme Court as so distinct from any interstate commerce in which the corporation was engaged, that its immunity from a demand measured by its total capital stock will depend upon whether the Supreme Court will overrule *Horn Silver Mining Co. v. New York*,<sup>81</sup> and thus reach the same result under the due-process clause alone as it reaches under the due-process and commerce clauses together. Yet if manufacturing is not sufficiently distinct from interstate commerce to prevent the applicability of the commerce clause, it is hard to see how a different attitude can reasonably be taken towards construction work done in the state with materials introduced from other states.

The only important question left open by the Supreme Court decisions is whether excises on foreign corporations engaged partly in interstate commerce may be measured by the receipts from all business done within the state. On this question the due-process clause has no bearing. But the receipts from interstate commerce could not be taxed directly, and the question whether they may be made the measure of a tax on a proper subject of state authority is logically difficult to distinguish from the issues raised under the commerce clause in *Looney v. Crane Co.*<sup>82</sup> and *International Paper Co. v. Massachusetts*.<sup>83</sup> But the Supreme Court has sacrificed strict logic for other considerations in sustaining taxes in fact measured by the total capital stock of the complaining corporation, provided taxes on larger corporations would be fixed by a specific maximum provision in the statute. And it may conceivably sacrifice logic and hold that the measure of receipts from business actually done within the state has not the vice of a measure which includes the value of property without the state.

We might hope to get material for prophecy from *Crew Levick Co. v. Pennsylvania*,<sup>84</sup> decided December 10, 1917; but the opinion of

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<sup>80</sup> 131 Tenn. 490, 175 S. W. 547 (1915). See 31 HARV. L. REV. 754-56.

<sup>81</sup> 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892).

<sup>82</sup> Note 3, *supra*.

<sup>83</sup> Note 52, *supra*.

<sup>84</sup> 245 U. S. 292, 38 Sup. Ct. Rep. 126 (1917).

Mr. Justice Pitney carefully left the precise question open. That case held that a tax on wholesale and retail dealers of merchandise, whose amount was based on the volume of business transacted, could not be measured by any receipts from foreign commerce. The portion of the tax so measured, it was said, "necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it."<sup>85</sup> And earlier in the opinion it was declared:

"It [the tax] operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; . . ."<sup>86</sup>

But the opinion also says that "the distinction between this tax" and that "sustained in *Maine v. Grand Trunk Ry. Co.*"<sup>87</sup> is "obvious;"<sup>88</sup> and it says further that the tax "bears no semblance of a property tax, or a franchise tax in the proper sense."<sup>89</sup>

Thus plainly *Maine v. Grand Trunk Ry. Co.*<sup>90</sup> is left unoverruled, and the court has explicitly left itself free to decide that a "franchise tax in the proper sense" may be measured in part by receipts which may not be taxed directly. When such a case comes before the Supreme Court, it may remind us that in all the cases annulling taxes measured by total capital stock, the due-process clause as well as the commerce clause was a factor. And it may say that these so-called franchise taxes measured by receipts from business done within the state are in substance taxes on intangible property and therefore sustainable as such, provided this same intangible property has not already been included in the assessment of other taxes.<sup>91</sup>

We shall know later.

(To be continued.)

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<sup>85</sup> 245 U. S. 292, 297-98, 38 Sup. Ct. Rep. 126 (1917).

<sup>86</sup> 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917).

<sup>87</sup> 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).

<sup>88</sup> 245 U. S. 292, 298, 38 Sup. Ct. Rep. 126 (1917).

<sup>89</sup> 245 U. S. 292, 297, 38 Sup. Ct. Rep. 126 (1917). Italics are the writer's.

<sup>90</sup> Note 87, *supra*.

<sup>91</sup> See 31 HARV. L. REV. 768, note 166.



## FAULT AND LIABILITY

## TWO VIEWS OF LEGAL DEVELOPMENT

CLEANING in a field where Holmes, Ames, Wigmore, Thayer, and Smith have garnered is not a very promising enterprise. Such a field is the study of the development of the relation between tort liability and fault. We can venture, at least, to draw upon their stores of facts to serve us in connection with a new need — the difficulty of explaining the recent tendency to revert to liability without fault in certain cases. Incidentally we may reconcile the two apparently conflicting theories of legal development that these writers represent.<sup>1</sup>

Mr. Justice Holmes in "The Common Law" (1881) placed before us two possible bases of tort law, that of a man acting at his peril and that of liability confined to moral shortcoming. He rejected both theories in favor of a synthesis of his own: that liability is determined by what the law would consider blameworthy in an average man. The process by which the law arrives at this synthesis, according to him, is one in which

"the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests of morals. But as the law has grown even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril."

In other words, according to Mr. Justice Holmes, the law begins with liability based on fault, and tends, as it grows, to formulate external standards which may subject an individual member of society to liability though there is no fault in him.

It may be well to understand at the outset that this view is dis-

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<sup>1</sup> See Bibliographical Note at end of this paper.

tinctly opposed to the view of legal development generally found in the books today. The most elaborate presentation in English of the doctrine that primitive law has no concern with blameworthiness, is that of Dean Wigmore. "Primitive Germanic Law," he tells us,

"raised no issue as to the presence or absence of a design or intent; it did not even distinguish in its earlier phases between accidental and intentional injuries."

He then overwhelms us with German, Dutch, Italian, and French authorities to prove that

"the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance, the visible source, whatever it be — human or animal, witting or unwitting — of the evil result."

Among all primitive peoples, he tells us, "the doer of a deed was responsible because he was the doer." He finds no evidence and but few writers to throw doubt on his theory.

"It is true," he admits, "that B. W. Leist in his *Graeco-Italische Rechtsgeschichte*, 1884, insists that even in the most primitive Greek period a distinction was made between intentional and non-intentional harms, but in this he stands alone; though Freudenthal in Mommsen's *Zum ältesten Strafrecht* inclines to that view. However, Glotz has once for all demonstrated the matter."

In short, the current view, which in honor of its American expounder I shall call the Wigmore view, is that the law begins with making a man act at his peril and gradually becomes moralized until liability is connected with fault. The tendency, in other words, is exactly the opposite to that described by Justice Holmes.

#### THE WIGMORE VIEW TRUE OF MODERN ENGLISH LAW

If we confine our attention to the best known period of English Law, from the reign of King Edward I to that of Queen Victoria, it is not difficult to see why the Wigmore view has become the generally accepted one — though by no means all of its devotees are conscious of the thoroughness of their departure from the theory of "The Common Law."<sup>2</sup> A fine application of the current

<sup>2</sup> When Wigmore says (29 HARV. L. REV. 607), "I admire supremely Justice Holmes' 'Law of Torts' because — he is the only writer who has (publicly) agreed with



view to this period of history is contained in Dean Ames' memorable address at the Seventy-Fifth Anniversary of the Cincinnati Law School. After telling us that "early law is formal and unmoral," he asks:

"Are these adjectives properly to be applied to the English common law at any time within the period covered by the reports of litigated cases?"

A survey of the last six hundred years is followed by this conclusion:

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."

This view of legal history, esoteric and learned though it seems, has become one of the commonplaces of English and American books. Sir William Markby was one of the first to utter it in England, but he did so with some trepidation.<sup>3</sup> Among recent writers we find it boldly flaunted. William Searle Holdsworth speaks confidently of "the dominant concept of Anglo-Saxon law, the idea that a man acts at his peril."<sup>4</sup> Sir Frederick Pollock, beginning as a disciple of Mr. Justice Holmes, allowed the adverse theory to grow on him until he unconsciously became an apostate. In the first edition of his book on Torts (1887) he reproduced the Holmes' view faithfully, that in spite of all *dicta* to the contrary, the English law was not and never had been that a man acted at his peril.<sup>5</sup> He even added almost the very words of his American friend, that he knew of no trace of any such doctrine in Roman or Continental jurisprudence. In later editions he cautiously limited this remark to "modern Continental jurisprudence," and added a most significant sentence: "Such [the doctrine that a man acts

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me as to the fundamentals of that subject!" he apparently has reference to his analysis of the subject, hardly to his treatment of the question, whether early law is or is not founded on the fault basis. See notes 8 and 9, *infra*.

<sup>3</sup> In his *ELEMENTS OF LAW*, 1871, he noted the absence of any general principle of torts (see page 95). After the appearance of *THE COMMON LAW* he thought Holmes's "process of specification" of rules from a general principle of blameworthiness, unlikely (*cf.* 5 ed., 344, § 710, note).

<sup>4</sup> 2 *HISTORY OF ENGLISH LAW*, 42, 203; 3 *ib.*, 299, 303-04.

<sup>5</sup> (1 ed.), 108.

at his peril] seems to have been the early Germanic law."<sup>6</sup> The same change of mind is reflected in his discussion of the moral basis of Trespass. Though he retains, through several editions, the statement based on "The Common Law" that "all positive law must presuppose a moral standard" the later editions add this inconsistent new matter:

"In a rude state of society the desire of vengeance is measured by the harm actually suffered and not by any consideration of the actor's intention; hence the archaic law of injuries is a law of absolute liability for the direct consequences of a man's acts, tempered only by partial exceptions in the hardest cases."

Still, Sir Frederick Pollock professes to cite Mr. Justice Holmes "on the whole of this matter," but oddly enough he now links Dean Wigmore with him.<sup>7</sup>

The dean of English law-writers is not alone in this mystifying, because unconscious, dissent. In fact, we frequently find Mr. Justice Holmes cited as an authority for such propositions as the following:

"Our law of Torts has been changed from one of absolute liability to one in which, for the most part, recovery is based on culpability."<sup>8</sup>

"It is a familiar historical fact that according to primitive legal conceptions in England, as in Rome and elsewhere, one was liable for all the consequences of his acts irrespective of the care with which the acts were performed."<sup>9</sup>

If we turn to the third and fourth pages of "The Common Law," we shall find all that the English language can do to repudiate responsibility for this notion. The learned author says:

"Vengeance imports a feeling of blame and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very

<sup>6</sup> Cf. Webb's American edition (1894), 163, citing HEUSLER, INSTITUTIONEN DES DEUTSCHEN PRIVATRECHTS, II, 263, and the Laws of Henry I, to which later editions add BRUNNER, FORSCHUNGEN, 487 sqq. In the last edition he is more emphatic: "Such was the early Germanic law" [10 ed., 145].

<sup>7</sup> *Ib.*, 145, note *h*.

<sup>8</sup> For this statement Chapters I-IV of THE COMMON LAW are cited with Wigmore's essay, by Professor Whittier, in 15 HARV. L. REV. 336.

<sup>9</sup> For this statement THE COMMON LAW is cited by Arthur A. Ballantine, in 29 HARV. L. REV. 711. Judge Smith's reference to Holmes in 30 *ib.*, 254, 255, is also unguarded in that the latter is made to appear of one mind with Ames, Kenney, and Whittier, that there has been a "change from the old law" of acting at one's peril to a modern rule of blameworthiness of some sort.



far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked."

Then after showing us how, in course of time liability for unintended harms emerges, he proceeds:

"It will be seen that this order of development is not quite consistent with an opinion which has been held that it was a characteristic of early law not to penetrate beyond the external visible fact, the *damnum corpore corpori datum*."

He has no doubt read Maine, perhaps also Lea.<sup>10</sup> He recognizes

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<sup>10</sup> See MAINE, *ANCIENT LAW*, 380; LEA, *SUPERSTITION AND FORCE* (3 ed.), Chap. I. Even after reading and being favorably impressed by Brunner's essay on which Wigmore's discussion is based, Holmes repeats (3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 382) that "the torts dealt with by the early law were almost invariably wilful," citing *THE COMMON LAW*, 3, 4, 101-03, with only this reservation: "I do not mean as a matter of articulate theory, but as a natural result of the condition of things."

As to Brunner's essay: Though Wigmore modestly gives Brunner credit for the idea of early law developed in his article, he really gets the theory of the absence of intent in primitive law from Post and Westermarck, whom he also cites. For Brunner clearly interpreted the facts quite differently: *Wie jedes Strafrecht ist auch das germanische Strafrecht generell darauf angelegt, im Verbrechen den verbrecherischen Willen zu strafen und ferne steht ihm der Grundsatz, strafen zu wollen, wo es keinen Willen, keine Schuld sieht. Allein das jugendliche Recht begehrt den sichtbaren sinnlichen Ausdruck des verbrecherischen Willens und sieht ihn in dem schädlichen Erfolge der That.* [Page 488 (815).] He goes on to speak of the mechanical, formal manner of deducing the *mens rea* (never of ignoring it) by a logic which is blind to the circumstances of the individual case. At this point he introduces his examples from the Beowulf and from Norse mythology to illustrate what he calls the "*typische Behandlung des Willens*" as contrasted with an individual examination of the will or intent in each case. [Cf. page 499 (823).] This "*typische Behandlung des Willens*" is essentially the same phenomenon as Holmes' "process of specification of rules" and what I refer to later as a "rough classification of culpable acts." The different aspects result from approaching the law as "a limitation of wills" or a "rule of conduct" or a "means to an end." How consistently Brunner adheres to his view in his *DEUTSCHE RECHTSGESCHICHTE* is shown in the very passages quoted by Wigmore from that work in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 481, notes 2 and 3. Noticing that Brunner constantly speaks of the old Germanic law as "presuming" or "imputing" an unlawful intent, he attempts in note 3 to come to the latter's rescue, by suggesting, "that when the learned investigator in these passages speaks, e. g. of 'treating the unlawful intent as accompanying, etc.' he hardly means to attribute to a past age the sentiments peculiar to the present one. The primitive Germans did not 'presume' or 'impute' an unlawful intent; they simply did not think of the distinction at all." Brunner could hardly be thankful for this attempt to kill his theory with kindness. On page 498 (823) he shows most clearly that the Anglo-Saxons saw the difference between acts done *gewealdes* and those done *ungewealdes*. (How else could they have developed the very words?) Their inability to carry out an investigation in each case as to the

the clash, says he knows no satisfactory evidence for the view which he refuses to adopt and concludes:

"But whatever may have been the early law, the foregoing account shows the starting point of the system with which we have to deal. Our system of private liability for the consequences of a man's own acts, that is for his trespasses, started from the notion of actual intent and actual personal culpability."

A clearer dissenting opinion could hardly have been penned even by the author of "The Common Law." It is, however, difficult to escape the tyranny of popular ideas! Here is one that expects those under its sway to derive *lucus a non lucendo*. But that is not all; when contrary facts show their heads, an apology is demanded — from the facts. It will presently appear that there are some very contrary facts to be dealt with in early English law. That is, the Anglo-Saxon laws were not nearly so unmoral as the Wigmore theory would lead us to believe. No one has presented these facts more clearly than Mr. George E. Deiser in his recent article, "The Development of Principle in Trespass."<sup>11</sup> He sees clearly that

"the [Anglo-] Saxon law was not indifferent to the intention with which an act was done, nor to the element of malice if present."

Then after giving excellent illustrations of the "many provisions in the Saxon laws . . . that suggest tests of liability and some that border on negligence," he offers this sacrifice to propitiate the current theory:

"The tests of liability appear sporadically and not as part of any coherent legal consciousness. Yet, tests must have been applied. In the case of the spear the test appears in the law; if the butt is higher than the point, the penalty is so much; if the butt and the point are on the same level, there is no fault. Furthermore some tests must be applied to determine whether or not a man knows of vice in his beasts. But when this is said, all is said."

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presence or absence of blameworthiness led to the recognition of types of culpable conduct. The note inserted in 1894 (at page 490) shows that von Amira was unable to convince him that the history of liability for accidental homicide (with all its superstitious associations) had been independent of the moral fault notion. *Ich sehe darin nach wie vor nicht eine singuläre Ausnahme, sondern nur einen Fall der typischen Behandlung des Willens, wie sie sich auch bei anderen absichtslosen Missethaten geltend macht.*

<sup>11</sup> See Bibliographical Note.



He then traces the development of the action of Trespass and draws this conclusion as to the condition of the common-law action in 1285:

"There is no elemental fact or series of facts upon which redress is based. . . . The cases discuss wrongs, and not whether they are intentional or not. . . . There is no suggestion in any of the cases as yet of any approach to a legal standard of conduct. That is a product of a later day. The standard is purely objective. The law is made cognizant that a wrong has been committed — or since this is a prejudicial statement — becomes aware of an injury — it seeks the actor — the person actively contributing to the injury — it compels him to pay the sum ascertained as damages."

A clearer contrast between the basis of liability in Anglo-Saxon days, and the basis two centuries after the Conquest, could hardly be drawn. The fault element (indefinite and crude, to be sure) is stronger in the earlier period than in the later, but modern scholarship will not permit the facts to speak for themselves. A legal standard of conduct, it insists, is the product of a later day.

At this point, I dissent — at least from the *innuendo*. That fault and liability diverge as we go back to the Year Books is no proof that they must diverge more and more, back to the beginning of time; nor is it a safe indication that they will continue to converge from now on until the end of time. On the contrary, the segment of English history on which the observation is based has been preceded and is being followed today by tendencies in the opposite direction.

Let us first consider the present tendency to multiply instances of liability without fault. Much of the older liability without fault was unwittingly discarded when our codes of pleading swept aside such technical actions as Trespass and Trover, and left in their places the notion that one's petition must allege some actual wrong, a cause of action. Yet a few old stocks have remained and some of them have proved quite hearty: thus mistakes as to title are no excuse; in accident cases the doctrine of *res ipsa loquitur*, whether assisted by the rule in *Rylands v. Fletcher* or not, may lead to wonderful results; the vicarious liability of employers has survived (I am not saying from very ancient times<sup>12</sup>) not to drag out a mis-

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<sup>12</sup> It is remarkable that when the two authors whose views are here contrasted come to this concrete illustration they seem to change sides. That is, Wigmore, who

erable existence, but to flourish as never before in the atmosphere of modern business organization, for the number of acts that must be left to servants and agents is increasing from day to day. The most marked instances of modern liability without fault are, of course, in the field of legislation. Statutes and ordinances raising a presumption of negligence, sometimes "conclusive" in law as well as in fact,<sup>13</sup> and statutes of "constructive" fraud are creeping into the books. It is hardly necessary to demonstrate here that some of these phrases are mere euphemisms for "liability without fault."<sup>14</sup> The liability of the owner of a dog is being placed by statute squarely on the ground of ownership independently of negligence even to a greater extent than it was in King Alfred's day (871-99).<sup>15</sup> As that famous lawgiver made liability for the wielding of a spear depend upon whether its point was carried three fingers higher than the butt,<sup>16</sup> so a modern legislature would make the liability of one who digs within the city limits depend not on the question of actual negligence, but on whether he goes deeper than nine feet.<sup>17</sup> Locomotives seem now to attract the legislative lightning that formerly was caught on the points of spears. We are not surprised to read in a modern General Code:

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teaches that early law knew no connection between blameworthiness and liability, finds a modern origin for the liability of a blameless principal. Holmes, on the other hand, who sees in liability without fault a later development, considers this particular illustration a senseless "survival from ancient times." 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 368, 533. Cf. also THOMAS BATY, VICARIOUS LIABILITY, 1916, maintaining the theory of a modern origin.

<sup>13</sup> Ezra Ripley Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317.

<sup>14</sup> Jeremiah Smith, "Surviving Fictions," 27 YALE L. J. 147, 155.

<sup>15</sup> ANCIENT LAWS AND INSTITUTES OF ENGLAND, Alfred, 23 (Th. 79; L. 62. In citing the Anglo-Saxon laws, I shall give in parentheses the page references to Thorpe's edition of 1840 [Th.], and to Volume I of Liebermann's edition of 1903-12 [L.]. Deviations from Thorpe in my translations are indicated by italics.) "If a dog *bite* or *kill* a man, for the first misdeed let vi. shillings be paid; if he [the owner] give him food; for the second time, xii. shillings; for the third, xxx. shillings. If after any of these misdeeds, the dog escape, let this 'bōt' nevertheless take place. If the dog do more misdeeds, and he keep him; let him make 'bōt' according to the full 'wēr,' or wound-*'bōt' according to the damage inflicted.*" (Of course, we must not forget that in early times human traits may naively have been imputed to the dog.) With this early law compare, e. g., GENERAL CODE OF OHIO, 1910, § 5838: "A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place. . . . The owner or harbinger of such dog shall be liable to a person damaged for the injury done."

<sup>16</sup> Alfred, 36 (Th. 85; L. 68).

<sup>17</sup> Cf. GENERAL CODE OF OHIO, 1910, §§ 3782, 3783.



"Every company operating a railroad . . . shall be liable for all loss or damage by fires originating upon the land belonging to it caused by operating such road. Such company further shall be liable for all loss or damage by fires originating on lands adjacent to its land, caused in whole or in part by sparks from an engine passing over such railroad."<sup>18</sup>

Employers' liability for injuries suffered by employees independently of the question of fault may perhaps be classified with contract cases rather than under the head of tort.<sup>19</sup> But Judge Smith has prophesied, in tones that suggest the foreboding of evil, the extension of some such plan of compulsory insurance to accident cases not involving employer and employee.<sup>20</sup> Mr. Justice Holmes, it will be remembered, had playfully suggested such a notion only to dismiss it.<sup>21</sup> Mr. Moorfield Storey more recently had held it up as a proposition worthy of more serious consideration<sup>22</sup> — and now comes Mr. Arthur A. Ballantine enthusiastically advocating it.<sup>23</sup> In the last paragraph that we have from the pen of the late Dean Thayer there is an expression of admiration for the manner in which Judge Smith has pointed out the apparent tendency in this field to recur to earlier conceptions, coupled with this prophetic declaration:

"This is a period of legislation, when it is alike inevitable and desirable that industry be subjected to detailed regulation of many kinds. . . . The imposition of liability without fault will be a constant characteristic of such legislation."<sup>24</sup>

Even if it is a little too early to understand this reversion from the tort law of 1900 to that of 1300 — and the explanations offered are by no means harmonious — a glance into the processes by which the older law came into being will probably be illuminating.

#### THE HOLMES VIEW AND EARLY ENGLISH LAW

It may seem bold to skip a generation and go back to "The Common Law" for light on early English legal history. When

<sup>18</sup> GENERAL CODE OF OHIO, 1910, § 8970. For similar provisions in other states, see Pound's edition of AMES AND SMITH, CASES ON TORTS, 499, note.

<sup>19</sup> I have so treated it in an essay on "The Standardizing of Contracts," 27 YALE L. J. 34.

<sup>20</sup> 30 HARV. L. REV. 241, 319, 409.

<sup>21</sup> THE COMMON LAW, 96.

<sup>22</sup> THE REFORM OF LEGAL PROCEDURE, 1911, 81 *sqq.*

<sup>23</sup> "A Compensation Plan for Railway Accident Claims," 29 HARV. L. REV. 705.

<sup>24</sup> *Ibid.*, 814.

Oliver Wendell Holmes wrote, Bratton's Note-Book lay undiscovered; Maitland had not yet opened up to us the storehouse of thirteenth-century law; the great "History" was undreamt of; Dr. Liebermann was just beginning to get interested in Anglo-Saxon laws and Twiss was still pouring confusion on the text of Bratton.<sup>25</sup> Yet I am emboldened to go back to "The Common Law," not only by reason of the deference with which it is still being quoted by all writers on the subject, even the unconscious dissenters, but for two other reasons. (1) Justice Holmes' theory seems clearly borne out by an independent investigation of the facts, made with all our new advantages. (2) His view is, after all, reconcilable with the current theory — in fact, is a necessary complement of it, irreconcilable as these views may appear at first sight.

In approaching the Anglo-Saxon dooms to see which theory fits, there is, of course, no danger nowadays of our regarding the imperfect law of early historic times "as a degeneration from some better pattern of justice which our remote ancestors were supposed to have followed in a simpler golden age." Yet it is a mistake to assume that any defect we may discover in the laws of a particular time must have been present to an even greater degree in all earlier times. Granting the unmoral nature of much that passes for law in the Year Books, does it follow that the law of the Anglo-Saxons was utterly devoid of any moral sense? Let us examine a few passages in the Winchester Code of King Cnut (1027-34), to detect if possible the relation between liability and fault in the jurisprudence of his day.

"§ 76. And I hold it right, though any one set his own spear at the door of another man's house, and he have an errand therein; or if any one quietly lay any other weapon, where they would be still if they might; and any man then seize the weapon and do any harm therewith; then it

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<sup>25</sup> "When I began," wrote Holmes recently, in the introduction to the first volume of the *CONTINENTAL LEGAL HISTORY SERIES*, "the law presented itself as a rag-bag of details. The best approach that I found to general views on the historical side was the first volume of Spence's *Equitable Jurisdiction*, and on the practical, Walker's *American Law*." No wonder that Wigmore suggested the ignoring of all studies of Anglo-American legal history that appeared before *THE COMMON LAW*! (2 *ST. LOUIS CONGRESS OF ARTS AND SCIENCE*, 1904, 350). Yet I do not mean to speak disrespectfully of the men who produced this literature — at least not here, with the grand old portrait of Timothy Walker, the author of "*American Law*" and the founder of this school, staring down at me from over my desk as I write.



is right that he who wrought that harm, also make 'bōt' for the harm. And he who owns the weapon, let him clear himself, if he dare, [by swearing] that it never was either by his will, or in his control, or by his counsel, or with his cognizance: then it is God's law, that he be innocent; and let the other who wrought the deed, see that he make 'bōt' as the law may teach.

"§ 77. And if any man bring a stolen thing home to his cot, and he be detected [by the owner]; it is just that he [the owner] have what he went after. And unless it has been brought under his wife's key-lockers, let her be clear; for it is her duty to keep the keys of *the following*: namely her 'hord-ern,' and her chest, and her 'tege.' If it be brought under any of these, then is she guilty. And no wife may forbid her husband that he may not put into his cot what he will. It was ere this, that the child which lay in the cradle, though it had never tasted meat, was held by the covetous to be equally guilty as if it had discretion. But henceforth I most strenuously forbid it, and also very many things that are very hateful to God."<sup>26</sup>

Clearly what animated the great lawgiver who spoke in this code was an almost religious horror of liability without fault such as had crept into the dooms of some of his predecessors. And when he attributed this anomaly to the greed of the covetous, I am not sure that he was not a better historian than some of our modern scholars who would explain it by a doctrine of Original Sin.<sup>27</sup> But, it may be said, the Danish invader was far ahead of his times. Did the earlier Anglo-Saxon dooms deal with a man according to his fault? Hastening over the passages in Edward (901-25)<sup>28</sup> and Ethelred (980-1016)<sup>29</sup> — these may have been borrowed directly from the Church — let us go back to King Alfred (891-901), who distinguished, crudely to be sure, between damage done by a spear properly carried and that done by one improperly carried. He had also distinguished in respect to the measure of damages between the owner's liability for the first, second, and third "mis-

<sup>26</sup> Embodied also in Henry I, 87, 2 (Th. 419, 593; L. [§§ 75, 76] 362, 601).

<sup>27</sup> Cnut's principle had been expressed in the seventh century. Ine, 7 and 57 (Th. 107, 139; L. 92, 114).

<sup>28</sup> Edward the Elder, I. 1 (Th. 161; L. 141): "... he should then declare on oath that he did it not 'from any knavery, but with full right, without fraud and guile,' ..."

<sup>29</sup> Ethelred, 52, embodied in Cnut, II, 69 (Th. 329, 413; L. [§ 68] 258, 354): "And if it be that anyone unwillingly or unintentionally do anything amiss he shall not be like to him who misdoes intentionally and of his own will; and also he who is an involuntary doer of that which he misdoes, he is ever worthy of protection and of the better doom because he was an involuntary doer of that which he did."

deeds" of a dog. The *scienter* idea, vaguely foreshadowed here, is also suggested in what he copies from his kinsman, Ine (688-95), with reference to swine that make a habit of helping themselves to unallowed mast and to beasts that break hedges and go in everywhere.<sup>30</sup> We are at once reminded of the Biblical case of the vicious ox which King Alfred translates from Exodus: "*Or if it be known that the ox was wont to gore in time past, and its owner hath not kept it in, he shall surely pay ox for ox, and the dead beast shall be his own.*"<sup>31</sup> But, it may be said, King Alfred, too, was a reformer. Does he not tell us that he rejected those dooms of his forefathers which did not seem good to him? Let us consider, then, the oldest words of law that have come down to us in a Germanic tongue, the Laws of King Ethelbert (about the year 600), and ask here whether the measure of damages is based on a theory of fault or purely on the doctrine of compensation for damage inflicted by acts done at one's peril. God's property and the Church's must be paid for twelvefold, the Bishop's elevenfold, and so on down through a scale measured not by the loss of the complainant nor even by a "probable rise and fall in his passions," but by the seriousness of the fault of the defendant.<sup>32</sup> True, it is suggested in the Anglo-Saxon dooms that the owner of weapons is *prima facie* liable for harm inflicted with them though he have no part in their use; but in such cases he could always clear himself by oath, that is, he had the burden, or rather the privilege of proof.<sup>33</sup> On the other hand, "if a man furnish weapons to another where there is strife though no evil be done, let him make 'bōt' with vi. shillings."<sup>34</sup>

The intent may be even more important than the infliction of harm. If, then, without attempting to go back to those ultimate beginnings that may properly be called primitive, we stop at the dawn of English legal history we find the fault basis clearly assumed. Indeed, if we read the mediæval dooms through, instead of stopping

<sup>30</sup> Ine, 42, 49 (Th. 129, 133; L. 106, 110).

<sup>31</sup> Exodus xxi. 35, 36 (Th. 51; L. 34).

<sup>32</sup> Ethelbert, 1 (Th. 3; L. 3).

<sup>33</sup> See LIEBERMANN, GESETZE, II, *Glossar*, s. v. *Gefährdeid*; Alfred, 19, embodied in *Instituta Cnuti*, III, 40, and Henry I, 87, 1 (Th. 75, 593; L. 60, 601, 613); Cnut, II, 75, 76, embodied in Henry I, 87, 2-3 (Th. 419, 593; L. 362, 601).

<sup>34</sup> Ethelbert, 18 (Th. 7; L. 4); cf. also Hlothhere and Eadric, 13 (Th. 33; L. 11).



at curious phrases, we shall find that the most striking principle that runs through them is a rough adjustment of liability to fault.<sup>35</sup>

In suggesting that mediæval law is not free from the fault notion, I am not asserting that the mediæval mind held it as a separate concept analyzed away from many related and even unrelated concepts. The isolation of such ideas may be as modern as the isolation of disease germs. But their power was as real in the past and as well attested as that of the epidemics that used to be attributed to the acts of God, or more probably to the acts of the Devil. The primitive reaction to offense is undoubtedly a very tangled mass. To overemphasize the fault element in it may be misleading, but it is equally misleading to isolate the revenge element (in a limited technical sense), or the taboo element, and more so to deny the existence of any one of them as an active force. In fact, the very idea of a separation of law from religion or morals in early times is an anachronism. "Thou shalt not kill," is law (criminal and civil), morals, religion, rolled into one, or rather one of the concrete rules of life from which these abstractions are destined to be evolved. The embryonic law of primitive man is not unmoral in any modern sense.

#### HOW THE THEORIES SUPPLEMENT EACH OTHER

It seems then that the history of tort law records lapses from the moral fault basis and returns to it, rather than a single movement in any one direction. There is, in fact, an alternation between periods of the tendency that Justice Holmes described when cases of acting at one's peril multiply in the law and periods of the kind Professors Ames and Wigmore describe, when morals are reinfused into the law. This alternation is entirely consistent with what we know of other branches of the law. Thus I have traced elsewhere a parallel phenomenon in the history of contracts, showing that legal development veers from standardization to individualization

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<sup>35</sup> Surely Liebermann is entitled to the last word on the subject with reference to the laws of the Anglo-Saxons. After discussing all of the instances of liability without fault that have ever been pointed out, he says, *s. v. Absicht: Dass aber die Unterscheidung der Absicht uralt-menschlich sei, scheint mir wahrscheinlich dadurch, dass sie den höheren Haustieren nach längerer Bekanntschaft mit dem Menschen zu eignen pflegt*. After all, we come back to Holmes and his pet dog.

of contractual relations and back again.<sup>36</sup> The former condition (to which we might give the name "status") predominates in periods of strict law (such as accompany and follow periods of codification); the latter in the intervening periods of growth by Equity. In like manner it is now submitted that the completest coincidence of individual fault and liability occurs in periods when legal development is by means of Equity, and that *jus strictum* brings with it a standardization of types of culpable conduct. A similar explanation is implied in "The Common Law," though a different view is taken there of the relative size and importance of the component parts of the movement, and the frequency and eccentricity rather than the regularity and naturalness of one of them is stressed. After discussing the possibility of disposing of the rule of acting at one's peril on the basis of precedent, of theory and of policy, Justice Holmes says:

"But we may go further with profit, and inquire whether there are not strong grounds for thinking that the common law has never known such a rule, unless in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction."<sup>37</sup>

It remains for us to consider the tendency of this type of period to recur regularly and to bring with it the condition that Justice Holmes regards as exceptional. Incidentally we shall find that what he calls the exception is so far-reaching in its effects that it is not surprising that others have seen in it the rule. For the purposes of our present synthesis we may call the two movements — both that to and that from the fault basis — swings of a pendulum rather than rule and exception.

As we found in our study of contracts, the periods of the culmination of strict law in English legal history have been three:

First: The crystallization of old English customs about the time of the Norman Conquest (eleventh century).

Second: The period following the closing of the Register of Writs in the days of Edward I (early fourteenth century).

Third: The period into which we are now passing.

<sup>36</sup> 27 YALE L. J. 34. I have discussed other phases of the tendency of legal stages to recur in cycles, in 65 U. OF PA. L. REV. 665, and in 31 HARV. L. REV. 373.

<sup>37</sup> THE COMMON LAW, 89.



The intervening periods, as we shall see, are filled with a struggle to moralize the tough law with which they have to grapple by bringing liability and fault together.

### *JUS STRICTUM* AND ITS TYPES OF CULPABLE CONDUCT

It is of the unmorality of the first of the historic periods of strict law enumerated and the relics of an older prehistoric period that Dean Wigmore's authorities speak. Ames fixed his attention on the unmorality of the second period. It is the coming of the third period that looms large to Judge Smith. All of these periods have one characteristic in common: they seem to set certainty above justice.<sup>38</sup>

It is significant, however, that at least those of the periods that fall within historic times are not really unmoral. We do not have to look far in any of them for traces of a feeling that normally liability should be based on fault. The difference is one of degree — the degree to which the peculiarities of an individual case can be taken into consideration. The first of the historic periods of strict law, that of the Conquest, looks back to old Anglo-Saxon maxims and forms for its guidance, not approvingly, but somewhat helplessly.<sup>39</sup> The man who cannot swear that he has not brought another nearer to death and further from life is indeed unfortunate, according to the so-called laws of King Henry I (1114-18). Yet the compiler is not blind to the anomaly of such rules. Accordingly he brings them all together in one place.

"There are moreover many kinds' of misfortunes (*infortuniorum*) happening by accident (*casu*) rather than by design (*consilio*) and to be handed over to mercy rather than to judgment; for the law provides who unwittingly offends, shall wittingly make amends, and who *brecht ungewealdes bete gewealdes*. . . . In these and similar cases where a man

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<sup>38</sup> We are reminded of F. R. COUDERT'S *CERTAINTY AND JUSTICE*, 1913. In his opening paragraphs he suggests that in the "general conflict between certainty in the law and concrete justice in its application to particular cases . . . the pendulum swings first one way and then the other." He does not seem to have in mind, however, the big swings of the pendulum in the course of history, to which these words might aptly apply, but only minor vibrations caused by the presence of two inconsistent ideals in the mind of a court. His discussion comes down to this: "The truth is that the courts are oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards on the other." Cf. Pound, "Justice According to Law," 13 *COL. L. REV.* 696, 699.

<sup>39</sup> Cf. Edward the Confessor, 12 (*Th.* 447; *L.* 638); *ib.*, 23 (*Th.* 452; *L.* 648).

intends one thing and another happens, where the *deed* is accused and not the *will*, let the judgment-makers decree rather venial damages (*emendationem et honorificenciam*) according to the circumstances."<sup>40</sup>

And this same code quotes from the Church Fathers, "*Reum non facit nisi mens rea.*"<sup>41</sup> In this code there is also a provision regarding the man who slays in self-defense.<sup>42</sup> It looks like an attempt to distinguish his case from that of the murderer on the basis of a fiction that the victim has rushed upon his enemy's extended spear. The age is not above fictions. Unable to get away from the tradition that he who falls from a tree and kills another is liable, it proceeds after the manner of Portia to say that the avenger may if he chooses fall from the same tree on the slayer.<sup>43</sup> This is a virtual declaration that the accidental slayer is neither civilly nor criminally liable. But above all we must never forget in dealing with this period that the *judicium dei* was expected in the final analysis to take care of exceptional cases and to separate the innocent from the guilty.

In the second period of *jus strictum*, that of the early Year Books, a good illustration of liability without fault is found in the recognition of the old custom of holding a man responsible for his fire, regardless of the question of negligence. The gist of the action, though frequently misunderstood, is now generally conceded to have been the failing to guard one's fire. The case of *Beaulieu v. Finglam*<sup>44</sup> has frequently been cited to show that five hundred years ago the notion of culpability as the basis of liability had not taken firm root in the law. The report of the case shows the contrary to be true. The attorney for the defendant seemed to assume the general principle of culpability, and the court did not object to his major premise.

<sup>40</sup> Henry I, 90, 11 (Th. 600; L. 606); cf. *ib.*, 88, 6 (Th. 595; L. 603). For a mediæval French passage of the same tenor, see BEAUMANOIR, *COUT. DU BEAUVOISIES*, 69, quoted by Brunner, 494 (819).

<sup>41</sup> Henry I, 5, 28 (Th. 511; L. 551), quoted from Augustine, *SERMO*, 180, 2. This is found in the almost contemporaneous *Decretum* of Ivo (xii, 39) and is later embodied in Gratian, *CANON* 22, *quaestio* 2, *causa* 3. Similar sentiments are expressed in Henry I, 34, 1; 35, 2; 68, 7, 9; 70, 12; 72, 2; 75, 5; 86, 2, 3 (Th. 536 *sqq.*; L. 565 *sqq.*).

<sup>42</sup> Henry I, 88, 4 (Th. 595; L. 602).

<sup>43</sup> *Ib.*, 90, 7 (Th. 600; L. 606).

<sup>44</sup> Y. B. 2 Henry IV, 18, pl. 6, translated by Holmes in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 383.



"HULL, for the defendant: That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feausance. . . .

THIRNING, C. J.: If a man kills a man by misfortune he will forfeit his goods, and he must have his charter of pardon *de grace. Ad quod curia concordat.*

MARKHAM, J.: I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any of them does, such a thing, as with a candle or other thing, by which feausance the house of my neighbor is burned; but if a man from outside my house against my will, puts the fire . . . for that I shall not be held to answer to them, *etc.*, for this cannot be said to be through ill-doing (*male*) on my part, but against my will."

The learned judge's application of his principle to the facts of the case is no doubt a little rough, a little mechanical. In fact the Chief Justice thinks it better that the defendant be wholly undone than that the law be changed through their sympathy for him. Yet the idea that ill-doing (*male*) and liability are somehow connected is by no means repudiated.

For the modern period we need not look far for evidence that our new cases of liability without fault are not based on the absence of an ethical theory of law. The self-consciousness of our age is developing a whole apologetic literature on cases of liability without fault even before the period of statutory formulation has run its course. I do not propose to justify the statute which takes away the "one bite" that the common law accorded every dog, or to enter into the philosophy of the nine-foot excavation rule, or the business sense of constructive fraud, or a nice comparison of the social values involved in the taxing of the nearest rich man to relieve the misfortunes of a poor neighbor, I merely suggest that in each of these periods of strict law we are encountering the same difficulty that eternally confronts the lawmaker. In his zeal to state what usually constitutes culpable conduct and in his distrust of tribunals, especially in cases where the damage is more easily proved than the fault itself, he makes probability take the place of proof, though by reason of his generalization the innocent must suffer with the guilty. As Pollock and Maitland have expressed it, with reference to the exceptional cases in early English law — they are after all exceptional —

"the extreme difficulty of getting any proof of intention, or of its absence, in archaic procedure is perhaps the best explanation of rules of this kind."<sup>45</sup>

But when we come to more mature systems with better procedural machinery the same difficulty confronts us. "Exceptional cases," says Sir Frederick Pollock in speaking of modern common law, "do occur, and may be of real hardship. One can only say that they are thought too exceptional to count in determining the general rule of law. From this point of view we can accept, though we may not actively approve, the inclusion of the morally innocent with the morally guilty trespasser in legal classification."

Again

"The principle of certainty requires that a rule once settled shall be carried out to its consequences when no distinct cause is shown for making an exception or revising the rule itself."<sup>46</sup>

One might imagine that the statute law of the twentieth century could avoid all roughness in classification. But when we turn to our modern statutes with reference to peculiarly hazardous enterprises we find that they redound to the benefit of men not exposed to the extra hazard. Of these Justice Van Devanter has said, that the doctrine of

"equal protection of the laws [does not] condemn exertions of [the power of Congress to classify] merely because they occasion some inequalities. On the contrary it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis and therefore is purely arbitrary."<sup>47</sup>

In fact, legislation cannot escape more or less of rough classification and consequent inequalities.

### EQUITY AND INDIVIDUAL FAULT

Still it is not to be expected that after these inequalities begin to be felt in concrete cases they will remain forever. The process of reintroducing the fault basis, so ably demonstrated by Ames in

<sup>45</sup> 1 HISTORY, 32, 55, (2 ed.), *cf*; Miss Bateson's Introduction to *BOROUGH CUSTOMS*, II (Selden Society, xxi), xl: "Ancient law could not discuss the question of intent because it had not the machinery wherewith to accomplish inquiry."

<sup>46</sup> *TORTS* (1 ed.), 16; *FIRST BOOK OF JURISPRUDENCE*, 52.

<sup>47</sup> *Second Employers' Liability Cases*, 223 U. S. 1, 52 (1911).



the lecture already cited, takes place not once but many times in the history of a legal system. Generations of interpretation may be necessary to rub off the edges of the legal polygon till it approximates the dimensions of the ethical circle, but the circle cannot be squared. This process of the infusion of moral ideas into the law has taken place in each of the intervening eras between the periods of strict law. Even back of the Norman Conquest, we have found a distinct consciousness of the impropriety of the dissociation of fault from liability in the law. Between the Norman crystallization of law and the Year Books there is another period of growth by Equity. Though Pollock and Maitland have laid all the facts about this period before us, there is a tendency of law writers to persist in classifying the age of Bratton as an age of strict law. The very opposite is the truth. It is during this period that the royal law is being bent into such shape that remedies are made to fit wrongs. It is impossible to understand the spirit of Bratton or of Raleigh and Pateshull, the great judges immortalized in the Note-Book, unless we recognize the equity of their period. "The crime or punishment of a father inflicts no stain on the son," says Bratton.<sup>48</sup> It must be borne in mind that the evolution by which tort and crime are differentiated from the parent species of "wrongs" is just being completed.<sup>49</sup> Turning again to Bratton we read, "The crime of homicide [does] not receive the same punishment regardless of whether it be accidental or wilful for in the one case there is rigor, in the other, mercy."<sup>50</sup>

It is no longer possible to dismiss all such passages as copied from Roman law. The Romanism of Bratton was at least eclectic, and quite under the control of his English training. It is this age that invents the process of pardoning, as a matter of course, for accidental killing<sup>51</sup> and killing in self-defense.<sup>52</sup> In this age the master

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<sup>48</sup> DE LEGIBUS, f. 105.

<sup>49</sup> When the differentiation was complete the intent element was perhaps more vital in criminal law than in civil, but never absolutely dominant or entirely absent in either branch.

<sup>50</sup> DE LEGIBUS, f. 104 b; 141 b; cf. also 120 b, 136 b.

<sup>51</sup> SELECT PLEAS OF THE CROWN, I (Selden Society, i), Nos. 114 (1214), 188 (1225); BR. NOTE-BOOK, No. 1137 (1235-36); Statute of Gloucester, 6 Ed. I (1278), c. 9; FLETA, I, 23, 15.

<sup>52</sup> SELECT PLEAS OF THE CROWN, I (Selden Society, i), Nos. 70 (1203), 145 (1221); BR. NOTE-BOOK, Nos. 1084 (1225), 1216 (1236-37).

was permitted to show as to the wrongs of his servant *se in hoc non conscium esse*.<sup>53</sup> In fact, it is difficult to see how we can accuse the age that substituted trial by jury for the diabolical guess-work of the ordeal,<sup>54</sup> the age that abolished the vicarious liability of fellow townsmen,<sup>55</sup> the age in which the King's courts built up a whole system of law basing their very jurisdiction on breaches of the peace, and substituted personal for real actions in half our law,<sup>56</sup> of a failure to understand the connection between fault and liability. The technical arbitrariness that Ames found in the fourteenth century of whose law he was the master, and which he left us to assume must have been worse a century earlier, was really not nearly so bad in the thirteenth century, for whose law we must turn to Maitland.

When we pass into the long modern period of Equity, by which the law, up to the end of the last century, was gradually being moralized both within and outside of the Chancellor's court, we are on more familiar ground. The writers already cited have traced the steps by which the common law has progressed in its efforts to distinguish between the morally blameless and the morally guilty. For the former it has devised many defenses. To hold the latter it has taken cognizance of defamation, malicious prosecutions, actions for deceit, the protection of authors' rights, protection of one's contractual and social relations against interference from without, unfair competition, new varieties of nuisance and negligence. These writers have shown us how Equity has followed the law with its bills for restitution in the realm of tort as well as its bill for specific performance in the realm of contract; and, of course, in chancery it is not enough to show that your case falls within a class—the Chancellor to exercise his discretion intelligently must examine the defendant's conscience. It will be observed that the individualization has two aspects: it protects the innocent by breaking down the recognized types of culpable conduct, and it catches the guilty by making inroads upon the corresponding

<sup>53</sup> 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, 497-502; SELECT PLEAS IN MANORIAL . . . COURTS, I (Selden Society, ii), 149, 153, 154 (1275); BR. NOTE-BOOK, Nos. 779, 781 (1233); DE LEGIBUS, f. 171, 172 b, 204 b, 158 b.

<sup>54</sup> MAITLAND, PLEAS OF THE CROWN OF THE COUNTY OF GLOUCESTER, Introduction xxxvi, *sqq.*

<sup>55</sup> Statute of Westminster I, 3 Ed. I (1275), St. I. c. 23.

<sup>56</sup> JENKS, SHORT HISTORY OF ENGLISH LAW, 55-60.



recognized types of nonculpable (immune) conduct. It is this second phase of the process of individualization of liability cases that has brought about the question, "how far an act may be a tort because of the wrongful motive of the actor."<sup>57</sup> The revolt against the *typische Behandlung des Willens*, it is submitted, has furnished the true impetus to the development of the law of malice as well as the law of negligence, but by the irony of fate, malice and negligence themselves tend to become externalized and standardized, until the jurist must explain that malice and negligence in law are not the same malice and negligence in fact.

### THE RELATION BETWEEN ABSOLUTE LIABILITY AND TORT

The opening of the twentieth century found us with a well-developed theory of tort law, in which fault was an important, if not the all-important, element. At the same time cases of absolute liability were accumulating. What was to be done with them? Judge Smith, fearing that legislative activity in this direction might contaminate our newly rationalized concept of a "tort," would, I believe, rigidly exclude from the denotation of the term all cases not based on fault.<sup>58</sup> Dean Wigmore, inclining in the opposite direction, would abandon the word "tort" altogether.<sup>59</sup> "Names enough," he tells us, "could be found." But with new names, or with old ones, I find it impossible to fence off a field of law in which liability is based exclusively on fault. In the first place, even in those cases in which fault is admittedly the basis of liability, it is not the individual fault of the particular culprit, but rather a type of culpable conduct that must be considered. Take for example the case of negligence. Judge Smith has observed a difficulty here, and I submit with deference that he has not met it. "The Courts," says he,

"have established an arbitrary standard of care, an external standard, *viz.*, the care which would be exercised under the circumstances by an average reasonable man, a man of average prudence,"

declining to take the individual's "personal equation into ac-

<sup>57</sup> Cf. Ames' essay in 18 HARV. L. REV. 411, reprinted in LECTURES ON LEGAL HISTORY, 399.

<sup>58</sup> 30 HARV. L. REV. 241, 319, 409.

<sup>59</sup> 1 WIGMORE, SELECT CASES ON TORTS, 1911, Preface, viii, quoted by Smith.

count."<sup>60</sup> It may seem a bit irreverent to call the "average reasonable man" or the "ordinary prudent man" a humbug, but he is at least a fiction "designed to present to the jury's mind in concrete form the conception of an external as distinguished from a personal standard."<sup>61</sup> "The rule," says Justice Holmes, "that the law does in general determine liability by blameworthiness is subject to the limitation that minute differences of character are not allowed for."<sup>62</sup> Now it would be impractical to put my case in one class — that of torts — if my personal equation happened to be like that of the average man, and in another, if my personal equation happened to be so different that the law held me liable though morally blameless. In other words, even within the realm of fault cases, the law cannot stop to take into consideration all of the peculiarities of the individual case to determine whether there is actual fault. It must classify, and classify more or less roughly.

On the other hand, most of the cases of recognized absolute liability have not been arrived at independently of any idea of conduct. It is not that in the one case liability arises though there is no corresponding primary duty breached, while in the other case there is a duty imposed in the first place. No, even in the case of the so-called absolute liability, the rule of law can be so phrased as to show a rule of conduct in which the duty imposed by law and the correlated right are clearly brought out. There is no need of going back to Austin's analysis and connecting absolute liability with "remote inadvertence;" I shall borrow at this point a part of the more modern apparatus of Professor Wesley Hohfeld,<sup>63</sup> and take the case of the statutory dog-bite (whether Anglo-Saxon or modern) as an example. Here a right is given to (or recognized in) each of us, a common (or general) right, not to be bitten by dogs. It is a "multital" right primarily against all dog-owners. What is the correlated duty? It is the duty of every dog-owner to prevent his dog from molesting us, at all hazards, that is, it is a

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<sup>60</sup> Smith in 30 HARV. L. REV. 261, 262. To meet this difficulty in his attempt to separate "tort" from "absolute liability" he simply says: "We think it best that *all* cases of liability for negligence, in the legal sense, should be classed under tort, with the accompanying explanation that, in a few exceptional cases placed under this head, liability is imposed in the absence of personal fault."

<sup>61</sup> Thayer in 27 HARV. L. REV. 317.

<sup>62</sup> THE COMMON LAW, 108, cited by Smith.

<sup>63</sup> See 26 YALE L. J. 710.



positive duty imposed by law regardless of the fact that its performance may in a particular case be extremely difficult or even impossible. Just as we can assume duties by contract so that impossibility of performance will be no excuse, just so the law may (though for obvious reasons it generally does not) impose positive duties of a similar scope in the absence of contract. How, then, does the dog-owner's relation to the potential victim under the statute differ from such a relation at common law? Is it different in kind? Or is it the same kind of relation with an additional duty? For example, if my dog is set upon you by a third person, am I still liable under the statute? If in spite of the statute you sue me for damage inflicted by my dog alleging *scienter*, must you prove it, on the theory that the statutory right of action is an entirely different thing from the common-law right? Indeed, under the statutory action may *scienter* be proven to enhance damages, or is evidence of previous vicious acts irrelevant? What if the statute is repealed while the case is pending? Most of these questions are being answered on the supposition that the statutory relations between dog-owners and the community differ from those prescribed by the common law, not in kind, but in scope.<sup>64</sup> The statute (for reasons which we need not discuss) refuses to recognize as a limit to the duties imposed the point where impossibility or virtual impossibility of performance is reached. Again, whatever the reason, we have a case of rough classification as a result of which the innocent must suffer with the guilty.

Perhaps a digression may be in order here, to distinguish between a rough classification on one side, and a purely artificial, fictitious classification, or a grouping not in the name of classification at all, on the other. It may be said, for example, that where public policy shifts a loss from him on whom it falls originally, to another who is equally blameless, it may do so without imputing any fault to any one; and that even if we go through the phraseology of imputing such fault we are resorting to an empty fiction. Fictions, we are warned, obscure classification.<sup>65</sup> A conclusive presumption is said

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<sup>64</sup> Cf. WILLIAM NEWBY ROBSON, *THE PRINCIPLES OF LEGAL LIABILITY FOR TRESPASSES AND INJURIES BY ANIMALS*, 117 *sqq.* For American cases see *CORPUS JURIS*, s. v. *Animals*, §§ 334, 349, 356.

<sup>65</sup> See Smith in 27 *YALE L. J.* 147, 155-56, amplifying 30 *HARV. L. REV.* 329, note 39.

to be "a rule of substantive law masquerading as a rule of evidence."<sup>66</sup> There may, indeed, be cases of liability without fault that do not grow out of resemblance to cases of culpability. Some of these are more closely allied to contract than to tort, as where the law says you cannot enter into certain relations without the assumption of certain absolute obligations or risks.<sup>67</sup> A few, like the primary obligation to support children or parents, are neither tort nor contract, and still others may be in the nature of a tax. How far our constitutions, to say nothing of public policy, will permit us to go in depriving Peter to pay Paul is still an open question.<sup>68</sup> But it is submitted that most of the examples which have ever been treated with tort law are related to classes of fault cases and grow out of an effort to induce people to be extraordinarily careful. One should watch his arms, his fires, his dogs, his digging, and be most careful to examine the title to property before he undertakes to meddle with it.<sup>69</sup> Liability without fault in such matters results from a failure of the law to provide for such exceptional cases as accident, unavoidable mistake, and self-defense. How, then, can we separate all absolute liability cases from those tort cases which are based on culpability?

### THE PATH OF PROGRESS

Alternately approaching and receding from the culpability theory, we have traveled in a cycle, but our second path has been described

<sup>66</sup> Williston in 24 HARV. L. REV. 425, quoted by Smith.

<sup>67</sup> Cf. note 19, *supra*.

<sup>68</sup> In *City v. Sturges*, 222 U. S. 313, 322 (1911), Lurton, J., makes the question of the "legislative power to impose liability regardless of fault" in the face of "a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against" turn on the police power. There is, of course, a much broader historical basis, which will have to be understood by our courts if they are going to decide the constitutional questions that are bound to arise out of our statutes of absolute liability, intelligently.

<sup>69</sup> As to the last of these duties, it has, indeed, been suggested that owing to peculiar historical conditions "the distinction between proceedings taken on a disputed claim of right, and those taken for the redress of injuries where the right was assumed not to be in dispute, became quite obliterated" and that in this way there has been dragged into tort law a class of property cases which originally had nothing to do with the question of blameworthiness [POLLOCK, TORTS (1 ed.), 14]. Be that as it may, the notion that there is no petitory or real action to recover chattels is as old as Bratton (f. 102 b) and the habit of approaching restitution cases from the tort angle antedates the beginning of legal memory.



by a much larger radius than our first. Our progress has been marked in two ways — by the higher moral notions to which we seek to adapt our law, and by a greater ability to adapt the law to any given moral notion. The improvement of our moral notions is reflected in our attempts to soothe our consciences whenever we find our law lapsing from its moral basis. A new problem faces us and we instinctively feel that a rough solution now is better than a deferred solution in which the ethics of the individual case will be more nicely measured. Yet we frankly criticize these temporary expedients even while we use them. Those of us who seek to justify them at all, refer to “public policy” or “social justice,” or try to demonstrate that in the long run, or in the average case, the burden we impose on a man or on an “enterprise” for the benefit of society will be shifted to society.<sup>70</sup> But nobody preaches that a low morality is essential or desirable in law.

Finally, when we compare our facilities for importing moral considerations into the law with the crude provisions of the Middle Ages, we realize why our attempts at the classification of conduct must be more successful than those of the past — though our problems are more difficult and our ethical demands more complex. Yet in the course of progress we cannot wholly avoid rough classifications of conduct; and the extent to which our law suffers from them shows both upward and downward movements from time to time, being greatest in periods of strict law and least offensive to ethics in periods of Equity. We are now approaching a point where a re-defining of external standards seems necessary. If the moral notion that links fault with liability must to some extent be violated, our position must not be interpreted as the abandonment of an ideal; it is but a new recognition of a human limitation from which human law cannot be free. The problems are new, but the limitations are the same, whether we declare them in the mediæval language of Chief Justice Brian — “The thought of man shall not be tried, for the Devil himself knoweth not the thought of man”<sup>71</sup> — or in the language of modern jurisprudence, that the law sets

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<sup>70</sup> Cf. Roscoe Pound in 27 HARV. L. REV. 233: “There is a strong and growing tendency where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss and hence to shift the loss by creating liability where there has been no fault.”

<sup>71</sup> Y. B. 7 Ed. IV, 2, pl. 2.

up a standard of conduct that is constantly approaching the goal of ethics, a goal for which it must ever strive, but which it can never reach.

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BIBLIOGRAPHICAL NOTE

- OLIVER WENDELL HOLMES, Jr., *THE COMMON LAW*, 1881, cc. iii, iv.
- HEINRICH BRUNNER, *UEBER ABSICHTSLOSE MISSETHAT IM ALTDEUTSCHEN STRAF-RECHT*, 1890, *SITZUNGSBERICHTE DER KÖNIGLICHEN PREUSSISCHEN AKADEMIE DER WISSENSCHAFTEN*, vol. xxxv; reprinted in *FORSCHUNGEN ZUR GESCHICHTE DES DEUTSCHEN UND FRANZÖSISCHEN RECHTS*, 1894, and condensed in the following:
- John Henry Wigmore, "Responsibility for Tortious Acts, its History," 7 *HARV. L. REV.* 315, 383, 441; reprinted in part in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 474.
- Clarke Butler Whittier, "Mistake in the Law of Torts," 15 *HARV. L. REV.* 335.
- James Barr Ames, "Law and Morals," Address at the Seventy-Fifth Anniversary of the Cincinnati Law School, 1908, *UNIVERSITY OF CINCINNATI RECORD*, Ser. I, vol. iv, no. 9; reprinted in part, 22 *HARV. L. REV.* 97 and in *LECTURES IN LEGAL HISTORY*, 435.
- James Parker Hall, "The New York Workmen's Compensation Act Decision," 19 *JOURN. POL. ECON.* 698.
- Francis H. Bohlen, "The Rule in *Rylands v. Fletcher*," 59 *U. OF PA. L. REV.* 298, 423.
- FELIX LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN*, II, pt. 2, *GLOSSAR*, 1912, s. v. *Absicht, Haftung, Gefährdeid.*
- DOUGLAS AIKENHEAD STROUD, *MENS REA, OR IMPUTABILITY UNDER THE LAWS OF ENGLAND*, 1914.
- Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 *HARV. L. REV.* 235, 344, 368; "Tort and Absolute Liability — Suggested Changes in Classification," 30 *ib.*, 241, 319, 409.
- Ezra Ripley Thayer, "Liability without Fault," 29 *HARV. L. REV.* 801.
- George F. Deiser, "The Development of Principle in Trespass," 27 *YALE L. J.* 220.



## THE WORLD WAR AND ITS EFFECT ON FUTURE PRIVATE INTERNATIONAL LAW

ONE need only glance into history to see the profound influence which has been exercised over private international law by each one of those great conflicts which from time to time during the Christian era have set European nations against each other. Such conflicts agitate nations to the bottom and, when peace comes, previous relations have been transformed.

The irresistible flood of the barbarian invasions spread out over the Roman Empire, submerging all rules which had grown up out from the experience of centuries and from the teaching of Greece and the great oriental kingdoms. Whether the law which disappeared was that concerning the relations of the diverse populations over which the emperors exercised their authority, or whether it concerned the relation of the population of the empire to such distant and almost unknown lands as had kept their independence, is immaterial. For when the invaders conquered and established themselves, they brought with them the rule of the personality of laws under which each individual is ruled by the laws of the race to which he belongs. Then when Franks, Goths, and Burgundians fixed themselves definitely on conquered territories there was born the new social system called Feudalism. Its legitimate issue was the other rule, absolutely different, of the territoriality of laws. This was a system in which the laws of each country governed absolutely every person who lived there, a system under which by virtue of the *droit d'aubaine*, whatever effects a stranger left behind him when he died became the property of the territorial sovereign. It was also a system in which perpetual allegiance bound every individual as if by chains to the sovereign of the territory, whether as serf or as vassal.

Then came the Crusades. During three centuries thousands upon thousands of men left their homes, traversed Europe, and crossed the seas seeking the liberation of the Holy Sepulchre. Thus whole peoples who would otherwise have remained entirely foreign

to each other learned mutual relations. Among them and even with the unbeliever commercial relations were established, the importance of which is evidenced by the contracts of this time which have survived to our day.<sup>1</sup>

Then the régime of the territoriality of laws, with all its barriers between places, no matter how close to each other, soon became intolerable. Thanks to Bartolus and to other Italian jurists of his time, the theory of *statuts*, clearing the path along which private international law would travel in centuries to come, broke down the rigid theory of feudal times, made relations between peoples easier, and in that way bettered the lot of every stranger in a foreign land.

At the very moment when the theory of *statuts* began to take shape came the terrible war between France and England called the War of One Hundred Years. This was a war longer than the title given it by history (1337-1453). Thanks to Joan of Arc and her companions, French territory was finally set free, but after a long battle. This battle first tempered and then cemented the hearts of Frenchmen so that their national unity took conscious form with a precision acquired much sooner than in the case of other peoples. This consciousness was a fertile germ from which grew up new private international law. But the hundred years war had yet another important effect. From the moment when his victory appeared to be reasonably secure the King of France set himself the task of bringing back order and prosperity in his much troubled kingdom. One of his moves toward this end was to direct that all French customs should be reduced to written form. Theretofore even the vigorous customs of the various localities remained unwritten. Hence at all times and above all when invoked in controversy, it was most difficult to deal with their extent and character. Charles VII rightly believed that he had done a great service to his people. It took nearly a century and it brought with it a most interesting consequence. Upon the written custom many jurists published commentaries. In discussion the jurists had to consider to what extent each custom could extend beyond its own territory through the application of some other custom. Several writers, of whom the most illustrious were Charles Dumoulin

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<sup>1</sup> I may cite the examples in my study of Contracts of Insurance in the Middle Ages.



(Molinœus) and Guy Coquille, expressed new ideas which still inspire modern internationalists and elaborated the theory known as the French theory of *statuts*.

One contemporary of these men was a Breton, Bernard d'Argentré. He was the partisan of the ancient theory that laws were territorial. Without honor in his own country, his ideas were destined to triumph in many foreign lands. This was doubtless due to the Thirty Years' War, which between 1618 and 1648 swept across Europe with fire and sword. Many of its consequences are interesting in the literature of international law; foremost among them all must be the famous work of Grotius. For *De Jure Belli Ac Pacis* is a work of importance not merely in public law. More than one question of private international law is dealt with in it.<sup>2</sup>

But in my judgment still another consequence must be traced to this war. The famous treaties of Westphalia, which brought it to an end, also granted to Holland an independence of which she had been deprived for many centuries. Proud of their recovered liberty the Dutch people set out to defend it against every form of foreign influence. Animated by this noble thought, the commentators on the customs of the Low Countries imitated the example of D'Argentré. He had endeavored to make the customs of Brittany safe from every exterior influence. They adopted his theory and proclaimed the principle of the absolute authority of their law and custom over every inch of the territory for which it had been made. However, the most illustrious of these men, Ulric Huber, and Paul and John Voet, were not content with any literal adoption of the ideas of the Breton. They added a new element, formulating the theory of international comity or courtesy, which has since had such a great success. Not only in Holland, but also in England and in the United States of America, we find three nations in which this theory is still the foundation of private international law.

From 1789 to 1815 war in the theatre of Europe was practically continuous. Indeed, it was not limited to Europe. And those wars exercised a profound influence on the evolution of this branch

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<sup>2</sup> For example, the condition of foreigners; the basis of allegiance; whether a man can change his country or be without one; the treatment in time of war of enemy or neutral merchants.

of law. The breaking out of the French Revolution gave the theory of nationality an importance in France such as it had never had before. It is true that under the *Ancien Régime*, as I have already indicated, they had begun to distinguish the subjects of the King, called *regnicoles*, from those who were not subjects, but from now on this distinction became substantial in France. For one thing, every citizen was called upon to participate in political life. He was an elector. He was eligible to office. Thus it was extremely important to know with accuracy what men were citizens. Moreover, these men were obliged to military service, and the long conflict practically without truces made this burden a heavy one. From day to day it became more vital to determine who was obliged to military service, and who could claim to be a foreigner and escape it. The theory of the social contract, popular with all the popularity of its author, resulted in the idea that since government depended on the consent of the governed, nationality was a bond which could be dissolved, while the old theory of perpetual allegiance led to a contrary result. Moreover, it would follow from the theory of the social contract that everyone had a right to change his country. And finally the thing most worthy of remark is that the new régime abolished all the various customs of the kingdom and replaced them by one law, extending over the whole country. This immediately produced a profound change in the point of view of French tribunals and jurists toward conflicts of law.

Before this time they concerned themselves principally with conflicts between different customs, *i. e.*, within the nation. The persons were all French, and the difference was that they were not domiciled under the same custom. Therefore it was necessary in each case to consider the place of domicile. The situation was the same as that today in the United States of America, where the conflicts between the laws of different states are very largely resolved by determining the domicile of some party in interest.

But in the new France all this stopped. From north to south and from east to west there was but one law. It replaced the innumerable feudal customs and statutes of the cities of the *Midi*. It replaced the Roman law wherever that had remained in force. There was no longer any opportunity for internal conflicts of laws. Each conflict must be between French and foreign law, international in its character, and for the solution of which the important thing



was not the domicile of the individual, but his nationality — was he French or foreign?

Thus the *Code Napoléon* proclaimed in its third article as a fundamental principle that "the status and the capacity of persons are determined by their national law." The armies of our emperor carried with them this new theory to all countries, following their flags. Most of the nations of Europe adopted it. Mancini made himself its apostle, at the same time somewhat exaggerating its scope.

The reader will pardon me, I trust, the length of this historical exposition. I have desired to point out that in all times a violent conflict between nations, although followed by peace, does not leave their peaceful relations with any such appearance or substance as before. And certainly the same result must follow from the present war, since it is the most severe and gigantic which the world has witnessed. We may, then, wisely look into the future and seek to discover in what ways private international law of tomorrow will be different from that of yesterday.

We know that the present conflict will leave a feeling of hostility and distrust between two groups of peoples, and we deduce the consequence that the allied nations will be led to exchange new favors among their citizens. To me it seems most certain of all that each nation will also inflict a rigorous treatment upon the subjects of those powers which have been its adversaries. This will give a new importance to nationality. Precision will be more valuable to each individual than ever before. Both the introduction of obligatory military service in the countries where it did not exist before and the necessity that every nation should have the largest possible army will tend to attract the attention of law-makers to the necessity of not granting naturalization without forethought. Still more, they will distinguish as carefully as possible between their citizens and foreigners, and all nations will tolerate still less the existence of any individual without a country.

On the other hand, the problems raised by questions of nationality ordinarily difficult to handle will be multiplied and receive infinite complication by reason of this great war. For it seems to realize the imprecation against Rome which Corneille in his Horace puts in the mouth of Camille.

"May Orient and Occident join forces against her.

"May a hundred peoples coming together from the ends of the universe pass over its mountains and its seas for her destruction."

Indeed, on the one side the army of the central Empires which invaded Venetia included Germans, Austrians, Turks, Bulgarians, and perhaps Greeks. On the other side the Entente has brought together on the French front, to assist our soldiers, Belgians, English, Portuguese, and Americans, and at the same time native troops have come from Algeria, Congo, India, and elsewhere. As I walk about the streets of the peaceful university city in which I write these lines, I meet wounded men who are Russians, Italians, and Serbians fraternizing with the *poilu*. Turkish, German, Bulgarian, and Austrian prisoners are working in our countryside and on our wharves, and with them free laborers of every race, negroes, Chinese, Annamites, Kabyles, and Spaniards. When peace returns these men will not all go home, and among those who do some will take home foreign wives. Friendly and commercial relations will have been created between them and the inhabitants of the regions in which they have lived. They will introduce into their countries customs and ideals till then unknown.

What will result from this unheard-of mixture of so many different individuals? It is beyond conjecture. It makes one feel like the artist who, in search of inspiration, might shake up a kaleidoscope. Before he applies his eye he cannot tell what he will see.<sup>3</sup>

Some problems, however, will necessarily be put before us. On these we may now exercise what foresight we have. The task before me is to indicate the content of those problems and the solutions of which they are susceptible.

## I. OF NATIONALITY

In England and in the United States the authors of treatises upon private international law put aside the theory of nationality, or at the best pay to it but little attention. We in France do differently, and the reason for the difference is that in England and America they think of this theory as belonging to public law. But I believe our view is preferable.

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<sup>3</sup> Mr. R. W. Lee has written very justly: "We are at the beginning of a new age. No one can forecast with any certainty what developments even some of us who are in the middle life may live to see." "Looking Forward," 30 HARV. L. REV. 792, 800.



Certainly nationality is the bond by which an individual is bound to his state. It is equally certain that differences often arise between two nations upon the nationality of an individual claimed by both. There are many such cases in which the United States has taken part.

But that is rare; the ordinary thing is that a question of individual nationality concerns above all the individual, or at most other individuals who have had legal relations with him. All this is part of the sphere of private law. No one can successfully deny that the individual is much more interested than the nation when the question is whether he may be extradited or expelled; whether he must obey particular police measures; whether he can vote or hold office; or whether he has an obligation to military service. There is even less public aspect when nationality is to be determined in order to determine capacity to do a legal act, or succession upon death, or the extent to which the law of a country accords rights to visitors. So it is, if during a suit or upon the execution of a legal act one of the parties relies upon an international convention and is met by the reply that he is not a citizen of the state with which that convention has been made. Finally, when a woman is about to marry, it is a matter of the highest importance for her to know exactly the nationality of her husband, since practically all law imposes it on her. What could be more horrible than the situation of a French woman who at this moment, believing that she had married an American, should discover that she is the wife of a German?<sup>4</sup>

Can one seriously maintain that in this latter case the problem has any aspect except that of purely private international law?

The theory of nationality presents, it is true, less importance in England and in the United States than it does in France. The law of the two former countries is still faithful to the application of the law of domicile. But it is none the less certain that it is impossible to study the numerous problems which private international law must solve without constantly striking some question of nationality, and it would appear to me that in the future this will be even more true than in the past.

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<sup>4</sup> I had already written this when the Civil Tribunal of the Seine, by its judgment of February, 1917, annulled the marriage contracted since the outbreak of war by a French woman with a German who had pretended to be a Frenchman.

At the present moment the prohibition against trading with subjects of enemy states, which has been imposed upon the subjects of practically every belligerent, obliges us to inquire exactly who are the persons to whom this prohibition applies and against whom it has been formulated.

But when peace comes there are many reasons to believe that economic war will follow it. The Entente powers clearly do not intend to continue their former generous grant of rights to the subjects of their adversaries. And if their plans are carried out, it is clear that in private law it will be even more important after the war to know clearly the nationality of each individual. The proposed economic policy also shows that beyond the nationality of human individuals, that of commercial houses and of corporations or associations will require the attention of jurists and of lawmakers.

#### *A. Nationality of Individuals*

For a long time international lawyers have agreed and proclaimed that every man must belong to some nation. Current events show that this is a well-founded juridical requirement. It is scandalous to see in the belligerent countries the man without a country, who leads a tranquil life, notwithstanding the war, or even grows richer by it while the citizens of the nation where he is, as it were, a guest, are undergoing every sort of suffering. They may die to secure a tranquil and lucrative life for such parasites. On the other side, these men without a country are a serious danger for the nations in which they live. From them spies, incendiaries, and all the others needed for dirty work are naturally recruited. It is against them that the Entente countries have needed defense, not only since the war, but even before it.

There are, therefore, extremely serious reasons for the contention that all legislation should be modified so as to suppress every provision by which a person may merely lose his previous nationality. Every individual who cannot claim a country of his own must accept the nationality of the country in which he resides. This measure will have no serious inconvenience, if it is combined with a proposal which I shall make later. I shall propose that in the future naturalization shall not immediately confer the rights of citizenship.



Worse than the man without a country is the man who has two countries at once. Holy Writ teaches us that one may not serve two masters. Surely it is impossible that a man should have for two nations at once sentiments which attach him without reserve. Yet both these feelings ought to animate every patriot. On this point, also, international lawyers agree and say that no man should have more than one country. Recently, it is true, the German law of July 22, 1913, called the Delbrück law, has denied this principle, providing that upon certain conditions a German, notwithstanding naturalization in a foreign country, may keep his nationality.

This opens up a subject supposed to be closed forever centuries ago when Cicero said: "*Duarum civitatum civis esse nostro jure civili nemo potest.*"<sup>5</sup>

But now that this danger is apparent, all nations will in future guard themselves against it, and will surely deny naturalization to every man who is authorized by his native country to abjure it without sincerity.

This is not the only reform which will be needed in the laws of naturalization. Most nations, either through liberality, or through the desire to increase the number of their citizens, have been too easy in granting nationality. In the United States five years of residence are enough. Our French law permits it in certain cases to individuals who have lived in France only three years, and in a few to some who have lived there only one year. As I have said elsewhere<sup>6</sup> this is regrettable, and flagrantly inconsistent with the principles which legislation like the French applies in the ordinary kind of adoption. All our lawmakers in effect agree and declare that adoption should not be recognized except where the natural relation between the father and the adopted child which would cause the serious sentiment of reciprocal affection has existed many years. No principle could be more natural, for it is the gravest of decisions to accept an individual in a family to which he is not tied by any bond of blood. But is there any less gravity in permitting a country to adopt an individual? And does it not follow that consent to such an adoption should be given only after that individual has clearly and decisively become assimilated? And as the true foundation of nationality is the community of

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<sup>5</sup> PRO BALBO, XI, 28, note 1.

<sup>6</sup> BULLETIN DE LA SOCIÉTÉ DE LEGISLATION COMPARÉE (1917), 146.

sentiments, ideas, memory, and interests of the men who live and die under one flag and defend it when there is need, should we not necessarily limit naturalization to those foreigners who after a long sojourn in our country may be presumed to have adopted its customs, its thoughts, its point of view, and its economic conceptions?

If this be sound, the legislation following on the war should require three conditions for naturalization. First, the stranger should formally renounce all bonds with his native land. Second, he should justify himself by a prolonged residence for some such period as ten years. Third, his application should be published in the newspapers in such a manner as to permit every citizen who saw any danger to oppose it, with a proper interval to permit such opposition.

During the war we have learned that many Germans have become naturalized in neutral countries to make spying more easy. My plan would make that more difficult.<sup>7</sup>

This is not all. It is plainly too generous to give an individual, who was yesterday a foreigner, upon the morrow of his naturalization every right of a citizen such as natives have enjoyed from their birth. Thus I should recommend that in the matter of political rights a naturalized citizen should only become entitled progressively to the privileges of a native. One step in this direction has been taken by our French law of nationality on June 26, 1889. A naturalized citizen cannot become a member of Parliament until ten years after his naturalization. Soon after the elections of September, 1889, this was applied in the case of the Irish general MacAdaras, who, having been naturalized September 12, 1888 had, through financial liberality, secured his election as deputy from the Department of the Basses-Alpes.

The real danger in confiding political functions to a foreigner may be shown by two examples:<sup>8</sup>

Louis XVI gave Necker the most extended power. Necker was

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<sup>7</sup> 42 JOURNAL DU DROIT INTERNATIONAL, 39, 52, 274, 622 (1915); 43 *Ibid.*, 378, 560 (1916); 23 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC, 370 (1916).

<sup>8</sup> The deplorable events of the last twenty years in Russia appear to me to be largely caused by the presence of officers, functionaries of every rank, and even ministers of state who were of German origin. See CHARLES RIVER, *THE LAST ROMANOF*, 106 (Paris, 1917).



also one of the first idols of our Revolution. But June 17, 1798, this man, once a French minister of state, wrote:

"I was born a citizen of Geneva; I remained a citizen by my place and rank in the councils of that republic. I remained a citizen of Geneva when I represented her at a foreign court, and I showed my intention to come to finish my days in my own country when I bought in the year 1784 my dwelling at the gates of Geneva."<sup>9</sup>

Although Necker remained faithful to his native city he was an honest man. One cannot say as much for the Hungarian adventurer who was naturalized in England under the justly venerated name of Lincoln. Trebitch succeeded in being elected to the House of Commons, but later he was convicted both as a spy and of common crime, and received in the Tower of London the punishment which every country reserves for traitors.

We reach, it seems to me, the conclusion that the naturalized citizen should only progressively be admitted into the organization of his new country. It would be both prudent and rational that the electoral power should be granted only after a certain time. An even longer time should elapse before he is eligible to local assemblies, and longer still before he is eligible to Parliament. In the same way he should be forbidden to exercise any important function in the army, in the courts, or in public administration until the period since his naturalization is long enough to indicate that he has really broken with his country of origin.<sup>10</sup>

One other measure is needed to supplement those which I have indicated. Until the present war broke out, in every country naturalization, once granted, was final. The greatest qualification of this was in the United States, where, since the statute of June 29, 1906, a naturalized citizen loses his rights if he is resident in a foreign country during the five years following his naturalization. Later the statute of March 2, 1907, applied the same rule to one who has lived for two years in his native country or for five years in any other foreign country.<sup>11</sup> Nothing like this existed so far as

<sup>9</sup> Necker's letter cited by P. KOHLER, *MADAME DE STAËL AND SWITZERLAND* (Payot, Lausanne, 1916).

<sup>10</sup> The lawyer who was imposed by the German authorities upon the unfortunate Miss Cavell, and who defended her in so strange a fashion, was a German naturalized in Belgium, named Kirschen. 41 *REVUE GÉNÉRALE DU DROIT*, 283 *et seq.* (1917).

<sup>11</sup> E. M. BOURCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD*, 520, 528, 533.

I know in any European legislation, until the law which permitted a German to take on a second nationality. This gave warning of a new peril. Such naturalization, if sought with no intent to be faithful, might well become a mere tool for a traitor. And this caused Articles 7 and 23 of the British statute of August 7, 1914, which made it possible to revoke certificates of naturalization obtained by fraud and to punish the guilty. Then our French laws of April 7, 1915, and June 18, 1917, granted to our tribunals, in case of war, the power to cancel the naturalization of an enemy when he had kept the nationality of his former country. These laws are a very interesting legislative innovation. Their example should be followed. Every country which is jealous of its independence and of the value of its nationality as an honorable thing, should by law provide that not only in time of war, but also in peace, naturalization might be withdrawn from any person whose acts should be declared by the tribunal to be contrary to the sentiments which he affirmed when he changed his country, *i. e.*, acts which prove that the change was not a reality.

Someone will object that in this way the number of men without a country will increase, and that this will be contrary to the wish which I have expressed above. But the answer is easy. The individual from whom a country takes away its citizenship will be treated in that country as a citizen of the state from which he came, and he will have brought it upon himself by his conduct if he becomes the real man without a country.

### *B. Nationality in Commercial Houses*

I have already expressed my views to the effect that every commercial house ought to be recognized as having nationality. The French law, more than a century old, called the law of the 27th Vendemiaire in the Year II, in its Article 12 speaks of French commercial houses, and in current language one often uses the expression.

In truth, as I have shown elsewhere,<sup>12</sup> a commercial house has a distinct individuality different from that of the merchant who presides over it. The proof is that this merchant may disappear

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<sup>12</sup> VALÉRY, MANUEL DE DROIT INTERNATIONAL PRIVÉ, 891 (Paris, Fontemoing, 1913); also "Maison de Commerce et Fonds de Commerce," ANNALES DE DROIT COMMERCIAL, 208, 239 (1902). Cf. Cahill, "Jurisdiction over Foreign Corporations and Individuals who Carry on Business within the Territory," 30 HARV. L. REV. 676.



and the house will remain. He may sell it or buy another and carry it on with the first. Such houses can, and generally do, keep the name of their founder rather than that of their actual proprietor.

We should also observe that very often the domicile of a commercial house and that of the merchant are distinct. The first may be, for example, in the city of London properly speaking, the second in any part of that immense metropolis or its suburbs.

These considerations, which I cannot develop here, sufficiently indicate that a commercial house, in the same way that it has a place at which its business is done and to which its letters go, must necessarily also have a nationality.

Since the outbreak of hostilities a much more lively interest has attached to this nationality, and as the war has gone on, all the nations engaged have forbidden every sort of commercial relation with the subjects of their adversaries, have sequestered their goods, and captured their ships and cargoes. But when peace returns, it will not be less interesting to determine the nationality of commercial houses. If economic war follows, each side will endeavor to injure the other as much as possible by imposing burdensome commercial restrictions, and thereupon it will be most important to know what commercial houses are subject to such restrictions.

The determination of the nationality of commercial houses is therefore, as it seems to me, one of the necessary things to be done after the war by the lawmakers of every country. How shall they deal with this problem? I have already indicated in the passage of my Manual which I have cited, that it should be done by giving the nationality of the country where the house is established without reference to that of the merchant.<sup>13</sup>

I see easily enough that this will bring upon me indignant protestations. Perhaps they will cease when the following considerations have been weighed. If one admits the theory which is the point of departure of my observations, if one admits that every commercial house has a personality of its own, one is obliged to recognize that the cause of that personality is the circumstance that the commercial house is something different from that of the person of the merchant. Just as a royal house is composed of members of the royal family and also their suite, so a commercial

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<sup>13</sup> *Supra*, note 12.

house includes both the merchant and his employees. By reason of the presence of the latter the merchant can die or retire and the house will keep on. They then are part of this life as much as he is, and if, in determining the nationality of the house, we care about the nationality of its members, the agents, as well as the principal, are material. Plainly enough there are insuperable difficulties in the way of making the merchant's nationality the test.

But suppose we should be content with that test, other practical difficulties would be inevitable. Everyone who did business with the house would have to know the nationality of the merchant. This is in no way a patent thing. The name may be misleading. The merchant may be Dupont and from the United States, or Mayer and the descendant of an Alsatian who chose to be a Frenchman. Hence the need of the black list by which the states at war advertise those houses which are with the enemy.

No such difficulty can arise if the nationality of each house of commerce depends upon its place of business, as, for instance, Paris or New York. And this is just and necessary. How can we admit that two commercial houses in the same city, in the same business, side by side, should differ because one belongs to an English merchant and the other to a German? Think of the complications which would follow, and following on them the lawsuits. Another thing seems to me of decisive importance. No commercial house can go on and do business without causing numerous debts to arise from its transactions. It must equally follow that among its creditors will be many domiciled in the country where it does business. Very likely that will be the case with all. Now can it be possible that the rights of these creditors should depend on the nationality of their debtor? That the creditors of the German and of the Englishman, whom I have imagined, should receive different treatment? Perhaps one would be declared bankrupt and the other not, under similar conditions, or if both were bankrupt the rights of their creditors might be different. Thus we see in a true light the just and practical reasons which make it necessary that every commercial house should follow the rule of immovable property and should necessarily obey but one law, the territorial one.<sup>14</sup>

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<sup>14</sup> The French law of July 15, 1880, has applied this principle. It requires a license fee from every person who comes into France to secure orders for houses of



Should it further follow that the nationality of the merchant should have no effect? That a German house in France should receive the same treatment as a French one? Certainly not! The analogy which I have just indicated between real property and business houses will show us what should be the influence of the merchant's nationality upon the legal standing of his house.

The house in which I live and which belongs to me adjoins a house belonging to a Spaniard. Nevertheless, both are subject to the same French law. It determines for both how they can be mortgaged and let and the rights of those who hire them. This is so because it must be so. The other thing would be anarchy in social relations, if anyone who had to deal with a landowner must investigate even the suspicion that he was a foreigner.

But let us suppose that the owner of one of these two houses should die without a will. To know how the house will descend we may need to consult either the national law of the deceased, or that of his last domicile. Should war break out between France and Spain, then the Spanish house might be seized and sold, while I should continue in the free enjoyment of mine.

It is easy to perceive that among the rules of law applicable to any piece of property some must necessarily be laid down by the country in which it exists, and must be identical with those applicable to other property in the country. But there are others which may be determined by the nationality or the domicile of the owner. These latter include those which relate to his family and to the inheritance from him. And they also include those which consider the extent of the right which local law grants to a foreigner.

Therefore, when we are dealing with a commercial house established in France we shall find it necessary to say that it is a French house, even if it is the property of a stranger, and the result will be that by applying the law of its *situs* it will have the same duties and rights as any other French commercial house. Thus it will pay the same taxes.<sup>15</sup> Its responsibility for its obligations must

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commerce in foreign countries, provided that in the foreign country French commercial travelers are subjected to a similar tax. Observe that it is the nationality of the business house, determined by its place of business, which this law makes applicable. How absurd it would have been to consider the nationality of the commercial traveler or of the merchant whom he represents!

<sup>15</sup> Certain Spanish merchants established in France claimed that the French-Spanish Convention of February 6, 1882, exempted them from the war-profits tax.

be that of articles 8 to 17 of the Commercial Code. If it stops payment it must be declared bankrupt under the conditions and with the consequences provided by the Code. On the other hand it will be entitled to undertake every kind of commercial operation, to sue and to be sued, and to have its trademarks and its patents respected exactly as if its owner were French.

But on the other hand the nationality of the owner of the house would have a bearing in every case where French law was intended to rule rather the foreigner in France than the property which he owned. Thus a French business house owned by a foreigner would not be able to own a French ship, since the law of June 11, 1845, provides that every ship under our flag must belong to French citizens at least up to half its value. And the purpose of this law was that no stranger should be able to control either directly or indirectly the portion of French territory afloat which is called a ship. Another application of the same idea arises when in the course of a suit the stipulations of an international convention are invoked in favor of a business house belonging to a foreigner. If we should refuse that, the tribunal would deny the very benefit which the treaty provided for. And our present state of war enables us to cite other cases in which certain measures reach a foreigner, striking through the shield of a business house. A notable case is prohibition against trade with the enemy. During peace the house of Schwartz Gebrüder at Barcelona carried on business with France on the same terms as any other Barcelona business house. But from the day of the outbreak of war the French government forbade the conclusion or execution of any business with enemy subjects. Hence this Barcelona business house became subject to a different rule, since otherwise the object of this measure would have failed. That object was to prevent the central powers from profiting through the medium of French citizens. Correspondence, which might be utilized by the German spy system, was also an object of this legislation, and it would not be prevented unless such a measure were effective. The sequestration of enemy property likewise must extend to business houses in France, but here

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This pretension was denied by the revenue authorities. Competition between French and Spanish would be impossible if in the same commerce on the same territory the latter were excused from paying a war-profits tax of from fifty to sixty per cent and the former bore such a burden.



we find a particularly interesting manifestation of the duality of the merchant and of his house, which I am endeavoring to illuminate by these comments. Notwithstanding the sequestration of the merchant's property, the house keeps on in business with the permission of competent authorities. If they think it is for the public interest or the national defence, or for the good of its French employees or creditors that it should remain active, there is no interruption. But of course the profits of these operations cannot be remitted in any way.

And finally I foresee much criticism which is likely to be directed against these ideas. I am the first to admit that they are somewhat confused and well open to discussion. Nevertheless I shall be satisfied if my formulation calls the attention of jurists to what I deem to be an important question. And I expect discussion and light from them, and I especially hope for some decision or result upon the question of whether the different nations will be driven to recognize that commercial houses have a nationality of their own and to decide upon its terms and limitations.

### C. *Nationality of Associations*<sup>16</sup>

The reader may think that I have given too much time to the nationality of commercial houses. My first excuse is that the subject has scarcely been heretofore considered. My second is that it helps largely in the solution of the next question, which has been the subject of many studies in all countries, namely, the nationality of commercial associations.<sup>17</sup>

At this moment the question is particularly before us, for in each belligerent country it is necessary to find out what associations may be traded with, what may have their property sequestered, which ones may sue, and which may have their property captured upon the sea.

<sup>16</sup> Note by translator. Professor Valéry uses the word *Société* to embrace both corporations and less definite personifications. It is here translated "associations."

<sup>17</sup> J. BAUMGARTEN, *INTERNATIONAL RELATIONS OF COMPANY LAW*; *INTERNATIONAL LAW ASSOCIATION*, 28th Report, 246 (1913); J. H. Hogg, 31 L. QUART. REV. 170; Lyon-Caen, 44<sup>e</sup> JOURNAL DU DROIT INTERNATIONAL, 5 (1917); Pic. *Ibid.*, 841; D'Amelio, *Ibid.*, 1224; Tchernoff, *REVUE POLITIQUE ET PARLEMENTAIRE*, July 10, 1916; Landry, November 10, 1916; Thaller, *Ibid.*, September 10 and October 10, 1917; 28 HARV. L. REV. 335; Albert Wahl, 37 JOURNAL DES SOCIÉTÉS, 153 (1916); Lyon-Caen, Landry, Rousseau, Barrault, *BULLETIN DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE*, (1916) 405, and (1917) 57 and 125.

But in times of peace the nationality of associations is none the less important. We must consider it when we determine how one can be created or can change its constitution, when we consider the extent of its capacity, and of its rights, its taxes, and the concessions which it may obtain.

Simply to enumerate these things shows that we must in every country establish a distinction between domestic and foreign associations. Some jurists of great standing refuse to recognize that these things may have nationality. They base this upon the idea that nationality necessarily implies affection, the sentiments of an individual toward his country, those which come from his birth, his education, and his family ties. They argue that nothing of this sort is true of an association.

But this is the reverse of convincing, for the conception of nationality upon which it is founded is distinctly contradicted by the reality. Take the case of Greeks and Armenians who are subjects to the Ottoman Empire. That controls their citizenship, but they have with that state no connection of race or sentiment. The truth is that citizenship in the legal sense is nothing but the bond between a person and a state. This bond may exist between a fictitious person and a state. The best proof of it is that from the earliest days of shipping, every ship has had its nationality. It is true that a ship is not a fictitious person, but nevertheless it has individual character, its own organization and life, and has profound resemblance to legal persons. It has a name. It is domiciled at its home port. Why then should we be surprised that it has nationality? I need not add that it must necessarily belong to some nation, for that point cannot be contested.

In the same way, and for like reasons, every association must have a nationality. The sponsors of the contrary opinion have to admit this, for one sees that they are willing to set up among associations distinctions which cannot be explained except by a difference between citizens and foreigners.

But I go further and say that to deny that a fictitious person can have a nationality would be to deny that Paris is French. And can you deny that the University of Oxford and that of Cambridge are English?

We must, therefore, follow the common opinion and recognize that commercial associations have a nationality, but the applica-



tion of this fundamental idea raises two questions with which I believe the law will be much concerned when peace returns. They are the following:

1. *Are all commercial associations capable of having a nationality?*
2. *How are we to determine the nationality of commercial associations?*

1. Surely a great progress would be realized and in the future many difficulties would be removed if on either or both of these questions the lawmakers could adopt uniform rules.

Can all commercial associations have nationality? I answer that nationality is an attribute of persons, and therefore the question obliges us to inquire what associations have a legal personality.

On this point the French theory, at least that of the French courts and of most French jurists, is simple. We think that all commercial concerns are legal persons. On the contrary there are other countries, of which England and the United States are examples, where a distinction is made.

Our associations *en nom collectif* or in *commandité* correspond to the partnership of English law which then draws a sharp line between them and what we call associations with capital or with shares which are called corporations in America or limited companies in England. These countries give legal personality only to this latter class.

This difference between the laws causes serious difficulties in international relations. We ought to get rid of it now that we are likely to have closer relations among those whom the war has made allies, and I submit that it should be removed through the adoption of the French system. If I express this opinion I feel sure that I do not do it as a chauvinist. Rather I have the profound conviction, held for a long time, that this system is required both by scientific and by practical considerations.

Take the first of these considerations. Any cursory observation requires us to admit that in mathematics the whole is the sum of all the parts. A added to B is the same thing as A and B. But in every other science the contrary is the case. If I draw a triangle or a square it is a different thing from the lines which form it. If we mix nitrogen and oxygen in certain proportions we have air.

Air in its turn is colorless, but the terrestrial atmosphere is blue. Water is colorless in itself, but the seas and oceans are green.

Turn from the physical world to the social, and we find the same thing. We speak of the passions of crowds, the crimes of mobs, the psychology of the crowd. We recognize that the assembly of individuals has itself passions, can itself commit crimes, has a psychology of its own. But there is a much greater reason if we substitute for a crowd, which is an amorphous thing of chance and without duration, an association of merchants. Here we are in the presence of a crowd of men which has been carefully organized by a contract. It has purpose, also duration. Thus it necessarily follows that this group of men has wishes and needs of its own, distinct from those of its members. It can act like a physical person. We should remember that the word itself, *persona*, had its first use in designating the mask with which actors covered their head and through the opening of which their voices issued with greater force. That was the reason why the Romans turned this word to use concerning every one who appeared upon the judicial stage, that is to say, every one who had rights and obligations, who appeared in the making of contracts, or as a party to a suit. The slave had no family, no nation, no domicile distinct from his master, no property of his own, but he was a person. And the converse follows, that from the moment when an association through its organization and resources can have property and residence, agents who can deal in its name, business affairs distinct from those of its members, it becomes one of those persons whose reciprocal relations are the object of the science of law. We must recognize that it is legally a person, and we must do that whether or no we establish the distinction in use in England, in the United States, and in Germany, between simple associations of persons and corporations with capital. That distinction should disappear.

Indeed, no matter which of these associations we consider, we shall find that it has the same quality of difference from and may have the same antagonism to its members. Also if we seek for the reason why in these particular countries these two sorts of associations are treated differently, we shall find that there is none but the historical. In the centuries which have passed, companies were created by royal charters. These authorized the for-



mation and granted the legal existence. Another historical reason is that in all European countries the Roman law has played a large part in the creation of the rules which govern associations. Now there were in the Roman law only certain great associations. These were similar to the great companies of early English law. There were companies which farmed the taxes, others to develop the public lands and mines, still others with great concessions from the state. It was these which Roman law recognized as moral persons.

If this is true it is clear that the distinction which I am criticizing rests upon no sound foundation. Practically everywhere associations may be freely formed to-day. It is no longer necessary to apply to a king. On the other hand, it is neither exact nor true to say that the Romans got on without giving personality to simple associations. There is an economic need, and it would be surprising indeed if, with their sense of what is practical, the Romans did not try to satisfy this need. Let me state the procedure by which, as I think, they accomplished the result.

In Rome the capitalists rarely did business together under their own names. They generally preferred to entrust to one of their slaves capital with which he was to undertake, for their gain, commercial or industrial operations.<sup>18</sup> But if there were to be important operations, either of long duration or with risks which it was desirable to avoid, there was a definite advantage that they should not be undertaken by single persons. Then two or more free citizens would create a company and buy one slave and supply him with capital to which each one of them contributed his portion. With this capital the slave would do the business directed by his masters. In this way gains and losses would be divided between them in proportion to their respective properties in the slave. But the most interesting thing is that he borrowed from them a legal personality which was lacking in himself, could make contracts in their name, sue and be sued, and figure in every legal transaction. Thus, in consequence, the Romans were able to realize an association invested with the same qualities as that which the French law deduces from legal personality.

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<sup>18</sup> One will find the references to the texts on which I have built up this theory in my article "*Maison de Commerce et fonds de Commerce*," XVI *ANNALES DE DROIT COMMERCIAL*, 209, 225 (1902).

This excursion which I have taken into history has other value. It shows that in all eras of advanced civilization there has been a need that commercial associations should have such personality. Thus it would seem to me that there should be no serious obstacle to my plan. The British Empire and the great American Republic might well consent to give the advantages of personality to all associations, and might well suppress their distinction between partnerships and companies or corporations. This would remove a source of difficulties between French and Anglo-Saxon laws, and would also simplify the problem of nationality of associations.

2. This problem I now take up. There is none which has greater present interest.

For a long time the importance of giving precise nationality to an association has been recognized. We must note this fact to know the law which governs the extent of its capacity and the conditions under which its members came together and under which it exists, before we can apply the differences which may have been established between domestic and foreign associations. What shall be our criterion to distinguish between these two categories? Some authors have proposed to take into consideration the nationality of the associates. Others wish to give the association the nationality of the country where it has been organized. According to a third system it should follow the nationality of the territory on which we find its commercial, industrial, or agricultural establishment for which it exists. But the most generally satisfactory theory, and to my mind the best in law, attributes to the association the nationality of the state in which it has its principal place of business or *siège social*.<sup>19</sup>

The *siège social* is the place which one might well call the head of the society. Thence go forth the orders to which its different organs are obedient. Thither should be addressed all communications which have to do with its general direction. No association can have more than one such head, although it may possess establishments in many countries. On the other side, if we should admit, as I think we must in these times of liberty, that every individual has the right to use the nationality which suits him best, the theory which makes the nationality of an association depend upon its

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<sup>19</sup> I have summarized in my *MANUAL OF PRIVATE INTERNATIONAL LAW*, § 896, the diverse theories which have been proposed on this point.



head place necessarily respects this principle and conforms to it. Each association, then, is free to establish its head place where it will, although it may be obliged to establish its center for doing its business wherever that business is to be done. Is it not legitimate and natural that a society founded by Frenchmen with French capital in whole or in a large part with French associates, which desires to develop a mine in Russia, or build a railroad in China, or own a sugar plantation in Brazil, should be French and recognized as such upon the sole condition that it should establish its head place in France? Why should it be, according to these examples, Russian, Chinese, or Brazilian?

Every other solution would be both contrary to reason and contrary also to the will of those interested, which should be respected. It is therefore not surprising that in recent years in all countries, courts and jurists have declared for this view. Shortly before the world war the sentence of arbitration given at The Hague in the controversy between Italy and Peru upon what was called the "*Affaire Canevaro*" made the nationality of an association depend upon its head place.<sup>20</sup> In the same way the International Conference upon the law of the air, which met at Paris in May, 1911, inserted in its project for a law, an article saying: "If the aëroplane belongs to an association the nationality shall be determined by the head place of that association."

This theory seemed at one time well established. But, like many others, it has lost ground during the gigantic battle of the last four years. That great conflict has shown us the danger to a nation at war which arises from the presence on its territory of associations which have taken its nationality but which obey orders of an enemy ruler, and which, obedient to those orders, may and do commit sabotage in munition factories, interfere with supplies, establish on their real property works needed for the operation of an army of invasion, and utilize this same property as a place from which to attack railroads, military works, and factories engaged upon national work. The great world conflict has equally thrown light on the obstacles which stand in the way of the application of measures taken against enemy acts. Associations under which enemies may hide are a most serious obstacle to such measures. Even be-

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<sup>20</sup> De Boeck, "*L'Arbitrage Canevaro*," *REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC*, 317, 354 (1913).

fore the war, indeed, the existence of these associations with a nationality different from that of their members had commenced to occupy public opinion. In many countries people were deeply moved when they saw some powerful German company sending out, it might be everywhere, affiliated companies which adopted the nationality of the territory to which they went. These enjoyed all the advantages given by the law of that country, and were really the tentacles of a sort of colossal devil-fish which, operating from Berlin or from Frankfort, reached out around the terrestrial globe. In France, a project for a law was presented in 1913, to the Chamber of Deputies, by M. Joseph Denais, intended to prohibit every association which was affiliated with a foreign concern, and which did not have a majority of French associates, from using in any way words which indicated that it was a French company.

When peace comes the interest in the subject of which I have been speaking will be even keener than now. As I have suggested and as most theories agree, the war will continue as an economic war. Each nation will be obliged to look out sharply for its own interests against the appetites of those who are on the other side today. That is one reason; but, moreover, the war itself has cast new light on the astuteness of Germany, and the means which she uses to get her grip upon industry, commerce, and navigation throughout the world.

She nearly succeeded. She would have succeeded if her own megalomania had not brought on this outbreak. It came because she believed herself invincible. We must take care that she should not make the same attempt again.

This puts before us the question whether we ought not to abandon the current theory and adopt in its place a different one, — one in which the nationality of a country should not be granted to an association until it should have something more than its head place in that nation. Should we not require that it should be composed in whole or in large part of citizens of that country?

I do not think so. We ought to mistrust these decisions which we are apt to make rapidly under the influence of our sentiments of the moment, or of some extraordinary event, before we sufficiently reflect on the resulting inconvenience. Suppose we should limit the nationality of associations in this way. Then consider what difficulties it would raise under circumstances such as these.



Suppose that Jacques, a merchant in Marseilles, associated himself with Pietro, an Italian. Then suppose, Jacques having first associated himself with his own compatriot, Jean, one of them retires and sells his interest to Pietro. Suppose Pietro, after the death of his partner, goes on in business with William, a new and English partner. We should first begin by observing that if the different partnerships thus supposed are refused any French character, it would follow that neither their constitution nor their workings would be subject to French laws. But then we should meet with two consequences absolutely outside of practical conditions. One of these would be the practical impossibility of knowing with any reasonable certainty the law that would apply to a simple association composed of persons of different nationalities. The other would be the difficulties which third persons would have if they tried to deal with a simple association governed by a foreign law. Think of what would happen in the case supposed, if a contract was governed by a different law according as to whether it was the partnership of Jacques and Jean, or the partnership of Pietro and William, which made the contract! We might well suppose that these two partnerships were established not merely in the same country, but in the same city, in the same street, in the same building.

There is only one way to get over difficulties of this kind, and that is to forbid the formation of associations which have foreigners among their members. Need I say that such a remedy is entirely inapplicable at a time like ours? It would abolish the particular evil in an absolute manner, but think of its effect on commercial relations at their present stage of development, and in view of the way in which they deserve to be encouraged!

Similar objections of equal gravity may be urged against applying any such rule to associations with shares or capital stock. Some of these laws propose that all the managers, or at least the majority, should be citizens. Others add that shares can belong to foreigners only within certain limits. Some, further, say that bearer securities can no longer be permitted; but why should we not expect that any such measures would be evaded by foreign capitalists who would use what we call "straw men"? We may say with reasonable certainty that this would be bound to happen, and if it should, the situation would be made the worse by any such

laws. Certainly it is better to know the truth and know one is dealing with a foreigner, and have a chance to suspect him of any hostile intention. That is preferable to dealing with a fellow-citizen behind whom an enemy is hidden.

I go further and say that the different measures which have been proposed with the idea of modifying the present situation about associations with capital stock and shares would all cause grave inconvenience. They would unavoidably injure in a substantial manner the economic interest of the country which put them into force. For nations need one another, and that truth is plainer to-day than ever before. Often a foreigner, by the ideas which he brings with him, by his scientific or practical knowledge, plays a fertile part in the country to which he goes, and thanks to such men very useful enterprises may be started and developed. They may even cause the most important increase in general wealth. It is also often true that a foreigner contributes to the growth of general wealth by the capital which he invests in some commercial, industrial, or agricultural establishment. Is it not both important and dangerous to deprive such elements of their fertility? One may compare them to the pollen which, carried by the wind, often fructifies the flowers of a tree previously barren.

Now this is not mere theory. The proof is in a well-known bit of history. At the end of the French Revolution the different Assemblies which governed France were inspired by the philanthropic and humanitarian ideas of Rousseau, Voltaire, and other contemporary philosophers. We suppressed practically every difference which existed under the *Ancien Régime* between Frenchmen and foreigners. Abuse and inconvenience swiftly followed, and caused a reaction. The *Code Napoléon* reflected this, and at least on one point the reaction went too far. Articles 726 and 912 decided that in the future a foreigner could not inherit in France, he could not take by a gift or legacy or through intestacy.

The consequence was immediate. After Napoleon had fallen and peace had come, all Europe went to work to cure the evils caused by war. Foreigners, and particularly Englishmen, who would otherwise have come to exploit the natural wealth of France, to open houses there, or to set up banks, declined to do so because of their very natural fear that when they died their heirs would take nothing and the state all. That was the more injurious be-



cause at this very moment the invention and the first improvement of the steam engine was beginning to cause a revolution in the industrial world. And so the French government almost without delay recognized the errors of the authors of the Code, and ended them by the law of July 14, 1819.

Likewise, if a country under the effect of current events should put burdensome restrictions on associations composed in whole or in part of foreigners, that country itself would suffer and in a very few years would be driven to a greater liberality.

Shall we conclude, because of these arguments, that we must bear all the inconvenience and all the danger which may be caused by the existence of such associations, that we should not seek a remedy of some kind? Surely not; but my view is that we ought to seek the remedy by and through the theory of the personality and the nationality of associations.

Under this theory commercial houses are assimilated in a general way to natural persons. It should then be easy to establish between commercial houses distinctions analogous to those which exist between persons. I have suggested above an idea which is already being carried out in part by legislation, that in dealing with political rights there ought to be a difference between natural-born citizens and those who are naturalized. The first have but one country and it has their entire allegiance. They are naturally qualified for plenary rights. The second, no matter how sincere, may well be presumed to have in the bottom of their hearts some attachment for their native land. I have inferred from that that they should be admitted only progressively and from trench to trench into the fortress of political rights.

Now I should make a similar distinction between associations entirely composed of native citizens and capital on the one hand, and those which have some foreign element on the other. If such distinction were made it should bring with it the following consequences.

From the point of private law there is no inconvenience in applying the same rules to native-born and naturalized citizens, to purely domestic associations and those with some foreign element. This has some substantial advantages. The security and rapidity of commercial operations, for reasons which I have already set forth, seem to require that all associations within a country should obey

the same law. Otherwise we should have complications, difficulties, and law suits for no good purpose whatsoever.

Next, as the existence of every commercial association necessarily pre-supposes the existence of a commercial house ruled by it, if we give the business the nationality of the country in which it is established, it is natural that we should do the same with the association.

But apart from private relations, each association has certain relations with the state in which it does business. These affect the public interest, and here we are dealing with a different situation. Just as I propose that the extent of political rights granted to naturalized citizens should be limited, so I express the hope that in this aspect and dealing with these relations, every association which has any foreign element should be subjected to certain limitations.

The laws of some countries have already commenced to operate along these lines. In France, for instance, the Law of April 7, 1902, declared, although somewhat indirectly, that in the future every association which owned a French ship must not only have its head place in France, but also a French president, a French manager, and a board of directors with a French majority. This rule was later extended to the Bank of Algeria. A century before, the Law of the 24th Germinal in the Year XI, which established for the first time the privileges of the Bank of France, forbade foreigners who should own shares to vote in its meetings.

At the end of the year 1916 there was founded in Paris a national company for dyes and chemical products, the object of which was to compete against the German industrial monopoly in things of that sort, and to use, when peace should come, the factories which have been built up during the war for the manufacture of explosives. Now in order to secure the return of these factories to their first use, if necessary, also to prevent the acquisition of control over them by foreigners seeking to reëstablish the monopoly, the Minister of War would not consent to turn over the factories of explosives to this company except on condition that it insert in its articles clauses establishing that the shares should be inscribed in the name of their owners, that they should not be transferable except with the consent of the directors, and that the directors might refuse their consent without assigning any reason. Other



clauses provided that the entire management should be by native-born French citizens, and that the appointment of the general manager should be subject to the approval of the Minister of War.

It seems to me that this is the sort of condition which each nation should impose upon those associations whose operations might be contrary to the public interest. Among such are shipping companies, railroad companies, those which construct fortifications or make munitions, insurance companies, bankers, mining corporations, and all associations which include among their properties ownership of land in the neighborhood of frontiers or coasts.

But I do not think even this would be a sufficient protection. As I have already said, we may well expect that foreigners who wish to control our commerce, our industry, and points of strategic importance should seek their ends through men of straw. Their intermediaries might satisfy all the conditions which the local law could impose on managers or shareholders, but they would be none the less people who merely shielded the really dangerous persons who controlled them.

The way to overcome such a danger is likewise suggested by the comparison I have already made between the nationality of associations and that of individuals. In my former comparison I showed the justice of the recent measures by which one who no sooner becomes a citizen than he shows himself unworthy may lose his rights.

Now associations which merely borrow their nationality, which merely cover foreigners in a way which causes danger for the country in which they are organized, should receive similar treatment. We have a theory of French law adequate for this subject. I do not know whether there is any corresponding theory in English or American Law. I refer to what we call the theory of *prete-nom*. It may well be applied here.

A *prete-nom* plays a part in a legal act in which he appears to be interested, but in reality the act interests only one or more other persons who wish to hide their personality behind his. If this maneuver has been employed in fraud of the law or to injure the rights of a third person, anyone interested may denounce the trick, require that the name of the persons truly interested shall appear

in the transaction, and even demand in court the rescission of everything which has been done in favor of such persons.<sup>21</sup>

By virtue of this theory as applied to the present matter permission should be given to the representative of the state, or even to every citizen, to pull off the mask behind which the foreigners hide themselves to accomplish those things which they could not do directly. And when it has been shown that an association is nothing but a fraudulent façade, used entirely for the execution of such a pernicious design against the public interest, a decree of nullity should be pronounced against the association.

French Law already contains the application of this idea. The statute of July 1, 1901, of *associations*, says in its twelfth article:

"Associations composed in the larger part of foreigners, those which have foreign managers, or which have their principal seat in a foreign country, if their business is of such a nature that it falsifies the normal conditions of the market for securities or merchandise or is a menace to domestic or foreign security of the state, may be dissolved by a decree of the President of the Republic."<sup>22</sup>

A like measure with slight difference should be applied to commercial associations. The courts should have power to dissolve them when it is established that they are really composed of foreigners, and that their existence menaces the domestic or foreign interests of the state or its credit, perhaps even its citizens. Moreover, this is a case where the same principle which is admitted to fix the nationality of associations ought to lead to this result. When we have agreed to make nationality depend upon the place where the head place of the association is established, would it not be logical to consider an association to be German, even if organized in France, and with its head place there, when it is really subservient to an association in Berlin? In other words, is it not true

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<sup>21</sup> The law makes an interesting application of this theory in the case of the interposition of a nominal legatee. For instance, where a legacy is given to someone whose entire rôle is to see that the liberality reaches another person who would not otherwise be able to receive it. Take for instance our law which makes void any legacy given to the doctor who has attended the testator in his last sickness; such legacy is void even if it is given to the wife or children of the doctor, and they are presumed to be the mere "interposing persons." (See Articles 909, 911, of the CIVIL CODE.)

<sup>22</sup> In French Law the word *association* has a technical meaning and refers to all societies which are not organized for profit; for instance, scientific or philanthropic societies, and it is in this sense that the word is used in this statute.



that such an association really has its head place in Germany? It is the point from which orders are issued, to which the French association gives its obedience, and the place to which profits go when they are realized, which should determine the result.<sup>23</sup>

*(To be continued.)*

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<sup>23</sup> Translated by Richard W. Hale, Boston.

# HARVARD LAW REVIEW

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JUDICIAL ADMINISTRATION IN THE FEDERAL COURTS. — In the National House of Representatives a bill (H. R. 9354) has been introduced, providing as follows: "Be it enacted, etc., That hereafter in any cause pending in any United States court, triable by jury, in which the jury has been impaneled to try the issue of facts, it shall be reversible error for the judge presiding in said court to express his personal opinion as to the credibility of witnesses or the weight of testimony involved in said issue: Provided, That nothing herein contained shall prevent the court directing a verdict when the same may be required or permitted as a matter of law.

"Sec. 2. That the judge of the court on the issue of law involved in said cause shall be required to deliver his charge to the jury after the introduction of testimony and before the argument of counsel on either side, and where requested by either party said charge shall be reduced to writing: Provided, however, That in United States courts sitting in States in which the law permits the trial judge to deliver his charge after argument of counsel, such procedure and practice may be followed by the trial judges in United States courts sitting in such States."

This bill has been favorably reported by the Judiciary Committee of the House. In the report, in which all the members of the committee concur, it is said that the expression of his opinion by a trial judge is "a clear invasion of the province of the jury, and therefore a flagrant usurpation of the prerogative of the jury to weigh the evidence." This is a great mistake. The history of trial by jury tells a different story. At common law it was always within the province of the judges to assist the jury by the expression of their opinions. Professor James Bradley Thayer, the greatest authority upon the subject of jury trials which



this country has produced, has said: "It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected."<sup>1</sup> Indeed it may well be doubted whether the provisions of the bill are not violations of the Sixth and Seventh Amendments to the federal constitution. Trial by jury does not mean trial by twelve laymen with unlimited power; it means trial by judge and jury. To allow the jury to invade the province of the judge is to deny the right to trial by jury.<sup>2</sup>

A number of states, particularly in the South and West, either by statute or decision or constitutional provision, have adopted one or both of the provisions of the proposed bill.<sup>3</sup> But these are matters relating to judicial administration, to the conduct of the trial; and in these matters the federal courts are not required to conform to the state practice.<sup>4</sup>

There is a popular idea that the more the power of the jury is extended, the more democratic an institution a trial becomes. This is not so, if democracy means equality before the law, if it means equal justice for all. The jury cannot act without some expert assistance. The only experts present in the court room are the judge and the contesting counsel. The more the power of the judge is weakened, the more the power of counsel is increased. If their traditional power of advising the jury is taken from the judges, the trial is too apt to be reduced to a struggle between opposing counsel in which the party who employs the abler or perhaps the more unscrupulous counsel will be successful; and if counsel rather than the judge are entitled to the last word to the jury, this effect is still more pronounced.<sup>5</sup> This is unjust; it is undemocratic.

Moreover, in summing up the evidence it is almost impossible for the judge, in cases in which the facts are at all complicated, to avoid an expression of opinion on any of the facts. The inevitable result of a

<sup>1</sup> THAYER, *PRELIMINARY TREATISE ON EVIDENCE*, 188, note.

<sup>2</sup> Mr. Justice Brown, "Judicial Independence," *REP. AMER. BAR ASSOC.*, 1889, 265; and see *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899); *Opinion of the Justices*, 207 Mass. 606 (1911).

<sup>3</sup> For a summary of the law of the various states on this point, and for an admirable discussion of the considerations of policy involved, see Sunderland, "The Inefficiency of the American Jury," 13 *MICH. L. REV.* 302.

<sup>4</sup> *Nudd v. Burrows*, 91 U. S. 426 (1875).

<sup>5</sup> "A system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal tyranny or lay magistrates, is today a senseless perversion." Ezra Thayer, "Judicial Administration," 63 *U. OF PA. L. REV.* 585, 594.

Dean Pound, the leading authority on procedural law in the United States, has expressed the opinion that "No small part of the exaggerated importance of the advocate in an American court of justice, of the free rein, one might almost say license, accorded him, while the judge must sit by and administer the rules of the combat, may be traced to frontier conditions and frontier modes of thought." Pound, "Some Principles of Procedural Reform," 4 *ILL. L. REV.* 388, 398.

statute forbidding the judges to express any opinion on the facts is to increase the necessity for new trials — and the multiplication of new trials is one of the worst evils of our system of procedure. The law reports of states where there are such statutes are full of such cases. Too often the granting of new trials means that the party with the longer purse will be successful. That is unjust; it is undemocratic.

Another very serious effect of taking from the judges their traditional power of supervising the conduct of the trial is to deter from accepting judicial office those who are best qualified. The whole system of trial by jury is dependent for its success as an efficient instrument in the administration of justice upon the competence of the judge who presides at the trial. In the admirable preliminary report on "Efficiency in the Administration of Justice" prepared for the National Economic League by President Eliot, Mr. Justice Brandeis, Dean Pound, Mr. Moorfield Storey and Mr. Adolph J. Rodenbeck, it is said:<sup>6</sup> "In most jurisdictions there is too little power of guidance of the jury by the court. Juries are left at large to be swayed by advocacy with no judicial corrective. It is often said that we cannot trust our judges to exercise the common-law power of advising juries. But if we cannot provide a type of judge adequate to the demands of the judicial office, we must not expect the administration of justice to be efficient."

The efficient administration of justice is a matter of the most vital concern to the future of this country. There can be no question that the federal courts, upon the whole, have been very efficient. This has been due in no small part to the fact that the federal judges have retained the power of supervising and controlling the conduct of the trial. It would be a mistake, merely because there may have been dissatisfaction in some isolated instances with particular federal judges, to deprive the federal courts throughout the country of the power to administer justice. Indeed, it would be more than a mistake — it would be a tragedy.

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THE LEGISLATIVE MINIMUM WAGE. — Proponents of social "legislation based on hopes rather than regrets"<sup>1</sup> have reason for satisfaction in recent triumphs of realism in the field of constitutional law.<sup>2</sup> The sustaining of the Oregon ten-hour law for factory workers<sup>3</sup> has been followed by the affirming of the constitutionality of statutes in Oregon,<sup>4</sup> Arkansas,<sup>5</sup> and Minnesota,<sup>6</sup> prescribing a minimum wage for women and minors in industry. Those who consider these measures

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<sup>6</sup> Page 26.

<sup>1</sup> See O. W. Holmes, "Ideals and Doubts," 10 ILL. L. REV. 1.

<sup>2</sup> See Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353.

<sup>3</sup> *Bunting v. Oregon*, 243 U. S. 426 (1917). See 28 HARV. L. REV. 89.

<sup>4</sup> Oregon Minimum-Wage Cases: *Stettler v. O'Hara*, 69 Ore. 519, 139 Pac. 743 (1914); *Simpson v. O'Hara*, 70 Ore. 261, 141 Pac. 158 (1914), 243 U. S. 629. The Oregon law was upheld by an equally divided court. There was no opinion. Mr. Justice Brandeis took no part in the decision.

<sup>5</sup> *State v. Crowe*, 197 S. W. 4 (Ark.) (1917).

<sup>6</sup> *Williams v. Evans*, 165 N. W. 495 (Minn.) (1917).



paternalistic, socialistic<sup>7</sup> departures from the "American conception"<sup>8</sup> of individualism, subversive of ordered liberty, have fulminated with a wealth of imprecatory Latin, but have not dissuaded the courts from "shaping their conclusions on the solid anvil of existing industrial facts."<sup>9</sup> Judgment by speculation<sup>10</sup> has given way to judgment deferring to scientifically recorded experience whose import was potent in turn to convince lawmakers of the expediency of the new legislation and judges of its reasonableness.<sup>11</sup>

Eleven states have enacted minimum-wage laws. Ohio, by constitutional amendment, has invested its legislature with specific authority to pass such an act. New York and Idaho have created commissions to investigate minimum-wage legislation. Statutes for the establishment of a minimum or living wage have thus far been designed solely for the protection of women and minors. Compulsory and noncompulsory statutes are found. Massachusetts<sup>12</sup> and Nebraska<sup>13</sup> have adopted the noncompulsory type. The minimum-wage commission has authority to fix a living wage, but the employer is under no direct penalty if he is recalcitrant. His name, however, may be included in a blacklist which newspapers are obliged to publish when requested by the commission. Compulsory statutes are of two kinds. In the first class the statutory wage is fixed by a commission through wage boards. The order of the commission when finally promulgated is binding on the employer. California,<sup>14</sup> Colorado,<sup>15</sup> Kansas,<sup>16</sup> Minnesota,<sup>17</sup> Oregon,<sup>18</sup> Washington,<sup>19</sup> and Wisconsin<sup>20</sup> have statutes of this kind. The second type of compulsory statute is found only in Arkansas<sup>21</sup> and Utah.<sup>22</sup> The terms of the statute fix the statutory minimum wage, without providing for investigation and determination by a commission or

<sup>7</sup> See Rome G. Brown, "Oregon Minimum Wage Cases," 1 MINN. L. REV. 471, 486.

<sup>8</sup> McCulloch, C. J., dissenting in *State v. Crowe*, *supra*, note 5.

<sup>9</sup> See Henry Bourne Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13, 25.

<sup>10</sup> Cf. *Lochner v. New York*, 198 U. S. 45 (1905).

<sup>11</sup> The minimum-wage law compels a provision for the deficit between the amount necessary to maintain the laborer at normal efficiency and the amount he receives. It denies the right of any industry to be a parasite. It protects enlightened employers from cut-throat competition made possible by getting labor at less than cost. It prevents unfair competition among the workers. The apprehension that the minimum wage would become the maximum, that industry would be disorganized, and that the public would suffer in many ways, does not seem to have been well founded. See the annual reports of the minimum-wage commissions of Massachusetts, California, Oregon, Washington, and Minnesota.

<sup>12</sup> MASSACHUSETTS ACTS, 1912, c. 706; 1913, c. 673, 330; 1914, c. 368; 1915, c. 65; 1916, c. 303.

<sup>13</sup> NEBRASKA LAWS, 1913, c. 211.

<sup>14</sup> CALIFORNIA STATUTES, 1913, c. 324; 1915, c. 571. A constitutional amendment authorizing a minimum-wage law was referred to the people and adopted November 3, 1914.

<sup>15</sup> COLORADO LAWS, 1913, c. 110.

<sup>16</sup> KANSAS LAWS, 1915, c. 275.

<sup>17</sup> MINNESOTA LAWS, 1913, c. 547.

<sup>18</sup> OREGON LAWS, 1913, c. 62; 1915, c. 35.

<sup>19</sup> WASHINGTON LAWS, 1913, c. 174; 1915, c. 68.

<sup>20</sup> WISCONSIN LAWS, 1913, c. 712.

<sup>21</sup> ARKANSAS LAWS, 1915, Act 191.

<sup>22</sup> UTAH LAWS, 1913, c. 63.

wage board in the original instance. American statutes show the influence of Australasian legislation, but no state has yet attempted such a radical interference with the contracts of employer and employee as is common in the antipodes.<sup>23</sup>

The principal objection to the constitutionality of the minimum wage is that it interferes with the freedom of contract of both employer and employee. The right to the acquisition of property and hence to freedom of contract is protected by the Fourteenth Amendment. The minimum-wage laws undoubtedly operate as a deprivation of liberty and property. So do all exercises of the police power. To be legitimate the exercise of the police power must be in the interest of the public health, safety, or morals. A situation in which the police power impinges upon the liberty guaranteed by the federal constitution is obviously not one for "trafficking in absolutes." Freedom of contract can be only a qualified right. Law is forced to adapt itself to new conditions in society induced by new relations between employers and employees.<sup>24</sup> The legislature must possess a wide discretion not only to determine the public interests requiring protection, but the most convenient means for consummating this protection. If the end aimed at is within the scope of constitutional legislative power, if the means selected are reasonably calculated to accomplish the legitimate purposes, no judicial doubt of the expediency of the legislation or of its essential wisdom should interfere with the state's right to conduct rational experimentation.<sup>25</sup> Unless the measure is arbitrary, wanton, and a spoliation it is within due process.

The state, it has been held, may regulate the hours of labor of women,<sup>26</sup> or of men, at least in occupations hazardous to health,<sup>27</sup> and when employed on public work.<sup>28</sup> It may specify the time, manner, and method

<sup>23</sup> A convenient collection of American and foreign minimum-wage laws and a comprehensive bibliography may be found in the brief for Defendant-in-Error in the Oregon minimum-wage cases. This brief by Professor Frankfurter (assisted by Miss Josephine Goldmark) has been reprinted by the National Consumers' League. See also STATE FACTORY INVESTIGATING COMMISSION (N. Y.), FOURTH REPORT, 1915, Vol. IV, Appendix VIII. Australasia seems well on the way to the development, both by statute and decision, of a distinct body of industrial law. See W. Jethro Brown, "The Judicial Regulation of Industrial Conditions," 27 YALE L. J. 427.

<sup>24</sup> Professor Frankfurter in his brief cited *supra*, note 23, suggests that the vital consequences which justify the imposition of the minimum living cost of labor upon the employer flow from the relationship of employer and employee. In other words, the employer has a relational responsibility to the employee. Professor Frankfurter argues that the center of gravity of the modern state is industry, just as in feudal days it was land. The law may work out reciprocal liabilities from modern industrial relationships just as it evolved the incidents of feudal tenure. See Edward A. Adler, "Business Jurisprudence," 28 HARV. L. REV. 135; *Id.*, "Capital, Labor, and Business at Common Law," 29 HARV. L. REV. 241.

<sup>25</sup> *Cf. Wilcox v. Consolidated Gas Co.*, 212 U. S. 19 (1909); *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *The Adamson Law*, *Wilson v. New*, 243 U. S. 332 (1917).

<sup>26</sup> *Muller v. Oregon*, 208 U. S. 412 (1908); *Miller v. Wilson*, 236 U. S. 373 (1915); *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695 (1910).

<sup>27</sup> *Holden v. Hardey*, 169 U. S. 366 (1898); *Bunting v. Oregon*, 243 U. S. 426 (1917). But see *In re Morgan*, 26 Colo. 415, 58 Pac. 1071 (1899); *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206, 110 N. E. 264 (1915).

<sup>28</sup> *United States v. Martin*, 94 U. S. 400 (1876); *Atkin v. Kansas*, 191 U. S. 207 (1903).



of payment.<sup>29</sup> Much of this legislation is upheld on much the same ground as that which justified equity's interference in favor of the necessitous. "Necessitous men," says Lord Northington,<sup>30</sup> "are not, strictly speaking, free men." Real freedom of contract can exist only between those substantially equal in bargaining power. The fundamental basis for sustaining social legislation, however, is that it is within the scope of reasonable legislative action.<sup>31</sup> The broad powers of the legislature over the dealings of men have long been familiar in case of usury statutes. Here as in the statutory minimum wage the public purpose is the prevention of coercive and oppressive contracts.<sup>32</sup> The realistic studies of industrial conditions point so emphatically to an affirmative enhancement of human values as a result of the minimum wage that counsel in support of the laws have probably been able to convince the courts not only of the reasonableness of the legislation, but also of its wisdom and timeliness. Chivalric concern for women is conspicuous in opinions on minimum-wage cases, but behind this is the recognition of the narrow function of the court in passing upon social legislation. Under the principles of recent decisions no statute supported by a respectable body of opinion and justified by honest testing should fail, if counsel are reasonably diligent in the collection of realistic data.

The liberal attitude of American courts toward labor legislation should rehabilitate the judiciary in the favor of social groups whose purposes and ideals are discordant with the aspirations of the groups from which judges are chiefly drawn. All of the complementary organs in a political system of checks and balances are instituted for the better expression of the public will. No branch of our tripartite scheme of government can permanently maintain its prestige if it is reputed consistently to deny popular demands. The profession of the law, highly skilled in the science of human conduct and deeply appreciative of its complexities, must not acquire an incubus of unpopularity which will deprive our democratic society of its logical leadership. The trend of recent decisions in the Supreme Court of the United States certainly shows no tendency to slumber upon the *formulae* of a decadent social and economic philosophy.<sup>33</sup> With this example lesser lawyers have no warrant for posing as "priests of a completed revelation." The liberalism that recognizes and welcomes rational evolution of political institutions to conform

<sup>29</sup> Knoxville Coal & Iron Co. v. Harbison, 183 U. S. 13 (1901); McLean v. Arkansas, 211 U. S. 539 (1909). But see Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354 (1886).

<sup>30</sup> Vernon v. Bethell, 2 Eden, 110, 113 (1762). See FREUND, POLICE POWER, §§ 316 *et seq.*, 500 *et seq.* See also Roscoe Pound, "Liberty and Contract," 18 YALE L. J. 454, 482.

<sup>31</sup> "The question, therefore, is not whether the state can regulate hours of labor . . . but what evils are manifest, and what tendencies are disclosed, that present a reasonable field for legislative encouragement. This field of reasonable action is the state police power." Felix Frankfurter, *arguendo*, Bunting v. Oregon, 243 U. S. 426, 431 (1917).

<sup>32</sup> See Thomas Reed Powell, "The Constitutional Issue in Minimum-Wage Legislation," 2 MINN. L. REV. 1.

<sup>33</sup> See Rast v. Van Deman & Lewis Co., 240 U. S. 342, 365 (1915); Otis v. Parker, 187 U. S. 606, 608, 609 (1903); Hurtado v. California, 110 U. S. 516, 530, 531, 537 (1884).

with changing social and economic needs and hopes is committed, seemingly, to a program of positive social legislation. Without capacious sympathy with the purposes of this legislation and comprehensive understanding of the social will promulgating it, the lawyer will not be accorded his deserved dignity and authority. With an acute societal sensibility he may expect the responsibility that devolves in course upon the living successors of the historic molders of human institutions.<sup>34</sup>

**TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS.** — Nearly two decades and a half ago one of our courts — seized of a prophetic mood — expressed the opinion that the protection of the right of contract and of subsisting contractual relations against the tortious interference of third parties is “a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century.”<sup>1</sup> Events have certainly vindicated the prophecy. Most of the problems involved still remain unsolved, and many of them are just beginning to present themselves to the courts. Beginning with the clear recognition in *Lumley v. Gye*<sup>2</sup> of the interest of a party in a contractual relation as a right *in rem*, a right of property, which will be protected against intentional infringement by third parties, the courts have been groping along in a steady effort to evolve a logical and harmonious system for the securing of this property interest.<sup>3</sup> While some of the earlier cases suggested the limitation of the doctrine to contracts of employment,<sup>4</sup> it has been generally extended to include contract rights of every description.<sup>5</sup> And it may now be considered the established rule

<sup>34</sup> See Learned Hand, “The Speech of Justice,” 29 HARV. L. REV. 617, 618, 621.

<sup>1</sup> Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 231, 55 N. W. 1119 (1893).

<sup>2</sup> 2 E. & B. 216 (1853).

<sup>3</sup> Even Blackstone, however, speaking of two sorts of injuries to the rights of the master, growing out of the relation of master and servant, says (3 BL. COM. 142): “The one is, the retaining a man’s hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. . . . Every master has, by his contract, purchased for a valuable consideration the services of his domestics for a limited time. The inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by special action on the case; and he may also have an action against the servant for the non-performance of his agreement. But if the new master was not apprized of the former contract, no action lies against him, unless he refuses to restore the servant upon demand. The other point of injury is that of beating, confining or disabling a man’s servant, which depends upon the same principle as the last, to wit, the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass *vi et armis*. . . .”

<sup>4</sup> See Allen v. Flood, [1898] A. C. 1; Boyson v. Thorne, 98 Cal. 578, 33 Pac. 492 (1893).

<sup>5</sup> Quinn v. Leathem, [1901] A. C. 495; Walker v. Cronin, 107 Mass. 555 (1871); Morgan v. Andrews, 107 Mich. 33, 64 N. W. 869 (1895); Rice v. Manley, 66 N. Y. 82 (1876); Angle v. Chicago, etc. Ry. Co., 151 U. S. 1 (1893). *Contra*, Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57 (1891); Glencoe Land, etc. Co. v. Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93 (1897).



of most jurisdictions that any contract right will be protected against the wilful, unjustifiable interference of third parties.<sup>6</sup>

The security given to this interest by the law, however, is by no means as yet consistent or complete. Thus, wherever the question has arisen, courts have denied a remedy for the negligent injury of a contract right, or for a loss proximately caused to the plaintiff through the medium of a contractual relation by the negligent act of a third party.<sup>7</sup> There seems an almost complete dearth of authority on the question of whether a person may recover for a loss occasioned by reason of a contract with or respecting another who has been wilfully injured by a third party.<sup>8</sup> An early Massachusetts case<sup>9</sup> denied a cause of action under these

<sup>6</sup> "That the wrongful and malicious interference by a stranger with contract relations existing between others; by causing one to commit a breach thereof, amounts to an actionable tort, is affirmed by nearly all the courts of the present day. The old rule that the remedy in such cases was an action against the party to the contract who committed the breach and not against the wrongful intermeddler, is not now the law, either in this country or in England. The rule has been extended and enlarged, and an action *ex delicto* against the mischievous wrongdoer is now sustained by nearly all the courts." *Joyce v. Great Northern Ry. Co.*, 100 Minn. 225, 110 N. W. 975 (1907).

In the analogous cases of contributory infringement it has been held that one who sells an article merely knowing that the use to be made of it by the purchaser will violate a license agreement between the purchaser and the patentee will be enjoined. *Thompson-Houston Electric Co. v. Kelsey Electric, etc. Co.*, 75 Fed. 1005 (1896); *Tubular Rivet & Stud Co. v. O'Brien*, 93 Fed. 200 (1898). See 23 HARV. L. REV. 230.

<sup>7</sup> *Conn. Mutual Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265 (1856); *Brink v. Wabash R. R. Co.*, 160 Mo. 87, 60 S. W. 1058 (1901); *Remorquage A Hélice v. Bennetts*, [1910] 1 K. B. 243. In the English case a tug belonging to the plaintiff was engaged under contract in towing a barge, when defendant's ship negligently collided with the tow, causing it to sink. The tug was not damaged. The court held that plaintiff could not recover for remuneration lost through the consequent impossibility of completing the towage contract. For a discussion of this case, see 24 HARV. L. REV. 397.

Similarly, the wife is given no separate cause of action against one who negligently injures the husband. *Feneff v. N. Y. Cent. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436 (1909); *Goldman v. Cohen*, 30 Misc. (N. Y.) 336 (1900). See Roscoe Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177, 194.

<sup>8</sup> Authority is not lacking, however, for a recovery by the master in the analogous case of a loss sustained by the master through the wrongful injury or imprisonment of his servant. Thus, in *Woodward v. Washburn*, 3 Denio (N. Y.), 369 (1846), a master was allowed to maintain an action on the case for the unlawful imprisonment of a servant hired by the year. The court said (page 371): "It is a principle of the common law, that where a person sustains a loss or damage, by the wrong of another, he may have an action upon the case to be remunerated in damages." Similarly, in *Martinez v. Gerber*, 3 M. & G. 88 (1841), where a servant was negligently injured by a third person, the master was allowed to recover from the tortfeasor for the added expense of employing another servant. See also FITZHERBERT'S NATURA BREVITUM, 91 G. (1616); *Robert Marys's Case*, 5 Coke, 201, 111 b, f. 113 a (1826); *Evans v. Walton*, L. R. 2 C. P. 615, 620 (1867); *Fluker v. Ga. Railroad & Banking Co.*, 81 Ga. 461, 8 S. E. 529 (1889).

This doctrine, however, at least as set forth in the earlier cases, was intended to apply to no other relations, arising from mere contract, than that of master and servant. See *Hart v. Aldridge*, 1 Cowp. 54 (1774).

<sup>9</sup> *Anthony v. Slaid*, 11 Metc. (Mass.) 290 (1846). Here the plaintiff was under contract with a town to support at a fixed rate all the town paupers "in sickness and in health." Defendant's wife assaulted one of the paupers, thus putting the plaintiff to increased expense for his care and support. The court, speaking through Chief Justice Shaw, said: "It is not by means of any material or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the de-

circumstances. On the other hand in the recent case of *Niles-Bement-Pond Co. v. Iron Molders' Union*,<sup>10</sup> which raised a similar question, an opposite conclusion was reached by the federal court. In this case an Ohio corporation was under contract with a New Jersey corporation to furnish special machines. Union employees of the Ohio company went on strike, and by threats and the use of force prevented other employees of the company from working. No injury to the New Jersey company was intended or contemplated. To get into the federal courts on the ground of diversity of citizenship, suit was brought by the New Jersey corporation, rather than by the Ohio company, to enjoin the striking employees from interfering with the business of the latter company and thus preventing it from fulfilling its contract with the New Jersey corporation. The Ohio company was joined as a codefendant. The court granted an injunction, on the ground that the New Jersey corporation had a separate and independent cause of action against the wrongdoers for the injury to its contract right. The decision is rested upon an earlier federal case, *Chesapeake, etc. Agency Co. v. Fire, etc. Coke Co.*<sup>11</sup> Aside from this case there seems to be no clear authority in support of the decision.<sup>12</sup>

The reasons for the general denial of a cause of action to a party thus injured in his contract rights, or who has suffered a loss through the medium of a contractual relation with another, by the negligent or wilful tort of a third party, vary in different jurisdictions. Some courts seem to be influenced merely by a conservative aversion to any addition to existing causes of action.<sup>13</sup> Others scent a danger in the possibility of parties manufacturing contractual relations *inter se*, with an eye to increasing the recovery against a wrongdoer in the event of the commission

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fendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. If such a principle be admitted, we do not see why the consequence would not follow . . . that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper, the town might maintain an action, with a *per quod*, for damages. That there is no precedent for such an action where there must have been many occasions for bringing it, if maintainable, is a strong argument against it."

<sup>10</sup> 246 Fed. 851 (1917).

<sup>11</sup> 119 Fed. 942 (1902), *aff'd*, 124 Fed. 305 (1903). The lower court said (page 947): "It [complainant] has contractual relations with these defendant companies, and I can see no reason why it would not have a right of action against anyone who by a wrongful act should render these companies incapable of carrying out their contracts with it. . . . It makes no difference whether a man is wrongfully and maliciously induced to cease business relations with me or whether he is maliciously and wrongfully prevented from doing so. The effect is the same. The means in either case are wrongful, and in either case the wrongdoer is liable, in so far as the injury is the natural and probable result of the wrongful acts."

<sup>12</sup> But see *Livermore v. Crane*, 26 Wash. 529, 67 Pac. 221 (1901); and note 8, *supra*.

<sup>13</sup> See *Anthony v. Slaid*, *supra*. Cf. *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210 (1866). In the *Ryan* Case, the rather common attitude of many courts in denying a cause of action on the ground of remoteness of causation is well set forth as follows: "The novelty of the claim . . . where the occasion for its being made had been so common, is a strong argument against its validity. . . . It was Littleton's rule, 'what never was, never ought to be.' 1 Ver. 384 (1685). To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject persons to a liability against which no prudence could guard, and to meet which no private fortune would be adequate."



of a direct wrong to either party to the contract.<sup>14</sup> But what has probably influenced courts most in denying a cause of action in these cases is the apparent difficulty of properly apportioning damages between the party directly injured and the party indirectly injured, and the consequent danger of a double recovery for the same loss.<sup>15</sup>

The difficulty in the apportionment of damages, if the cause of action be allowed, is not altogether chimerical. It is confined, however, to a particular, though common, type of contractual relation. Thus in *Niles-Bement-Pond Co. v. Iron Molders' Union* the contract between the two companies contained no clause exempting the Ohio corporation from liability for breach of contract where caused by a strike or by the tortious interference of a third party. The recovery by the Ohio corporation in an action in tort against the strikers would therefore include, as an item in the total damage caused by the tortfeasors, the amount of its liability to the New Jersey corporation for the breach of contract.<sup>16</sup> If the New Jersey company is allowed a separate cause of action against the wrongdoers and pursues its remedy first, then in a subsequent suit by the Ohio corporation against the strikers the Ohio company's recovery should be reduced by an amount equal to that already recovered by the New Jersey company. On the other hand, if the Ohio company sues first and recovers its damages in full, to allow the New Jersey corporation subsequently to recover from the tortfeasors would submit them to a double liability for the same item of damage, with the possibility, however, of recovering back a part of the sum paid to the Ohio corporation. Since in such a case as this the party indirectly injured is generally sufficiently protected by his remedy on the contract,<sup>17</sup> to allow him a separate cause of action involves a needless multiplication of

<sup>14</sup> *Conn. Mutual Life Ins. Co. v. N. Y. & N. H. R. Co.*, 25 Conn. 265 (1856). At page 275 the court says: "To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more potentous than our jurisprudence has yet known."

<sup>15</sup> See *Feneff v. N. Y. C. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436 (1909).

Dean Pound in the article on "Individual Interests in the Domestic Relations," cited *supra*, discussing the analogous topic of the protection given to certain of the wife's interests in the marital relation, says (page 194): "Where these interests are infringed by physical injury to the husband or by abduction of the husband, a difficulty arises in that the husband has an action in which he may recover for diminution of his earning power, loss of earnings, and impairment of his ability to support those dependent upon him. The same problem arises in case of like interests of children. The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both. Moreover, the injury to wife or child is very hard to measure in money. Hence, on a practical balancing of interests the wife is usually denied an action."

<sup>16</sup> See 1 SEDGWICK, DAMAGES (11 ed.), 142, 143. And see *Castino v. Ritzman*, 156 Cal. 587, 105 Pac. 739 (1909); *Graves v. Baltimore & N. Y. Ry. Co.*, 76 N. J. L. 362, 69 Atl. 971 (1908).

<sup>17</sup> This, of course, is subject to the qualification that the quantum of damages recoverable in the contract action occasionally may differ materially from the quantum recoverable in the tort action.

actions. In these cases, therefore, the courts follow a sound instinct in denying him a cause of action.<sup>18</sup>

This type of case, however, is the exception rather than the rule. Commonly, contracts contain an exemption of liability for breach resulting from inability to perform caused by tortious acts of third parties, as where an ordinary strike-exemption clause is inserted. Such a clause was present in *Chesapeake, etc. Agency Co. v. Fire, etc. Coke Co.*, cited *supra*. To the rest of the world the promisee is entitled to performance, unhindered by the wrongful acts of third parties. But the promisor has a defense to an action for breach of contract. Damages recoverable by the promisor from the third party wrongdoer would not then include as an item of loss sustained a liability for breach of contract. Similarly in the ordinary contract of personal service illness will excuse performance by the employee. Yet one who tortiously causes such illness thereby unlawfully interferes with the employer in the enjoyment of a property right. In none of these cases does the difficulty of damages arise.<sup>19</sup>

It would seem, therefore, that no sufficient ground exists for the general denial in these cases of a cause of action to the party indirectly injured, — either in the case of a wilfully tortious act or of a merely negligent act by the third party. No valid distinction can be drawn between an intentional infringement of a contract right, such as occurred in *Lumley v. Gye*, and an injury proximately caused to the plaintiff by an intentional wrong to another. The law protects other property against both sorts of injury. Having recognized this interest as a right of property, and already securing it against direct, unjustifiable interference of third parties, a consistent body of law requires that this interest be accorded the same measure of protection that is accorded by the law to other property rights, no practical difficulties standing in the way.<sup>20</sup> Nor, it is submitted, can a distinction be made, in this connection, between a wilfully tortious act and a negligent act. Negligent conduct is as anti-social as wilfully injurious conduct. The interest of the community in the freedom of action of the individual tolerates the one no more than the other.<sup>21</sup>

Even if a cause of action at law is not allowed, it would seem that an injunction may well be granted to the party indirectly injured in such a case as *Niles-Bement-Pond Co. v. Iron Molders' Union*.<sup>22</sup> The interest

<sup>18</sup> Nor is the case of *Lumley v. Gye* entirely free from the difficulty as to damages. Obviously, if *Lumley* recovers from *Gye* in an action in tort and that judgment is satisfied, he cannot subsequently recover for the same damages in a suit against *Miss Wagner* for breach of contract. The satisfaction obtained from *Gye* in effect discharges, not merely his own liability in tort, but also *Miss Wagner's* liability in contract. The legal situation brought about by granting to *Lumley* a separate remedy against *Gye* thus results in the unmerited enrichment of *Wagner*. The same result follows, however, wherever satisfaction is secured from one of several joint tortfeasors, since the injured party has an action against each of the wrongdoers for the whole amount of damage, and yet there is no right of contribution *inter se*.

<sup>19</sup> Likewise, in a case like *Conn. Mutual Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, *supra*, no such obstacle is presented.

<sup>20</sup> See *PIGGOTT, LAW OF TORTS*, 363, 368. And see note 11, *supra*.

<sup>21</sup> See 27 *HARV. L. REV.* 689; *POLLOCK ON TORTS* (9 ed.), 22 *et seq.* But see *O. W. Holmes*, "Privilege, Malice, and Intent," 8 *HARV. L. REV.* 12.

<sup>22</sup> *Supra*.



of a party to a contract being recognized by the law as a property right and as such protected against some wrongful acts, equity, in giving a remedy to protect this legal right where no action is allowed at law, would merely be acting within the established scope of its concurrent jurisdiction.<sup>23</sup> An example of this sort of exercise of equity jurisdiction is the granting of an injunction to the remainderman to prevent the wanton destruction of the estate by the life tenant, without impeachment for waste, though no action exists at law for such an injury.<sup>24</sup> And, similarly, equity in protecting the *jus disponendi* of property by removing clouds upon title is securing an interest recognized by the law in cases where no remedy is given at law for the particular injury.<sup>25</sup> Finally, in such a case, it may be possible to view the right of action of the directly injured party, the Ohio company, against the wrongdoers, as held partly for the benefit of the promisee, the New Jersey corporation. An injunction might then conceivably be granted at the suit of the New Jersey corporation, joining the Ohio company as a codefendant, on analogy to a suit by a *cestui que trust* against a recusant trustee and a third party obligor to enforce an obligation held by the trustee for the benefit of the *cestui*.<sup>26</sup>

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**SOLDIERS' WILLS OF PERSONALTY.**—The practice of exempting soldiers from the ordinary requirements concerning formalities in the making of testamentary dispositions had its origin in the Roman law. It was unknown to the republic, and was first introduced by Julius Cæsar.<sup>1</sup> It has continued in some form down to the present time, and still exists in the civil law.<sup>2</sup> The privilege made its first appearance in Anglo-American law in the Statute of Frauds,<sup>3</sup> was continued in the Wills Act,<sup>4</sup> and now exists in Canada<sup>5</sup> and most of the United States.<sup>6</sup>

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<sup>23</sup> See 27 HARV. L. REV. 668.

<sup>24</sup> *Vane v. Barnard*, 2 Vern. 738 (1716); *Aston v. Aston*, 1 Ves. 264 (1749).

<sup>25</sup> *Gage v. Rohrbach*, 56 Ill. 262 (1870); *Sullivan v. Finnegan*, 101 Mass. 447 (1869).

<sup>26</sup> See AMES, CASES ON TRUSTS, 67, note. As a prerequisite to such an action, the *cestui que trust* ordinarily must show that the trustee was requested to sue and failed to do so. *Fletcher v. Fletcher*, 4 Hare, 67 (1844); *Gandy v. Gandy*, 30 Ch. D. 57 (1885). Some courts, however, hold that mere neglect of the trustee to sue is sufficient. *Kelly v. Larkin*, [1910] 1 R. 550. See *Mason v. Mason*, 33 Ga. 435 (1863).

The interests of the *cestui que trust* and of the recusant trustee are recognized as sufficiently distinct to give a federal court jurisdiction on the ground of diversity of citizenship, though the citizenship of the trustee and of the obligor are identical. *Reinach v. Atlantic & G. W. R. Co.*, 58 Fed. 33 (1878).

<sup>1</sup> See *Ex parte Thompson*, 4 Bradf. Surr. (N. Y.) 154, 157 (1856). See also MUIRHEAD, ROMAN LAW (2 ed.), 320.

<sup>2</sup> France, CIVIL CODE, Art. 93, 981-98; Germany, DES REICHSMILITARGESETZES VOM 2 MAI, 1874, § 44. See *Matter of Smith*, 6 Phila. (Pa.) 104, 105 (1865).

<sup>3</sup> See 29 CAR. II, § 23.

<sup>4</sup> See 1 VICT. c. 26, § 11.

<sup>5</sup> British Columbia, 61 VICT. c. 193, § 9; Manitoba, REV. STAT. c. 150, § 8; New Brunswick, CONSOL. STAT. c. 77, § 6; Nova Scotia, REV. STAT. c. 89, § 8; Ontario, 1897, REV. STAT. c. 128, § 14.

<sup>6</sup> *Anderson v. Pryor*, 10 Sm. & M. (Miss.) 620 (1848); *Van Deuzer v. Gordon*, 39 Vt. 111 (1866). See 1 STIMSON, AMERICAN STATUTE LAW, § 2700; 1 REDFIELD, WILLS (4 ed.), 185.

Cæsar seems to have given the privilege to all soldiers;<sup>7</sup> the restriction that the soldier must be *in expeditione* was first laid down by Ulpian<sup>8</sup> and was adopted by Justinian.<sup>9</sup> The modern statutes all require that he be in actual military service. This has been construed to include a soldier in winter quarters in the enemy's country,<sup>10</sup> in a military hospital,<sup>11</sup> on the march toward the enemy,<sup>12</sup> or from one regiment to another in the field;<sup>13</sup> and he is even said to be in actual service as soon as the order for mobilization is given.<sup>14</sup> But a soldier is not in actual service when home on a furlough,<sup>15</sup> or when enrolled in a volunteer company not yet mustered into service.<sup>16</sup> The exact form of such testaments was not prescribed in the civil law,<sup>17</sup> though it was said at one time that whatever the soldier should write upon the sand with his sword would be good; but the modern French law requires at least a writing, two witnesses, and a signing by the testator.<sup>18</sup> Under American and English law no writing is necessary, and the will may be proved by one witness.<sup>19</sup> The ordinary rule of nuncupative wills that the testator must be *in extremis* does not apply to soldiers,<sup>20</sup> but it seems that *rogatio testium*, a calling upon the witnesses to bear witness that this is the testator's will, is essential.<sup>21</sup>

Cæsar apparently intended the privilege as a reward for the soldier's services,<sup>22</sup> whereas Justinian based it upon the extreme ignorance of soldiers in such matters,<sup>23</sup> a truly remarkable reason for relaxing the

<sup>7</sup> See MUIRHEAD, ROMAN LAW (2 ed.), 320. The word "soldier" includes "all who hold commissions or warrants, or are borne on the rolls as enlisted men, and who are in actual military service." See GARDNER, WILLS, 61.

<sup>8</sup> See DE FRESQUÉT, TRAITÉ DE DROIT ROMAIN, 393.

<sup>9</sup> See INST. JUST., Lib. II, tit. XI. In the Roman law, only a soldier could die partly testate and partly intestate. See HALLIFAX, CIVIL LAW (Geldart's ed.), 48.

<sup>10</sup> Leathers v. Greenacre, 53 Me. 561 (1866).

<sup>11</sup> Gould v. Safford, 39 Vt. 498 (1866).

<sup>12</sup> Botsford v. Krake, 1 Abb. Pr. N. S. (N. Y.) 112 (1866).

<sup>13</sup> Herbert v. Herbert, D. & Sw. 10 (1855).

<sup>14</sup> Gattward v. Knee, [1902] P. 99. But cf. White v. Repton, 3 Curt. Eccl. 818 (1844).

<sup>15</sup> Matter of Smith, *supra*, note 2.

<sup>16</sup> Pierce v. Pierce, 46 Ind. 86 (1874).

<sup>17</sup> See 2 DOMAT, LES LOIS CIVILES, § 3071.

<sup>18</sup> See 2 DOMAT, LES LOIS CIVILES, § 3073, 3076. See also MOURLON, CODE NAPOLÉON, § 802, "*Il doit être signé par le testateur . . . Il doit être signé par l'officier ou les officiers qui l'ont reçu et aussi par les deux témoins.*"

<sup>19</sup> See Goods of White, 22 L. Rep. (Mass.) 110, 114 (1858); *Ex parte* Thompson, 4 Bradf. Surr. (N. Y.) 154, 158 (1856).

<sup>20</sup> Leathers v. Greenacre, *supra*, note 10. See Botsford v. Krake, 1 Abb. Pr. (N. S.) (N. Y.) 112, 120 (1866). But see Hubbard v. Hubbard, 12 Barb. (N. Y.) 148, 156 (1851). See REDFIELD, WILLS (4 ed.), 190, 201. Statutes sometimes require that the soldier be *in extremis*. See 1910, OKLA. REV. LAWS, § 8343.

<sup>21</sup> See PAGE, WILLS, § 237; 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2 ed.), § 45. On the general subject of this paragraph see 1 SCHOULER, WILLS (5 ed.), §§ 366-68.

A similar privilege is extended to "mariners at sea." This has been held to include a cook on a vessel lying at a wharf. *Ex parte* Thompson, *supra*, note 1. Likewise, a lady typist on the *Lusitania* was held to be within the statute. In the Goods of Hale [1915] 2 Ir. 362. But a mariner who is merely a passenger at the time is not included. Warren v. Harding, 2 R. I. 133 (1852). See also *In re* Gwin's Will, Tuck. Surr. (N. Y.) 44 (1865).

<sup>22</sup> See MUIRHEAD, ROMAN LAW (2 ed.), 320.

<sup>23</sup> See INST. JUST., Lib. II, tit. XI. "*Supradicta diligens observatio, in ordinandis*



ordinary safeguards. But in the modern civil law the real reason for the rule is to be found in the probability that, owing to the dangers and uncertainties of his business, it will usually be very inconvenient, if not impossible, for the soldier to comply with the ordinary formalities of execution.<sup>24</sup> This is unquestionably the reason underlying the privilege as it exists in England and the United States.<sup>25</sup>

One of the most difficult questions that is likely to arise on this subject is whether the statutes remove the disability of infancy. It has been the practice in England to admit infant soldiers' wills of personalty to probate,<sup>26</sup> and although the only foundation in authority for this practice is an *ex parte* decision by Sir Herbert Jenner Fust made on motion,<sup>27</sup> the text writers seem to have accepted it without question.<sup>28</sup> Several *dicta*, however, in the more recent English cases have, at least by implication, discountenanced the practice.<sup>29</sup> In the recent case of *In re Wernher*,<sup>30</sup> the court delivered a vigorous and learned *dictum* to the effect that infant soldiers' wills of personalty are not valid under the Wills Act. At common law, an infant of fourteen might make a will of personalty,<sup>31</sup> and this was unaffected by the early statutes, for they dealt only with realty.<sup>32</sup> The Statute of Frauds prescribed certain formalities for a nuncupative will of personalty,<sup>33</sup> but provided that soldiers in actual service might bequeath their personalty as before the

*testamentis, militibus propter nimiam imperitiam constitutionibus principalibus remissa est."*

<sup>24</sup> See 2 DOMAT, LES LOIS CIVILES, §§ 3001, 3069. That this is the reason is also indicated by the fact that the will is only good for six months after the soldier returns to normal conditions of life. See MOURLON, CODE NAPOLÉON, § 806. "*La loi veut que le testateur, revenu dans un lieu où il a la liberté d'employer les formes ordinaires, teste de nouveau et selon le droit commun. Elle lui accorde toutefois un délai à cet effet. Le délai est de six mois, à compter de son retour dans le lieu où il a la liberté de tester selon la forme ordinaire.*"

<sup>25</sup> See *In re Hiscock*, [1901] P. 78, 80; *Hubbard v. Hubbard*, 12 Barb. (N. Y.), 148, 155 (1851).

<sup>26</sup> *In re McMurdo*, L. R., 1 P. & D. 540 (1867); *In re Hiscock*, *supra*, note 25.

<sup>27</sup> *In re Farquhar*, 4 Notes of Cases, 651 (1846).

<sup>28</sup> See THEOBALD, WILLS (7 ed.), 19; FLOOD, WILLS, 367; 1 WILLIAMS, EXECUTORS (7 Am. ed.), 172.

<sup>29</sup> See *In re D'Angibau*, 15 Ch. D. 228, 241 (1880): "No will can be made by an infant;" In the Goods of Hale, [1915] 2 Ir. 362, 369: "All that the 11th section does is to release persons so situated from certain obligations as to execution and verification which were imposed for the first time, for the protection of the public generally, by the Wills Act; and the difficulties that have arisen, and the cases that have been decided on this branch of the law show how unreasonable it would have been to exact obedience to these obligations from persons in the position of soldiers and seamen when in service;" *In re Limond*, [1915] 2 Ch. 240; soldiers' and sailors' wills "are left entirely unaffected in respect of execution and attestation by the provisions of the Act."

<sup>30</sup> 34 TIMES L. REP. 191 (1918). The will was properly executed, and the only question was as to infancy. The exact question was whether the will was sufficient to execute a general power over personalty, and as the will had already been admitted to probate, the court held the power well executed. See SUGDEN, POWERS, 178. It appears that under some circumstances an infant might exercise a power collateral when he could not dispose of his own property, and the only apparent reason for this is that it requires more discretion to dispose of one's own property than that of other persons. Per Sir George Jessel in *In re D'Angibau*, 15 Ch. D. 228, 233 (1880).

<sup>31</sup> See 1 WILLIAMS, EXECUTORS (6 Am. ed.), 19 *et seq.*; 2 BLACKSTONE, COMMENTARIES, 497; COMYN'S DIGEST, Devise H 2.

<sup>32</sup> See 34 & 35 HENRY VIII, c. 5, § 14.

<sup>33</sup> See 29 CAR. II, c. 3, § 19.

Act.<sup>34</sup> No provision had yet been made as to age, so that until 1837 an infant of fourteen might make a will of personalty. Section 7 of the Wills Act provided that no will by a person under twenty-one should be valid,<sup>35</sup> and section 11 provided that a soldier in actual service might bequeath his personal estate as he might before the making of the act.<sup>36</sup> If the section is read literally, an infant soldier may certainly bequeath his personalty. But it is in the form of a proviso, and it is believed that it is intended to qualify only the sections immediately preceding which deal with execution. That this is true is indicated by the fact that the section is taken from the Statute of Frauds<sup>37</sup> which made no provision as to age, and, moreover, by the very reasons underlying the privilege. The situation of the soldier may make proper execution difficult, but it can hardly increase his discretion. Furthermore, the Report of the Real Property Commissioners, upon which the Wills Act is based, indicates that it was not intended to extend the privilege to infants.<sup>38</sup> There is a square American decision under a very similar statute which accords with this view.<sup>39</sup> Although the section was borrowed from the civil law,<sup>40</sup> it affords little aid in construing the statute. It is true that Augustus permitted soldiers still subject to the *patria potestas* to make their wills as if *sui juris*,<sup>41</sup> but in continuing this rule Justinian required that such soldiers should comply with all the usual formalities of execution.<sup>42</sup> No trace of such a special privilege to infant soldiers has been found in the modern civil law.

In the present state of the authorities it may fairly be said that the question is still *res integra* in England. It is to be hoped that, if the question arises squarely for decision, the English court will hold such a will invalid.<sup>43</sup>

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DISCRIMINATION BY A NATURAL GAS COMPANY. — It is axiomatic that, ordinarily, a public service company must extend its facilities to

<sup>34</sup> See 29 CAR. II, c. 3, § 23: "Provided always, that notwithstanding this Act, any soldier being in actual military service, . . . may dispose of his movables, wages, and personal estate, as he or they might have done before the making of this Act."

<sup>35</sup> See 1 VICT. c. 26, § 7.

<sup>36</sup> See 1 VICT. c. 26, § 11: "Provided always, and be it further enacted, that any soldier being in actual military service, . . . may dispose of his personal estate as he might have done before the making of this Act."

It is to be noted that the language of this section does not so clearly qualify *all* the provisions of the Act as the corresponding section of the Statute of Frauds.

<sup>37</sup> See *In re Limond*, [1915], 2 Ch. 240, 248.

<sup>38</sup> FOURTH REPORT OF THE REAL PROPERTY COMMISSIONERS, 22, 23 (1833).

<sup>39</sup> *Goodell v. Pike*, 40 Vt. 319 (1867).

<sup>40</sup> See *Drummond v. Parish*, 3 Curt. Eccl. 522, 531 (1843). It appears from the preface to the life of Sir Leoline Jenkins, who was instrumental in preparing the Statute of Frauds, that he took considerable credit to himself for having secured to English soldiers the same privilege in bequeathing their property as that enjoyed by the Roman soldiers.

<sup>41</sup> See MUIRHEAD, ROMAN LAW (2 ed.), 322. This was later extended by Hadrian to those who had obtained an honorable discharge. *Ibid*.

<sup>42</sup> See INST. JUST., Lib. II, tit. XI. "*Sed testari quidem, etsi filii familiarum sunt, propter militiam conceduntur, jure tamen communi, eadem observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum proxime exposuimus.*"

<sup>43</sup> This result may well be deemed undesirable, but the remedy, of course, is with Parliament.



meet reasonable demands. The interests of the public generally, rather than those of the company, are the deciding factor in determining what extensions should be made. The company must perform that which is, under all the circumstances, a reasonable service.<sup>1</sup>

A company, engaged in the business of distributing water for irrigation purposes, is a public service company at common law and is subject to all the duties of public service.<sup>2</sup> But where there are natural limitations on its supply, it is compelled to take on consumers only up to the capacity of its system. Consumers of the normal supply are primary consumers and are equal in right; if there is any deficiency, the primary consumers must pro-rate.<sup>3</sup> When the normal supply is fully devoted to primary consumers, additional or secondary consumers may demand any surplus,<sup>4</sup> but cannot be admitted to the normal supply,<sup>5</sup> even though more favorably situated than a primary consumer.<sup>6</sup> A primary consumer may enjoin the company from admitting an additional consumer to the normal supply, when it is already devoted to primary consumers.<sup>7</sup> This is worked out under the general rule that a public service company must furnish the public a reasonable service equally and without discrimination.<sup>8</sup>

It is difficult to see why the same results should not be reached in the case of a company distributing natural gas.<sup>9</sup> Such a company, like the irrigation company, is a public service company,<sup>10</sup> engaged in the distribution of an article, upon the supply of which there are natural limitations. As in the irrigation cases, the interesting problem arises where a

<sup>1</sup> *Birmingham Water Works Co. v. Birmingham*, 176 Ala. 301, 58 So. 204 (1912); *Root v. New Britain Gaslight Co.*, 91 Conn. 134, 99 Atl. 559 (1916). Cf. *Covington, etc. R. Co. v. Sandford*, 164 U. S. 578, 596 (1896).

<sup>2</sup> *San Diego Land & Town Co. v. Sharp*, 97 Fed. 394 (C. C. A.) (1899); *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22 (1900); *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 Pac. 598 (1904); *Salt River Valley Canal Co. v. Nelssen*, 10 Ariz. 9, 85 Pac. 117 (1906); *Crow v. San Joaquin Irrigation Co.*, 130 Cal. 309, 62 Pac. 562, 1058 (1900); *Wheeler v. Northern Colo. Irrigating Co.*, 10 Colo. 582, 17 Pac. 487 (1888); *Colorado Canal Co. v. McFarland and Southwell*, 50 Tex. Civ. App. 92, 109 S. W. 435 (1908).

<sup>3</sup> *Holman v. Pleasant Grove City*, 8 Utah, 78, 30 Pac. 72 (1892); *Souther v. San Diego Flume Co.*, 121 Fed. 347 (C. C. A.) (1903). Cf. *Larimer & Weld Irrigation Co. v. Wyatt*, 23 Colo. 480, 48 Pac. 528 (1897).

<sup>4</sup> *Green Valley Ditch Co. v. Schneider*, 50 Colo. 606, 115 Pac. 705 (1911).

<sup>5</sup> *Gerber v. Nampa & Meridian Irr. Dist.*, 16 Idaho, 1, 100 Pac. 80 (1908). See *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 450, 76 Pac. 598, 601 (1904).

<sup>6</sup> *San Diego Land & Town Co. v. Sharpe*, 97 Fed. 394 (C. C. A.) (1899).

<sup>7</sup> *Wyatt v. Larimer & Weld Irrigation Co.*, 18 Colo. 298, 33 Pac. 144 (1893); *Lanning v. Osborne*, 76 Fed. 319 (C. C. A.) (1896), (affirmed, *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22). *Contra*, *Bank of California v. Fresno Canal & Irrigation Co.*, 53 Cal. 201 (1878).

<sup>8</sup> See 2 WIEL, *WATER RIGHTS* (3 ed.), §§ 1279-87.

<sup>9</sup> In the irrigation cases the courts talk about "appropriation" and "water rights," and of course the results in those cases were originally reached through water law combined with the law of public-service companies. However, it is submitted that, where there is a company supplying a natural product through conduits to a large number of consumers, the problem is, in substance, the same, whether that natural product be water or gas. For a concise, non-technical presentation of the different doctrines of water law in this country, see Pound, "Irrigation Law," 5 AMER. L. & PROC. 363.

<sup>10</sup> *Bloomfield, etc. Natural Gaslight Co. v. Richardson*, 63 Barb. 437 (1872); *Charleston Natural Gas Co. v. Low*, 52 W. Va. 662, 44 S. E. 410 (1901); *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17 (1897).

connection is demanded after the company has already contracted up to its normal supply; but the only court which has passed squarely upon this question has reached a result opposite to that in the irrigation cases. In *State ex rel. Wood v. Consumers Gas Trust Co.*,<sup>11</sup> it was held that a new consumer must be "permitted to share in the quantity of gas the company has at its command, whatever that may be, on the same terms that others are permitted to use it." This decision has been the subject of criticism.<sup>12</sup> The authorities cited by the court do not support the decision. There are two elements in the duty of the company: (1) reasonable service, (2) no discrimination. The court evidently concentrated its attention on the latter and lost sight of the former.<sup>13</sup> As in the irrigation cases, it is a reasonable service to the primary consumers to limit the number of consumers to the available supply of gas. Any other rule is thoroughly unsatisfactory. Such discrimination as there is under this rule is fully justified under the circumstances. It is not discrimination in itself that is objectionable, but only discrimination which is not based on any reason. Suppose there is a temporary car shortage. There are only ten cars available. A hundred shippers apply for cars, and each must have at least one car to make it worth while. Should the carrier be compelled to say to them, "You can have one-tenth of a car each"? Rather, the first ten applicants should get the cars. Similarly, if there is a natural gas company having only a hundred units of gas normally available, the first hundred applicants should be connected and these primary consumers should have equal rights;<sup>14</sup> but they should not be subjected to unreasonable diminution by further connections. If the company is compelled to connect all who apply, the service may become totally worthless to all consumers. Such a result is hardly consonant with the primary duty of the company to furnish a reasonable service.

It is not suggested that the natural gas company may, in the first instance, discriminate between patrons. It cannot give its directors or stockholders, as such, a preference over the general public,<sup>15</sup> nor can it undertake to give all its supply to one consumer.<sup>16</sup> This is further

<sup>11</sup> 157 Ind. 345, 61 N. E. 674 (1901). This case was followed in *Indiana Natural Gas Co. v. State ex rel. Armstrong*, 162 Ind. 690, 71 N. E. 133 (1904). See 15 HARV. L. REV. 571.

<sup>12</sup> "A rule which may result in satisfactory service to none, not even to the applicant in question, is hardly consistent with public service to all." 1 WYMAN, PUBLIC SERVICE COMPANIES, § 653.

<sup>13</sup> A similar error was made in *United Fuel Gas Co. v. Public Service Commission*, 73 W. Va. 571, 80 S. E. 931 (1914). The natural gas company had established a rate of 23 cents a thousand cubic feet for its "no contract" consumers, while charging those who signed a five-year exclusive contract, 22 cents. The court held that this was undue discrimination. It would seem that there are essentially two different services performed, and the authorities seem to allow a discrimination in rates based on such differences in service. *Graver v. Edison Electric Illuminating Co.*, 126 App. Div. 371, 110 N. Y. Supp. 603 (1908); *Steinman v. Edison Electric Illuminating Co.*, 43 Pa. Super. Ct. 77 (1910); *Beck v. Indianapolis Light & Power Co.*, 36 Ind. App. 600, 76 N. E. 312 (1905); *Souther v. Gloucester*, 187 Mass. 552, 73 N. E. 558 (1905); *St. Louis Brewing Ass'n v. St. Louis*, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911 (1896).

<sup>14</sup> *Fairchance Window Glass Co. v. Star Gas Co.*, 66 Leg. Int. (Pa.) 409 (1908).

<sup>15</sup> *Crescent Steel Co. v. Equitable Gas Co.*, 23 Pitts. Leg. J. (N. S.) 316 (1892).

<sup>16</sup> "The defendant [natural gas] companies are public service corporations, having



evidence of the similarity between the natural gas and the irrigation companies. The irrigation company cannot grant exclusive rights,<sup>17</sup> nor undertake to give its entire supply to one consumer.<sup>18</sup>

A recent case<sup>19</sup> has arisen, where, although the supply of gas was normally more than adequate, the company was unable to supply the abnormal demands made by the consumers during a period of fifteen or twenty days of extremely cold weather. The court, considering the short duration of the period of deficiency and without deciding the question presented in *State ex rel. Wood v. Consumers Gas Trust Co.*,<sup>20</sup> ordered the company to give to the relator the connection which he sought.<sup>21</sup> This result seems sound. The real dispute in these cases is between the old consumers and the new one. Here the old consumers were demanding an unusual amount of gas for this short period. As between them and the new consumer, this was an unreasonable demand. It is only where the new consumer is cutting into the normal supply of the old one that the result in *State ex rel. Wood v. Consumers Gas Trust Co.*<sup>22</sup> becomes objectionable.

## RECENT CASES

**BAILMENTS — BAILEE AND THIRD PERSONS — RIGHT OF BAILEE TO RECOVER FULL DAMAGES FROM SURETY OF CONVERTER.** — The defendant was surety for \$2,000 on a postal employee's bond which was conditioned on his accounting for all property which came into his hands as clerk. The employee stole \$15,000. The government, though its own liability to the owner was limited to \$50, sued for the full amount of the bond. *Held*, that the govern-

the right of eminent domain, bound to furnish gas to consumers along their lines and within their respective districts . . . under ordinary rules of law applying to public service corporations in general. From the very nature of the source of supply this cannot mean that they are bound to furnish all consumers along their lines with all the gas they might require, but only that they shall furnish whatever gas they have to all who desire to become consumers along their lines, with a reasonable degree of equality. While it has not yet been held that a contract by which a natural gas company would undertake to give all its supply to one consumer is void as against public policy, such a contract certainly tends to encourage, if not to compel, the gas company to default in its duties to the general public, and is therefore not to be favored." *Per* Shafer, J., in *Clairton Steel Co. v. Manufacturers Light & Heat Co.*, 240 Pa. 427, 438, 87 Atl. 998, 1002 (1913).

<sup>17</sup> *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, 106 Pac. 404 (1909.)

<sup>18</sup> *Sammons v. Kearney Irrigation Co.*, 77 Neb. 580, 110 N. W. 308 (1906).

<sup>19</sup> *Park Abbott Realty Co. v. Iroquois Natural Gas Co.*, 168 N. Y. Supp. 673 (1918). See Recent Cases, page 000.

<sup>20</sup> 157 Ind. 345, 61 N. E. 674 (1901).

<sup>21</sup> The relator applied for the connection before building the house and before the period of shortage. Upon the happening of the shortage, the Public Service Commission ordered the gas company to make no more connections, and, relying on this order, the company refused the connection to the relator when he completed his house. The court, in making its decision, considers the element of estoppel. However, it is evident that such consideration can have no weight. Estoppel could at best give the relator a merely private right, which could not be the foundation of a writ of mandamus.

<sup>22</sup> *Supra*, note 20.

ment can recover. *United States Fidelity & Guaranty Co. v. United States*, 246 Fed. 433.

Grounded on the old English property conception of possession being of primary importance, the rule that a bailee may recover entire damages for injuries to a bailed article irrespective of his liability over, is well established. *The Winkfield*, [1902] P. 42; *Ullman v. Barnard*, 7 Gray (Mass.), 554; *Chamberlain v. West*, 37 Minn. 54; *Union Pacific Co. v. Meyer*, 76 Neb. 549, 107 N. W. 793. See HOLMES, THE COMMON LAW, c. 5. If the bailee may recover from the employee who converts property intrusted to him, it seems clear he should be able to recover from the surety on a bond which called for the faithful paying over by the employee of any property he might receive. *United States v. Griswold*, 9 Ariz. 314, 80 Pac. 317; *United States v. American Surety Co.* 155 Fed. 941; *Gibson v. United States*, 208 Fed. 534. After a bailee has made full recovery he is responsible to the bailor for all he has recovered above the value of his own interest. See SEDGWICK, DAMAGES, 9 ed., § 76. It would seem that after the government has recovered from the wrongdoer or his surety, the bailor should be allowed to sue the government in the Court of Claims and should not be dependent merely on the government's benevolence. See 24 STAT. AT L. 505.

COMMON CARRIERS — REASONABLE SERVICE — DISCRIMINATION. — On the application of certain "snow bird" coal miners, whose mines were only temporarily opened because of the shortage of coal and the resultant high prices, the Public Service Commission of West Virginia ruled that a regulation of the applicant railroad, providing for the furnishing of open-top cars only to miners who had tippie-loaders, a device for speedy loading of cars, which could be used only with open-top cars, was unjustly discriminatory, and ordered that these cars be provided to all miners applying in proportion to the capacity of their mines. The exceptional demand for cars created a shortage, and the railroad was supplying only box cars to the small mines. *Held*, that the order of the Commission be annulled. *Baltimore, etc. R. Co. v. Public Service Commission*, 94 S. E. 545 (W. Va.).

The common carrier is under a duty to provide a sufficient number of cars for any ordinary exigency; but it is not bound to provide cars for extraordinary and unforeseeable emergencies. *Shoptaugh v. St. Louis, etc. R. Co.*, 147 Mo. App. 8, 126 S. W. 752; *Wall Milling Co. v. Atchison, etc. Ry. Co.*, 82 Kan. 256, 108 Pac. 137. See *Anderson v. Chicago, etc. R. Co.* 88 Neb. 430, 437, 129 N. W. 1008, 1011. But it is the duty of the carrier to provide the facilities which it possesses to all who make demand, without discrimination. *Chicago, etc. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451; *Sonman Shaft Coal Co. v. Pennsylvania R. Co.*, 241 Pa. 487, 88 Atl. 746. This question of discrimination, however, must be tested by what is reasonable. If the discrimination is not unjust, then the carrier may employ it without any violation of the principle of equality. *United States ex rel. Pitcairn Coal Co. v. Baltimore, etc. R. Co.*, 154 Fed. 108; *Logan Coal Co. v. Pennsylvania R. Co.*, 154 Fed. 497; *Gulf Compress Co. v. Alabama Great Southern R. Co.*, 100 Miss. 582, 56 So. 666. And the regulation in question appears clearly reasonable under the circumstances. It has even been held that a railroad is justified in refusing cars to any except tippie-loaders, if a shortage of cars justifies such policy, and no discrimination is practised between mine-owners similarly circumstanced. *Harp v. Choctaw, etc. R. Co.*, 125 Fed. 445; *Thompson v. Pennsylvania R. Co.*, 10 I. C. C. 640. The sole question then remaining is whether the carrier is providing a reasonable service to the public and the mine-owners. And, since the answer to this question must depend on the foreseeability of the emergency, and since the railroad is meeting the situation as well as its equipment will permit, it would seem that the service provided is all that could reasonably be expected. *Pennsylvania*



*R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121; *Udall Milling Co. v. Atchison, etc. Ry. Co.*, *supra*; *Cumbie v. St. Louis, etc. Ry. Co.*, 105 Ark. 415, 151 S. W. 240. See *Illinois Central R. Co. v. River & Rail Coal & Coke Co.*, 150 Ky. 489, 493, 150 S. W. 641, 643. Hence the decision seems clearly sound.

DESCENT AND DISTRIBUTION — WHAT CONSTITUTES ADVANCEMENT. — A court of equity ordered that payments from the surplus income of a lunatic's estate be made from time to time to next of kin whom the lunatic when sane was in the habit of assisting financially. *Held*, that these payments were gifts. *In re The Farmers' Loan and Trust Co., Administrator*, 58 N. Y. L. J. 1565.

Whether or not a payment by an intestate during his lifetime is to be treated as an advancement rests on the intent of the intestate. *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414. In the case of a payment to a child of the intestate, or to a person to whom the intestate stands *in loco parentis*, the presumption is in favor of an advancement. *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350. A court of equity in ordering payments to be made from the estate of a lunatic acts not on any supposed interest in the property on the part of the beneficiaries but upon the principle that the court will act with reference to the lunatic, and for his benefit, as it is probable the lunatic himself would have acted, if of sound mind. *Ex parte Whitbread*, 2 Mer. 99. On these principles the present decision is clearly sound.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — INCIDENTAL RESTRAINT OF MARRIAGE. — Plaintiff's intestate promised to transfer his entire property to defendant in case the latter managed the estate until the death of intestate and remained unmarried during that period. In proceedings to settle the estate, defendant filed a cross bill for performance of this agreement. *Held*, that the agreement is valid, and that defendant is entitled to the relief sought. *Fletcher v. Osborn*, 118 N. E. 446 (Ill.).

In a majority of the cases raising similar considerations, the decisions are in accord with the principal case. *King v. King*, 63 Ohio St. 363, 59 N. E. 111. *Crowder-Jones v. Sullivan*, 9 Ont. L. R. 27. *Contra*, *Lowe v. Doremus*, 84 N. J. L. 658, 87 Atl. 459. There is nothing intrinsically illegal in abstaining from marriage, but public policy does not favor agreements tending to a restraint thereof. The principal case marks out what is conceived to be a reasonable limitation of this doctrine, namely, that the contract is not vitiated where the restraint is merely incidental to the main object thereof. It is generally held that this rule is not applicable to the analogous cases of contracts incidentally effecting a restraint of trade. *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299; *Saratoga Bank v. King*, 44 N. Y. 87. But the distinction in result is probably sound, as there is a stronger policy against restraint in the latter type of case. See 14 HARV. L. REV. 614.

INJUNCTION — ACTS RESTRAINED — PUBLICATION OF PERSONAL LETTERS. — The defendant had obtained personal letters written by one of the plaintiffs to the other, and had deposited the letters with a court in a divorce proceeding against the writer. This proceeding being concluded she applied to the court for the letters for the purpose of publishing them. The plaintiff brought a bill to enjoin the giving of the letters to her and the publication of them by her. *Held*, that the injunction be granted, to protect the property right of the plaintiffs in the letters. *King v. King*, 168 Pac. 730 (Wyo.).

Courts of equity since the time of Lord Eldon have not hesitated to enjoin the recipient of private letters, or third parties, from publishing them. The jurisdiction of equity was based, by Lord Eldon, upon the securing of the property interest of the writer in his personal letters. *Gee v. Pritchard*, 2 Swanst. 402. Property in personal letters, which are without historical, literary, or

autographical value is, however, such an unsubstantial and trivial interest that equity would dismiss the suit as vexatious, were it not for the interest of personality involved. The real interest protected by the court is not a property interest but the interest of personality of the writer. See Roscoe Pound, "Equitable Relief Against Defamation and Injuries to Personality," 29 HARV. L. REV. 640, 643, 671. The courts have, however, almost universally put the jurisdiction of equity on the basis of protection of property interests. *Woolsey Judd*, 4 Duer (N. Y.) 379; *Baker v. Libbie*, 210 Mass. 599, 97 N. E. 109; *Labouchere v. Hess*, 77 L. T. (N. S.) 559. See *Folsom v. Marsh*, 2 Story (U. S. Dist. Ct.) 100, 110. It is only by *dicta* that a few courts have asserted that equity will protect the rights of personality in such cases, apart from any property right. See *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 919, 67 Atl. 97, 100; *Itzkowitz v. Whitaker*, 115 La. 479, 480; 39 So. 499, 500, 117 La. 708, 710, 42 So. 228, 229; *Munden v. Harris*, 153 Mo. App. 652, 659, 134 S. W. 1076, 1079.

INTERSTATE COMMERCE — CONTROL BY STATE — POLICE POWER OF STATE — INTEREST OF PUBLIC HEALTH — PROHIBITION OF CONDENSED MILK MADE OF SKIMMED MILK. — The plaintiffs, manufacturers of a compound of evaporated skimmed milk and vegetable fat, a wholesome product, properly labeled under the Federal Pure Food Act, sought to enjoin the enforcement of an Ohio statute prohibiting the manufacture and sale of condensed milk made from skimmed milk, on the ground that it was unconstitutional. (OHIO GEN. CODE, § 12725.) The milk was manufactured and shipped from without the state into Ohio for sale. *Held*, that relief be denied. *Hebe Co. v. Calvert*, 246 Fed. 711.

It is clear that a state in the exercise of its police power may enact laws which will be valid, though they indirectly affect interstate commerce. *Savage v. Jones*, 225 U. S. 501; *Hennington v. Georgia*, 163 U. S. 299. A statute, however, palpably directed at evading the commerce clause is objectionable. *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446. A state regulation must not exceed the exigencies of the case. *Railroad Co. v. Husen*, 95 U. S. 465. Nor may it render unsalable articles of interstate commerce. *Collins v. New Hampshire*, 171 U. S. 30. The question in the particular case must be: Is the interference with interstate commerce unreasonable? This involves balancing the importance and necessity of police regulation on the one hand and the extent of encroachment on interstate commerce on the other. Police power may justify a statute as due process under the Fourteenth Amendment. *Powell v. Pennsylvania*, 127 U. S. 678. But only a necessary exercise of that power will justify interference with interstate commerce. *Schollenberger v. Pennsylvania*, 171 U. S. 1. A drastic state law prohibiting the sale of oleomargarine, so colored as to resemble butter, has been upheld by the Supreme Court as a legitimate police provision against fraud. *Plumley v. Massachusetts*, 155 U. S. 461. The principal case follows that decision and sanctions a statute equally as paternalistic, arguing that despite the proper label, some one may be deceived.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — ORDER OF THE COMMISSION INOPERATIVE THROUGH UNCERTAINTY. — An Illinois statute prohibited any intra-state passenger rate in excess of two cents per mile. Certain carriers having raised the interstate rate to 2.4 cents per mile, the Interstate Commerce Commission found this created a discrimination between intra-state and interstate shipments, and ordered the railroads to desist from "collecting passenger fares between St. Louis, Missouri, and points in Illinois upon a basis higher than 2.4 cents per mile, . . . which basis was found reasonable . . ., or higher than the fares contemporaneously exacted between East St. Louis, Illinois, and the same Illinois points." The carriers raised



their intra-state rates and sued to enjoin interference by the Illinois state authorities. *Held*, that the uncertainty in the order as to the points to which it is applicable renders it inoperative as to intra-state rates. *Ill. Cent. R. R. Co. v. Public Utilities Com. of Illinois*, 38 Sup. Ct. Rep. 170.

An order of the commission which is so general as to amount merely to a restatement of the legal duties of the carrier or of the prohibitions of the Interstate Commerce Act will not be enforced by the courts. *Farmers' Loan & Trust Co. v. Northern Pacific Ry. Co.*, 83 Fed. 249; *Southern Pacific Co. v. Colo. Fuel & Iron Co.*, 101 Fed. 779, aff'd in 22 Sup. Ct. Rep. 954. An order may, however, like a decree of court, under some circumstances, merely prescribe the end to be attained, and leave a wide discretion to the carrier as to the means of effecting that end. *Houston, etc. Ry. Co. v. United States*, 221 U. S. 1; *Carpenter v. Easton & Amboy R. Co.*, 28 N. J. Eq. 390. Thus a carrier may be ordered to cease an unlawful discrimination arising from the maintenance of lower rates to one point than to another similarly situated, allowing the carrier the option of raising the former rates or lowering the latter, or changing both. *Houston, etc. Ry. Co. v. United States*, *supra*; *Adams Express Co. v. South Dakota*, 244 U. S. 617. And although an order is in itself two indefinite to be enforced, if it can be made sufficiently definite for intelligent performance by reference to the report of the commission it will be given effect by the courts. *Adams Express Co. v. South Dakota*, *supra*. Where the rates producing the discrimination are wholly interstate, a remedial order of the commission might be held valid, although it failed to specify the precise points between which the new schedule should be operative, leaving it to the courts or the commission to make any subsequent limitations found proper. See *Behlmer v. Louisville etc. R. Co.*, 83 Fed. 898, affirmed in 175 U. S. 648; *Philadelphia, etc. Ry. Co. v. United States*, 219 Fed. 988. Where, however, the order also permits a readjustment of intra-state rates, a conflict with state authority is encountered. The power of the Interstate Commerce Commission to effect intra-state rates extends only so far as it is necessary to prevent discrimination against interstate commerce, or to remove any other direct burden on such commerce. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 145; *Houston, etc. Ry. Co. v. United States (Shreveport Rate Case)*, 234 U. S. 342. Therefore the commission must find in the case of each intra-state rate altered that it is a burden on interstate commerce, and may not leave the territory and points to which the order applies uncertain and at the discretion of the carrier, because there is a general discrimination against interstate commerce. See *American Express Co. v. Caldwell*, 244 U. S. 617, 625.

**LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PETITIONS TO A PUBLIC OFFICER.** — A petition against renewing the plaintiff's license was widely circulated in a community to obtain signatures, charging the plaintiff in obviously exaggerated phrases with keeping a disorderly saloon. This occurred six months before plaintiff's license would terminate; the plaintiff had not requested a renewal. As a petition for revocation it did not conform to the statutory requirements. *Held*, on demurrer, that the communication was not privileged. *Koehler v. Dubose*, 200 S. W. 238 (Texas).

In certain situations it seems the better policy not to place upon the petitioner the risk of having spirited language subsequently construed as evidence of actual malice, and therefore in those cases the law has allowed an absolute privilege. Thus petitions to the legislature pertinent to matters before the proceeding are so privileged. See *Cook v. Hill*, 3 Sandf. (N. Y.) 341, 350. It has been held that a petition to the governor for the pardon of a criminal is absolutely privileged, on the ground that it is in the nature of a paper filed in a judicial proceeding. *Connelley v. Blanton*, 163 S. W. 404 (Texas). In most cases, however, petitions to public officers are only qualifiedly privileged, *i. e.*,

privileged unless actual malice is shown. A communication to a proper public officer as to a suspicion of crime is so regarded. *Mueller v. Radebaugh*, 79 Kan. 306, 99 Pac. 612. The same is true of complaints made to public officers concerning the alleged misconduct of a subordinate. *Tyree v. Harrison*, 100 Va. 540, 42 S. E. 295; *Howarth v. Barlow*, 99 N. Y. Supp. 457. A petition to the proper official against the issuing of a teacher's license is qualifiedly privileged. *Wieman v. Mabee*, 45 Mich. 484. Cf. *Bodwell v. Osgood*, 3 Pick. (Mass.) 379. Similarly, a communication to the proper official as to alleged misconduct of a saloon proprietor enjoys a qualified privilege. *Coloney v. Farrow*, 39 N. Y. Supp. 460. This is so even though the petition has been circulated for signatures. *Vanderzee v. McGregor*, 12 Wend. (N. Y.) 545. The communication, however, must be made at a reasonable time and in a reasonable manner. This was not done in the principal case. See *Werner v. Ascher*, 86 Wis. 349, 56 N. W. 869.

MUNICIPAL CORPORATIONS — TERRITORIAL LIMITS — *QUO WARRANTO*. — As the result of an accident upon a highway, the question arose whether the highway was within the jurisdiction of a certain city or an adjoining township. Both deny jurisdiction over the disputed tract of land. The state brought *quo warranto* against the city to determine its true boundary. The city contended that *quo warranto* would not lie to correct its conduct in confining its territorial jurisdiction within too narrow limits. Held, that *quo warranto* was the proper proceeding. *State ex rel. Ramsey v. City of Hutchinson*, 169 Pac. 1140 (Kan.).

*Quo warranto* is appropriate to test the legality of the exercise of a public franchise. It is held the proper proceeding to determine the right of a municipal corporation to exercise jurisdiction over added territory. *East Dallas v. State*, 73 Texas, 370, 11 S. W. 1030; *People v. City of Peoria*, 166 Ill. 517, 46 N. E. 1075. But it is difficult to see how the writ can be maintained where as in the principal case the converse situation is involved. As there has been no usurpation of a franchise, the writ is unavailing. *Attorney-General v. City of Salem*, 103 Mass. 138. The fact that two suits may be necessary to fix liability for the accident on either the city or the township, shows the need of procedural reforms, permitting joinder in the alternative, but it does not justify torturing *quo warranto* to serve an unintended purpose.

PATENTS — NATURE AND REQUISITES FOR PATENT — EFFECT OF SECRET USE OF DEVICE ON RIGHT TO PATENT. — The plaintiff, who had invented a process for the manufacture of glass, and who, having used it for ten years in secret, placing the product on public sale, had patented the process when he could no longer keep it secret, sued the defendant for infringement of his patent. The patent law provides that in such a suit it should be a defense that the invention had been "abandoned to the public" before the application for the patent. (REV. STAT. § 4920.) Held, that the plaintiff could not recover, since he had abandoned the invention to the public. *Macbeth-Evans Glass Co. v. General Electric Co.*, 246 Fed. 695.

The patent laws specify no time after the invention within which a patent must be applied for. Mere delay in applying for a patent, where there are no intervening rights, does not forfeit the right to secure it. *Bates v. Coe*, 98 U. S. 31. It is difficult to see how the use of a process in secret, with the continuing purpose of applying for a patent as soon as the secret can no longer be kept, is an abandonment of the process, and an abandonment to the public. The decision can, however, be supported on another ground. The purpose of the patent laws, as set forth in the United States Constitution, is "to promote the progress of science and useful arts by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries." U. S. CONST.,



ART. I, § 8. The patent law limits the grant of a patent to a term of seventeen years. See REV. STAT. § 4884. It requires that the application shall contain a full description of the invention so that any one may use it after the patent expires. See REV. STAT. § 4888. If an inventor postpones his application for a patent, profiting by his invention in the meantime, in order to extend the time of his monopoly beyond the period provided for by the patent law, it is clear that it is not within the policy of patent legislation to aid him in carrying out this purpose by granting him a patent when he can no longer keep the invention secret. See *Pennock v. Dialogue*, 2 Peters (U. S.), 1, 19; *Kendall v. Winsor*, 21 How. (U. S.) 322, 328. See also 1 BLACKSTONE, COMMENTARIES, 87. Compare with this the case of the prolonged use of a device for purpose of experimentation and improvement, which is held not to forfeit the right to a patent. *Kendall v. Winsor*, *supra*; *Elizabeth v. Pavement Co.*, 97 U. S. 126.

PLEADING — PARTIES — JOINDER — STATUTORY PROVISION FOR JOINDER OF DEFENDANT IN THE ALTERNATIVE. — A Rhode Island statute provides that "whenever in any action the plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with a view of ascertaining which, if either, is liable." Plaintiff joined the X company and the Y company in an action for damages for personal injuries to his wife, suffered in a collision between the X company's car, on which she was a passenger, and the Y company's truck. Negligent management by the servants of each defendant is alleged to have caused the collision. The X company demurred on the ground of improper joinder. *Held*, that the demurrer be sustained. *Beshavian v. Rhode Island Co.*, 102 Atl. 807 (R. I.).

The origin of this statute is found in the English Judicature Act of 1873 and in the Supreme Court of Judicature rules. See 36 & 37 VICT. c. 66; SUPREME COURT OF JUDICATURE RULES, Order XVI, Rule 7. Therefore the Rhode Island court went to the English decisions for the construction of their statute. See *Phoenix Iron Foundry v. Lockwood*, 21 R. I. 556, 45 Atl. 546; *Mason v. Copeland Co.*, 27 R. I. 232, 61 Atl. 650. The English rule as it read when Rhode Island adopted its statute was construed not to permit joinder of causes of action. *Sadler v. Great Western Ry. Co.*, [1896] A. C. 450. The immediate result of this decision was a change in Order XVI so as to permit joinder of causes of action, provided they grew out of the same transaction or series of transactions. See THE ANNUAL PRACTICE, 1916, Rules, Order XVI. The inference seems clear that the court had misinterpreted the purpose of the rules, and that the change was made to secure that purpose by removing the limitation imposed by the court. Generally, since the change, the English courts permit joinder of causes of action under Order XVI. *Frankenberg v. Great Western Horseless Carriage Co.*, [1900] 1 Q. B. 504; *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264; *Congeladas v. Houlder Bros. & Co.*, [1910] 2 K. B. 354. *Contra*, *Thompson v. London County Council*, [1899], 1 Q. B. 840. Therefore, if the Rhode Island court had looked at the English law as it had developed, it should have found that the intent was to permit joinder of causes of action under Order XVI. By the decision in the principal case, however, the Rhode Island statute has been denied all effect, for the rule now is that tortfeasors can be joined only if they are joint tortfeasors, which was the common-law rule. See DICEY, PARTIES, Rule 98. It is submitted that no court is justified in thus denying all effect to a statute that is intended to accomplish an end possible of accomplishment. See Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383.

POLICE POWER — REGULATION OF PROFESSIONS — POWER TO LICENSE CEMENT CONTRACTORS. — A municipal ordinance provided that no person

should engage in the cement-contracting business without a license from the city council and without filing a bond with the city guaranteeing the proper construction of work undertaken by the licensee. *Held*, that the ordinance is unconstitutional. *State ex rel. Sampson v. City of Sheridan*, 170 Pac. 1 (Wyo.).

The proper exercise of the police power permits regulation in the interest of the peace, comfort, convenience, and prosperity of the community. See *The Minnesota Rate Cases*, 230 U. S. 352, 404. In the interest of the prosperity of the community certain lines of business endeavor may be regulated with a view to protecting the people thereof against their own improvidence and bad judgment. Thus dealers in investment securities may be licensed under the supervision of the state. *Hall v. Geiger-Jones Co.*, 42 U. S. 539. Similarly the practice of encouraging retail sales by means of "trading stamps" may be regulated. *Rast v. Van Deeman & Lewis*, 240 U. S. 342. But the rule of these cases does not go so far as to permit indiscriminate regulation of any business or occupation as such. Power to regulate should turn largely on the actual existence of the evil sought to be remedied and the magnitude thereof. Of necessity this is an elastic standard. Thus on the validity of license restrictions imposed on itinerant merchants there is a decision each way. *State v. Conlon*, 65 Conn. 478, 33 Atl. 519; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515. Under this principle there is no occasion to quarrel with the decision in the present case.

**PUBLIC LANDS — BONÂ FIDE PURCHASER OF CERTIFICATE OF ALLOTMENT — RIGHTS TO IMPROVEMENTS.** — The issue of a certificate of allotment of lands under the Choctaw-Chickasaw Agreement was procured by fraud. The certificate was then sold to a *bonâ fide* purchaser. Upon discovery of the fraud the certificate was held for cancellation and the land allotted to others. The *bonâ fide* purchaser seeks by mandamus to have a patent issued to him. *Held*, that the writ should not be granted. *Duncan Townsite Co. v. Lane*, 38 Sup. Ct. Rep. 99.

A *bonâ fide* purchaser of a fraudulently obtained certificate of allotment of public lands who later and in good faith secures a patent is protected. *United States v. Clark*, 200 U. S. 601; *People v. Swift*, 96 Cal. 165, 31 Pac. 16. See 19 HARV. L. REV. 542. But if the purchaser has not secured the patent, and has only the certificate, he has merely an equity and is not protected against the legal owner. *Hawley v. Diller*, 178 U. S. 476. The principal case suggests the question of whether a *bonâ fide* purchaser of a fraudulently secured certificate, who in good faith improves the premises but fails to secure legal title, is entitled to any relief. The general rule is that if a person honestly believing himself rightfully in possession makes improvements he may set off the value of such improvements in any equitable action by the true owner. *Green v. Biddle*, 8 Wheat. (U. S.) 1. The theory is that the true owner must do equity if he seeks the aid of equity. But affirmative action on the motion of one who makes such improvements is denied. *Putnam v. Ritchie*, 6 Paige (N. Y.) 390. The theory is that whatever is attached to the land becomes a part of the land and belongs to the owner. The result is that justice is secured by invoking a technical rule in the one case, and that there is a failure of justice for the same reason in the other. This seems a desirable situation for an application of the principle of unjust enrichment. *Bright v. Boyd*, 1 Story (U. S. Dist. Ct.), 478, 2 Story (U. S. Dist. Ct.), 605. See 2 STORY, EQUITY JURISPRUDENCE, § 799 b (n.).

**PUBLIC SERVICE COMPANIES — EXCUSES FOR NOT SERVING — FAILURE OF SUPPLY.** — Relator applied for a connection to the respondent natural gas company. Before time to make the connection, there was a period of fifteen or twenty days of extremely cold weather; and, although the supply of gas



had for years been fully adequate, it was not sufficient to fill the abnormal demands made during this period. The Public Service Commission ordered the respondent to connect no more consumers, and pursuant to this order, the respondent refused the relator its connection. *Held*, that a writ of mandamus should be granted compelling the respondent to give the relator its connection. *Park Abbott Realty Co. v. Iroquois Natural Gas Co.*, 168 N. Y. Supp. 673.

For a discussion of this case, see Notes, page 1028.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — WHAT ARE REASONABLE RATES AFTER TERMINATION OF FRANCHISE. — After the expiration of a water company's franchise the city passed an ordinance fixing the rates, to be charged by it, providing, *inter alia*, for annual hydrant rentals which were to include such hydrants as the Council might thereafter require. The company sued to have the city enjoined from enforcing this ordinance on the ground that the rates fixed were confiscatory. *Held*, that in determining the reasonableness of the rates the plant was to be valued as a plant in use, and the item of "going value" was to be considered. *City and County of Denver v. Denver Union Water Co.*, 38 Sup. Ct. Rep. 278.

The state has of course the right to regulate the rates of public service companies. *Spring Valley Waterworks v. Schottler*, 110 U. S. 347. In order not to constitute a taking of property without due process these rates must allow a reasonable return on the value of the company's plant. *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249. The usual method of valuing the plant is to find the cost of replacement, deduct the depreciation, and add an item for "going concern value." The latter is the additional value of the plant over its value as an assembled plant due to the fact that it is in actual operation. In a rate case at least the fact that the company is or is not making profits is not to be considered as an item of "going value." *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; *National Waterworks Co. v. Kansas City*, 62 Fed. 853; *Spring Valley Waterworks v. San Francisco*, 192 Fed. 137. In the principal case the company's franchise had expired, and as between the parties the city had a right to compel the company to remove its pipes within a reasonable time. *Laighton v. Carthage*, 175 Fed. 145. It was argued for the city that the plant was therefore to be valued as junk and the item for going value was erroneous. But it would seem that the city's duty to the people would defeat its right to require a removal of the pipes until a substitute had been provided. In any event the city by its regulating ordinance in effect gave the company a license for an indefinite term. *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081. So long as this license continued the company was subject to regulation and bound to supply water. *Laighton v. Carthage*, *supra*. The plant was a going one and was properly valued as such. *Cedar Rapids Water Co. v. Cedar Rapids*, *supra*. The decision seems not only sound but eminently desirable.

STATE — SUIT AGAINST AN OFFICER NOT NECESSARILY SUIT AGAINST THE STATE. — Upon the insolvency of a bank against which the plaintiff held a certificate of deposit, the defendant who was Bank Commissioner under a Deposit Guarantee Plan, took possession of the bank and its assets. It was alleged that he exercised his power so arbitrarily and capriciously that plaintiff was damaged to the extent of his certificate of deposit. *Held*, that this was not an action against the state. *Johnson v. Lankford*, 38 Sup. Ct. Rep. 203.

That the Eleventh Amendment secures to the states immunity from private suits has long been established. *Hans v. Louisiana*, 134 U. S. 1. When a suit is against the state and when against an officer personally is not always easy to determine. The test — whether the state is a party of record — has long

been discarded. See 2 WILLOUGHBY, CONSTITUTIONAL LAW, § 621. It is said the question "must be determined by a consideration of the nature of the case as presented on the whole record." *In re Ayers*, 123 U. S. 443. Obviously a suit against an officer for invasion of private rights, though done under color of office, is against him personally. *Scully v. Bird*, 209 U. S. 481. This is true also where those acts are done in execution of unconstitutional legislation. *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738; *Poindexter v. Greshaw*, 114 U. S. 270. Suit to recover property wrongfully taken or withheld by an officer is against him *qua* wrongful possessor, and hence is maintainable. *United States v. Lee*, 106 U. S. 196; *Morrill v. Am. Reserve Bond Co.*, 151 Fed. 305. Cf. *Rolston v. Missouri Fund Com'rs*, 120 U. S. 390. But if the property loses its identity, *e. g.*, taxes collected unlawfully and paid into the treasury, the theory of the action changes from a suit to recover property to one for the performance of an implied obligation to pay — an obligation of the state. *Smith v. Reeves*, 178 U. S. 436. Though the officers are under a duty to carry out the obligations of the state, that duty, as in any case of agency, extends only to the principal, the state, and not to third persons. Suit against the officers to secure performance or damages for nonperformance of those obligations must necessarily proceed on the theory that it is against the state and as such is not maintainable. *Louisiana v. Jumel*, 107 U. S. 711; *Murray v. Wilson Distilling Co.*, 213 U. S. 151. The principal case alleges capricious misconduct, whereby plaintiff's property has been destroyed. The decision conforms with the general principle that if a person acting affirmatively exercises a power in wanton disregard of the rights of others, he becomes an individual trespasser, even though purporting to act in the capacity of an officer. See GUTHRIE, THE FOURTEENTH AMENDMENT, 176.

**SURETYSHIP — SURETY'S DEFENSES — PAYMENT OF DEBT OWED BY CREDITOR TO PRINCIPAL DEBTOR.** — By statute a landlord had a lien on crops raised by the tenant, and could follow the crops into the hands of a purchaser. The defendant purchased the crops of a tenant who had not paid his rent. Subsequently, the landlord employed the tenant and paid him as wages a sum greater than the amount of the rent. Then the landlord tried to enforce his lien against the purchaser. *Held*, that he could not recover. *Scott & Garrett v. Green River Lumber Co.*, 77 So. 309 (Miss.).

When one person owns property which is security for the debt of another, the property is in effect surety for the debtor. See 1 BRANDT, SURETYSHIP AND GUARANTEE, § 43. The question in this case is whether the payment of wages to the principal debtor by the creditor discharges the surety. Release of security by the creditor discharges *pro tanto* his claim against the surety. *Henderson v. Huey*, 45 Ala. 275; *Kirkpatrick v. Hawk*, 80 Ill. 122. Mere failure, however, on the part of the creditor to sue or to take other steps to enforce the obligation does not destroy the liability of the surety. *Schroepell v. Shaw*, 3 N. Y. 446; *Brick v. Freehold National Bank*, 37 N. J. L. 307. The payment by the creditor of a debt owed by him to the principal debtor, instead of using it as a set-off lies somewhere between these two groups of cases. It is generally held that if a creditor bank fails to satisfy a debt out of the general deposits of the principal, but permits him to withdraw the deposits, that does not discharge the surety. *National Bank v. Peck*, 127 Mass. 298. See *Strong v. Foster*, 17 C. B. 201, 224. *Contra*, *McDowell v. Bank of Wilmington*, 1 Harr. (Del.) 369. *A fortiori*, it would seem that for an ordinary creditor thus to pay the debtor would not destroy his right against the surety, for whereas a bank has the right to appropriate money due on a general deposit to the payment of a depositor's obligations, an ordinary creditor has no right to make such a set-off, but must sue or wait to be sued, and let the court make the set-off. See *White's Adm'r v. Life Association of America*, 63 Ala. 419, 430. The principal case is not in



accord with other cases on this point. *Glazier v. Douglass*, 32 Conn. 393; *Hollingsworth v. Tanner*, 44 Ga. 11; *Baubien v. Stoney*, Speer's Eq. (S. C.) 508.

**TORTS — INTERFERENCE WITH BUSINESS OR OCCUPATION — INJUNCTION AGAINST INJURY TO CONTRACT RIGHT BY THIRD PARTY.** — An Ohio corporation was under contract to furnish complainant, a New Jersey corporation, with certain machines. The defendants, striking employees of the Ohio company, by force and intimidation prevented other employees from working, thus incapacitating the company from performing its contract with complainant. No injury to the New Jersey corporation was intended or contemplated. *Held*, that the New Jersey corporation has a separate cause of action against defendants, and an injunction will issue at its suit. *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851.

For a discussion of this case, see Notes, page 1019.

**TRUSTS — CESTUI'S INTEREST IN THE RES — RIGHT TO SUBSCRIBE FOR STOCK AN ACCRETION TO CAPITAL.** — Stock was held in trust, the income to be paid to a life tenant, the *corpus* on his death to go to a remainderman. The corporation increased its capital, and offered the new issue of stock to its stockholders at par, in proportion to their holdings, no dividend accompanying this right to subscribe. The trustee, having sold this right, brought an action to determine the interests of the life tenant and remainderman in the proceeds. *Held*, that the proceeds are an accretion to the capital, and not income. *Baker v. Thompson*, 168 N. Y. Supp. 871.

It seems clear that if the trustee holds an available fund in addition to the stock, on the same trust, an application of the fund to the purchase of the new issue would be merely a change in the form of the trust *res*. Any profit realized by this purchase could not be considered income. *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318. The same is true where stock is bought and sold at a profit, the increase remaining part of the *corpus*. *In re Robert's Will*, 82 N. Y. Supp. 805. If, then, instead of subscribing to the new issue at par, the trustee sells this right, it would follow that the sum realized becomes part of the *corpus* of the trust. *In re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Greene v. Smith*, 17 R. I. 28, 19 Atl. 1081. The rule is the same in England. *Sanders v. Bromley*, 55 L. T. (N. S.) 145. The court in the principal case very properly points out, however, that the life tenant is entitled to the interest on the proceeds. See *Atkins v. Albree*, 12 Allen (Mass.), 359.

**TRUSTS — VESTING OF CESTUI'S RIGHTS ON DISCHARGE IN BANKRUPTCY — EFFECT AGAINST CREDITORS.** — A testator bequeathed money in trust to pay the income to his son for life with a remainder over to others, subject to the condition that the son should receive the principal when he became able to pay his just debts from resources other than the principal. The son went into voluntary bankruptcy and received his discharge. The trustee in pursuance of a decree of the court paid him the principal. Thereafter the estate of the bankrupt was reopened, and the trustee in bankruptcy sought to reach the fund. *Held*, that the right to the fund did not pass to the trustee in bankruptcy under section 70 a (5) of the Bankruptcy Act. *Hull v. Farmers' Loan & Trust Co.*, 245 U. S. 312.

English courts have uniformly held void a provision in either a will or deed that a life interest therein appointed shall not be subject to the claims of creditors. *Brandon v. Robinson*, 18 Ves. 429; *Graves v. Dolphin*, 1 Sim. 66; *Snowden v. Dales*, 6 Sim. 524. But the trustee may be given an arbitrary discretion in applying the fund. *Chambers v. Smith*, 3 A. C. 795. Or provision may be made for forfeiture of the interest upon bankruptcy. *Manning v. Chambers*, 1 De G. & Sm. 282; *Hatton v. May*, 3 Ch. D. 148; *In re Bullock*,

60 L. J. Ch. (N. S.) 341; *Nichols v. Eaton*, 91 U. S. 716; *Camp v. Clary*, 76 Va. 140. Some American courts have followed the English doctrine and have refused to countenance "spendthrift trusts." *Robertson v. Johnson*, 36 Ala. 197; *Tillinghast v. Bradford*, 5 R. I. 505. But the ever-increasing weight of authority tends towards the view that an equitable interest may be limited in trust for a debtor, and that it shall be free from involuntary alienation at the instance of creditors. *Jourolomon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Shankland's Appeal*, 47 Pa. 113; *Spindle v. Shreve*, 111 U. S. 542. A few jurisdictions have gone to the extreme of allowing an absolute and alienable equitable interest to be placed beyond the reach of creditors. *Boston, etc. Trust Co. v. Collier*, 222 Mass. 390, 111 N. E. 163; *Wallace v. Foxwell*, 250 Ill. 616, 95 N. E. 985. Other American states have sought a compromise through statutory regulation giving a measure of protection to both the beneficiary and the creditors. *Hardenburg v. Blair*, 30 N. J. Eq. 646. See GRAY, RESTRAINTS ON ALIENATION 2 ed., § 286. The instant case is but another aspect of the controversy. *Prima facie*, the owner of property should be allowed to do with it as he pleases, so long as he does nothing illegal or against public policy. But how far shall the law permit him in disposing of it to protect a person who is *sui juris* against himself? Certainly not when it will be more injurious to the one side than beneficial to the other. It cannot be just to permit one man to enjoy wealth to the injury of another. See GRAY, RESTRAINTS ON ALIENATION 2 ed., §§ 137-277.

WILLS — TESTAMENTARY CAPACITY — CAPACITY OF INFANT SOLDIER TO BEQUEATH. — An infant soldier nineteen years of age, made a properly executed and attested will bequeathing personalty. *Held*, that an infant soldier cannot make a valid will under the Wills Act. *In re Wernher*, 34 T. L. R. 191. For a discussion of this case, see Notes, page 1024.

## BOOK REVIEWS

CASES ON FUTURE INTEREST AND ILLEGAL CONDITIONS AND RESTRAINTS. SELECTED FROM THE DECISIONS OF ENGLISH AND AMERICAN COURTS, By Albert M. Kales. St. Paul: West Publishing Company. 1917. pp. xxvi, 1456.

In a recent number of the "Law Quarterly Review" an English reviewer of Shaw Fletcher's treatise on contingent and executory interests vents his impatience by remarking that "until the day comes when the law of real property is abolished, it will remain necessary that some persons should be learned upon the subject of contingent remainders and executory interests." This is unfortunately more than an individual reaction. It fairly typifies a somewhat general attitude among American lawyers toward what two generations ago was at once the delight and the diversion of the more learned members of the profession. Before modern social legislation had begun to compel judges and lawyers to devote so much time to the numerous "non-legal" matters which now all but monopolize their interest, few practitioners had dreamed of "abolishing" the law of real property. Such a triumph as that of developing, out of the conception that there should be no possibility upon a possibility, the rule against a limitation to the unborn child of an unborn child, was one of the important intellectual compensations of the mid-victorian lawyer. Nowhere else has the "jurisprudence of conceptions" held such undisputed sway.

But the modern practitioner finds little time for the subtleties of the law of feudal tenure. Perhaps it is on the theory that what one does not know, one



need not deal with in practice, that he has been content to leave the learning of our law of future interests to the expert and the legal antiquarian. Certain it is that much of this learning has passed out of common ken. Mr. Kales has recognized this in compiling a case-book which as he says, "deals with the subjects of property more commonly met with in litigation, about which lawyers in general know the least, and where academic knowledge and analysis are of great importance in handling cases."

Though the subject has so largely become one for the expert, a tradition seems to have lingered in appellate chambers that every well-read judge is an expert in the field, as a matter of law. A consequence has been that in many states the litigation of future interests questions today faces a most uncertain fate; for one can never tell when a remnant of feudal principle will find its way into a reformed and somewhat modernized system of property law. In a state where much of the lore of feudal tenure has been discarded as out of consonance with modern thinking, one often finds an outcropping of the effects of ancient law — in such a rule, for instance, as that which invalidates any limitation after an absolute gift with a super-added power of disposal. Where legislation prevails, this is particularly true; judicial interpretation is so often made to depend, not upon the satisfactory development of a new system of property law which the legislation has attempted to establish, but upon some survival of the feudal law of estates which, though inconsistent with the new régime, was not clearly excluded by the words of the statute.

A consequence of the neglect of property law by the general practitioner has been its isolation from the course of modern juridical development. During a period when most of our rules have undergone close reëxamination with a view to their better adjustment to the conditions of present-day society, the law of real property has almost escaped attention. In the first place, it has not been a field for legislation since the period of imitative statute-making in the middle of the last century, when so many new states were endeavoring to unshackle themselves from the land law of England. It is a rare thing for one to encounter in the modern session acts any legislation dealing with the law of real property. The Massachusetts Contingent Remainders Act of 1916 is an outstanding and lonely exception. The period of legislation which began with the New York Real Property Law promised for a time to be somewhat general throughout the country, but with the imitation of the New York legislation in Michigan, Wisconsin, Minnesota, North Dakota, South Dakota, and California, it suddenly stopped. Even in these jurisdictions, there is as yet little disposition to scrutinize the legislation with a view to its practical success and satisfaction. One finds important communities still lagging behind most of the country; for instance, the Rule in Shelley's Case still prevails in Illinois, and one must still avoid the pitfalls of an indefinite failure of issue in that state.

But there is a more serious consequence than this neglect of legislation. There has been almost no attempt on the part of the profession to evaluate the rules of property law, with a view to their serviceability either to the owners and managers of property or to society. Doctrine is still the be-all and end-all of juridical effort in this field. The law of restraints against alienation furnishes an illuminating example. We have perpetuated Littleton's interdiction against the "condition that the feoffee shall not alien the land to any," which he put on the ground that it would be against reason to deprive the owner of a power which the law gives him. In modern times, we have acquiesced in this, often avowedly for Littleton's reason, but really because of the social interest in free alienability. Courts still treat the incidents of ownership as if they were fixed and unchangeable for all time, and attempt thus to explain our law of alienability. At the same time, the profession goes on without any serious appraisal of the social and individual interests which it is the function of these legal incidents to protect. Even Mr. Gray, than whom no American lawyer

has been better fitted for the task, did not attempt to determine whether *Nichols v. Eaton* was merely "a blot on the escutcheon of the common law," or a "jewel in the crown of the Social Republic." And if free alienation is established as a social principle, we need yet to determine whether it is being adequately protected by the existing rules of law. If one cannot expressly forbid the alienation of a fee simple for a limited time, yet he may by a judicious expression of a condition subsequent or by creating executory limitations accomplish the result substantially and keep within our rules of law.

The rule against remoteness is another doctrine in the application of which we have not inquired into the needs of modern society. We ought to know more about the so-called "policy of the law against the creation of perpetuities." The very statement of it as a "policy of the law" should conjure inquiry. Why do we make it our own policy? On what is it grounded? What real interests does the rule against remoteness protect? What conflicts of interests do the decisions applying it resolve, and why should they be resolved as they are? Are we successful in preventing remoteness, or do we allow the policy to be defeated in some indirect way? In the United States we hold that the rule against remoteness is not applicable to rights of entry for conditions broken, but the English courts do not so limit it. Behind such conflicts there is usually an unavowed survey of social and economic consequences, which seldom gets into the open so far as the printed reports divulge. An advance will be made in property as in other branches of the law when these moving considerations are brought from under cover, when the "real" reasons for results reached are avowed as the "good" reasons for the decisions.

Future study of the law of real property must take into account the economic and social factors which it involves. It should furnish a basis, not merely for ridding our land law of its worthless survivals, but also for whipping it into the service of a modern industrial or agricultural community. Unless this function is performed soon and performed properly, disastrous social consequences may be in store. For it seems probable that land ownership may undergo radical changes in the reconstruction which will follow the war. Indeed, in South Dakota it is already being proposed "that all interests in land in fee simple or otherwise shall be construed to be an ownership only for use and occupation of the owner or his heirs and assigns." The direction of the changes which are to come, and the assurance of their meeting the social demands which lead to them, will depend to a large extent upon the capacity of the legal profession for the appraisal and adjustment of our existing law. We have in some degree reached the end of fruitful analysis — and this progress is in no small measure due to Mr. Kales' own work, to his treatise on future interests and his numerous magazine articles, to his impress as an advocate on the law of Illinois, and to this case-book. Further historical exposition may likewise pass into temporary abeyance. What we need now is an intelligent weighing of the interests affected by the law of real property, a philosophical basis for their evaluation in the light of modern notions of ownership and enjoyment, and the evolution of a system of law which will somehow enable even the most fixed of its branches to become responsive to growth and change. Mr. Kales has indicated these needs with reference to another branch of the law in a notable article on due process in a recent number of the "Yale Law Journal." If we must continue to have a doctrinal law of ownership, we need at least a new substitute for the feudal doctrines. It will be unfortunate if our experts do not devote themselves to this difficult task, and even they will need the coöperation of economists and workers in other fields of social science. If any "abolishing" is to be done to the law of real property, it ought to be done by the experts in the field. But experience would justify the fear that it may be done by outsiders.

It may be doubted whether such a functional treatment should be included



in a case-book, and until Mr. Kales' work had been done the time was ripe for raising the question. Mr. Kales has put a finishing touch on Mr. Gray's classic collection. The historical material in Mr. Rood's and Mr. Gray's collections of cases has been suggestively rearranged. Professor Gray's masterful analysis of cases has been developed in such a way as to make this new case-book much more than the revision which it purports to be; it will be more useful in the class room, and at the same time more indispensable to the practitioner. The compiler of the next case-book in the field might strike out on a new line. He might attempt to perform for the law of real property the service which Mr. Wigmore's case-book has so conspicuously essayed for the law of torts. Such a case-book as Mr. Wigmore's is more needed, perhaps, in the field of future interests than in the field of torts. First-year students just beginning their work may need the standard case-book as a guide to the study of historical development and to careful analysis. But third or fourth year students who have completed, in addition to an institutional course in property, courses on titles and wills are better prepared for a broader study of the law of future interests. Mr. Kales has pointed the way in the direction suggested by including in his case-book the drafts of statutes needed in the state of Illinois, which are given on pages 155, 308, 315, and 535.

The editor might almost have called this an Illinois edition of Mr. Gray's collection of cases. It is no objection even to a general case-book that many of the recent cases are taken from the Illinois reports, for legislation in so many other states has obviated the necessity of such a development of the common-law rules as the Illinois cases have made. But it is unfortunate, even for local purposes, that legislation in other states has been so largely neglected. Not only have few cases under the important New York legislation been given, but the litigation under other statutes has been slighted. This is particularly true in the chapter on "The Statutory Remainder Created by the Statute on Entails." In some places the treatment is likely to mislead the student into thinking that on certain matters there has been no satisfactory legislation in the United States. One is surprised to find a draft of a model statute on gifts upon failure of issue printed without adequate reference to the statutes of other states and the important litigation which has grown out of them.

This localization leads to the suggestion which the editor would doubtless welcome, that editions of Mr. Kales' case-book should be prepared for various other states. The vast difference in the law of property in American jurisdictions would seem almost to necessitate this wherever a course in future interests is being taught. Mr. Hildebrand's Texas edition of Warren's "Cases on Corporations" is a suggestive beginning in the field of local case-books.

Mr. Kales' greatest service in this excellent case-book will probably prove to be his clearing up so many of the soft spots which have been the fighting ground of recent litigation. His chapters on the "Alienation of Contingent Remainders," "Powers in Life Tenants to Dispose of the Fee," "The Rule Against Perpetuities Distinguished from the Rule Which Makes Void Restraints on Alienation and Provisions Requiring a Trusteeship (otherwise valid) to be Effective at Too Remote a Time," and "Effect on Valid Limitation of the Failure of Other Limitations for Remoteness," are valuable analyses for which any worker in the field will be profoundly grateful.

In the report of *Whitby v. Mitchell*, it would seem that some reference might have been included to the controversy which has raged in recent periodicals over the doctrine of that case. And it may be questioned whether our case-books should continue to include the oddity of *Wilson v. Cockrill* which has had no influence in other states and which has been discarded in the state where it was decided.

To the historical work of Mr. Rood and the analytical work of Mr. Gray, Mr. Kales has given us a valuable addition which should place his case-book

in every law school where the subject is taught and in the library of every specialist in the field. The task of "articulating the major premises" of our law of future interests is now before us, and no one in the country is better qualified to undertake it than Mr. Kales.

M. O. H.

JOSEPH H. CHOATE: NEW ENGLANDER, NEW YORKER, LAWYER, AMBASSADOR. By Theron G. Strong. New York: Dodd, Mead and Company. 1917.

The author frankly admits that he has not written a complete biography, but rather a sketch of Choate's public career, based largely on personal acquaintance with him, and on newspaper clippings. In this way much material that might have been lost has been preserved in permanent form, and the result is an amusing book.

Choate was a graduate of the Harvard Law School in the class of 1854, and from 1896 to 1904 was president of the Harvard Law School Association. He was always a loyal friend of the School, and for many years one of the most distinguished of the men trained here. He delighted to recall to the alumni the old days before the case system, in "the golden age." Unfortunately, Mr. Strong's book adds little to our knowledge of that time. "I told him I wanted to get some facts concerning his life at the Harvard Law School. He replied, 'There was nothing of interest there; all we had to do was to go to Holworthy once a day and wear out the seat of our trousers.'"<sup>1</sup> There must be some error here. Choate's room was in Holworthy. Did he get his whole legal education in his room, like the apocryphal student who arrived at Property I, at eleven minutes past the hour, and finding the door locked, wrathfully foreswore all lectures, worked up his courses himself, and won a straight A?

The chapter entitled "The Lawyer" is much the best of the four, and every practitioner will find it enjoyable reading. It contains many hints upon what might be called the craftsmanship of our profession. Young surgeons are in the habit of taking an occasional vacation which is spent in some hospital watching a master-carver at work. Lawyers find little opportunity for such apprenticeship, and perhaps the best substitute is extensive reading of legal biography such as this book. The author has wisely interspersed among the famous trials of Choate's practice, numerous little court-room clashes, so that we watch the advocate from day to day.

"I obtained my knowledge," he said, "from reading at home and fighting in the Courts — principally fighting in the Courts." The chapter is full of fights and good stories and tricks of the trade. Too many tricks, indeed! We are left with a suspicion that Choate's legal victories were sometimes obtained not by the elucidation of the truth, but by making the opposing witness or counsel look like a fool. The plaintiff in a seduction case had made the acquaintance of Choate's client when he assisted her to rise from an icy sidewalk. Choate won "by sheer good humor," as Mr. Strong calls it, getting the laugh on the plaintiff by referring to her as "a fallen woman." After discrediting the testimony of a noted art critic, Clarence Cook, Choate "turned upon him and shaking a quivering forefinger at him quoted in dramatic emphasis: 'False, fleeting, perjured Clarence.'" The famous cross-examination of Russell Sage not only took an unfair advantage of a man who could not hit back, but was hardly a search for relevant testimony at all.

Choate was reluctant to retire because "he did not know where so much fun

<sup>1</sup> Strong, *op. cit.*, 22, 23. Compare the account of the School under Parsons in Choate's Address at the Langdell Dinner of the Harvard Law School Association, 1895.



was to be found as trying cases in the Courts." He liked to resume a trial after lunch and "have some more fun with the opposing counsel." It is good to find a man who got such thorough enjoyment from his work, but unbidden there springs to mind Bentham's reproach that legal proceedings are conducted like a game — a game played by professionals, at that.

Although Choate gained his renown as a jury lawyer, he won a large number of very important cases before appellate courts. Unfortunately Mr. Strong misstates the titles of several cases and omits almost all references to the Reports, so that the interested reader is left nearly helpless. Among Choate's victories in the United States Supreme Court were *In re Neagle*,<sup>2</sup> which established a novel point, the implied power of the federal government to protect its judges from attack; *United States v. Stanford*,<sup>3</sup> which saved Leland Stanford's millions for his university; *Canada Southern v. Gebhard*,<sup>4</sup> involving conflict of laws; and *Pollock v. Farmers' Loan and Trust Co.*,<sup>5</sup> which overthrew the Income Tax Act of 1894.

The Income Tax Cases were a temporary victory for private property over forces which have since returned to the assault with redoubled vigor and bitterness. From any point of view the situation was extremely grave. Choate's old partner, Charles F. Southmayd, who had retired from practice at sixty, ten years before, because he feared that if he continued he might make a mistake, was so aroused by this iniquitous attack on property,<sup>6</sup> that he volunteered to prepare Choate's brief. Did Southmayd make his mistake after all? Choate was opposed by James C. Carter, his lifelong rival and friend.<sup>7</sup> After Carter's admirable discussion of the methods of taxation<sup>8</sup> and his solemn close, urging respect for the discretion of Congress, Choate opened his argument by comparing Carter to Jupiter thundering all around the sky and himself to Mercury coming out from his hiding-place and looking about to see how much damage had been done.<sup>9</sup> And yet he stated later, "I have felt the responsibility of this case as I never felt one before and never expect to again."

Carter put his finger on the flaw in Choate's character when he said, "There was lacking in his make-up the capacity for moral indignation."<sup>10</sup> For instance, defects in the law do not seem to have disturbed Choate. Perhaps they made the game more interesting. A great lawyer is possibly justified in aiding his client to crawl through any hole in the law he can find; Choate seems to have found a very small hole on one occasion;<sup>11</sup> but a great lawyer, as Mr. Brandeis once remarked, ought to make it his business as a servant of the public to go to the legislature afterwards and get that hole stopped up. Choate certainly did not acquire a prominence in such work commensurate with his great legal abilities. He could contentedly describe law as "a careful and exact science which makes void the part where fault is and preserves the rest, as it has been doing for centuries."<sup>12</sup> (Imprisonment for debt continues to exist in New York.) Again, Choate was a leading court lawyer at a time when the abler members of the bar were rapidly shutting themselves up in their offices, leaving trial-work for the most part to inferior men. One wishes that Choate had done something to stem the tide, had, for instance, induced

<sup>2</sup> 135 U. S. 1, 20.

<sup>3</sup> 161 U. S. 412.

<sup>4</sup> 109 U. S. 527.

<sup>5</sup> 157 U. S. 429, 532; mistakenly cited on page 226 of Strong's book.

<sup>6</sup> On page 225 of Mr. Strong's book he reports Mr. Choate as arguing in the Income Tax Cases, "I thought that the fundamental object of all civilized government was the preservation of the right of private property." In the official report it is "one of the fundamental objects." What did Choate really think on this point?

<sup>7</sup> Choate and Carter were also opposed in two interesting cases of expulsion from an unincorporated association. *Hutchinson v. Lawrence*, 20 How. Pr. 38 (N. Y. Stock Exchange); *Loubat v. LeRoy*, 15 Abb. N. C. 1, 40 Hun 546 (Union Club).

<sup>8</sup> 157 U. S., 513.

<sup>9</sup> Strong, *op. cit.*, p. 222.

<sup>10</sup> Strong, *op. cit.*, 62.

<sup>11</sup> Strong, *op. cit.*, 153.

<sup>12</sup> Strong, *op. cit.*, 134.

a group of the best lawyers of the succeeding generation to join him as specialists in advocacy.

It must be remembered, however, that the last word on Choate has not yet been said. A fuller account of his public services may show that the impression left by Mr. Strong's book is incorrect. Indeed, the non-legal portions of the book are very unsatisfactory. They are little more than a string of long extracts from after-dinner speeches, which do not bear warming over much better than the dinners. A few after-dinner speeches leave any one ready for sleep. It is unfortunate that so much is made by Mr. Strong of Choate's victorious cases, and so little of his constructive charitable work, or of his achievements as chairman of the American Delegates to the Second Hague Conference. Mr. Strong reduces this event, perhaps the greatest in Choate's life, to a paragraph of newspaper gossip.<sup>13</sup> The creation of the International Court of Prize Appeals and the Court of Arbitral Justice is not even mentioned, nor the manner in which Choate "was able to adjust apparently irreconcilable difficulties" between England and Germany.<sup>14</sup> Choate's achievements at the Hague have been hidden but not obliterated by the conflict which he lived long enough to take part in as vigorously as he was able, and his plans for international courts may one day become a living reality.

Z. C., JR.

#### GUIDE TO THE LAW AND LITERATURE OF ARGENTINA, BRAZIL, AND CHILE.

By Edwin M. Borchard. Washington Government Printing Office. 1917. pp. 523.

Increased commercial intercourse with South America has caused us in recent years to modify our traditional picture of South American countries as places where revolutions and adventurous dictators leave little room for legal order or other characteristics of civilized life. But even those who have kept more or less in touch with the civilization of South America will be surprised by the astonishing wealth of legal literature described in this volume. Professor Borchard has gone at his task with admirable thoroughness, and has produced a most convenient guide book for those who wish to avail themselves of the legal thought and experience of our southern neighbors.

The arrangement of the information for each of the three countries treated in this volume follows the model set in Professor Borchard's "Guide to the Law and Legal Literature of Germany." After a general historical and bibliographic introduction, information is given as to legislative and judicial reports, general works in law and legal history, the civil codes, commercial law, judicial organization and civil procedure, criminal law and procedure, constitutional, administrative, military, ecclesiastical, and public and private international law. Each of these heads contains numerous special topics, but under the heading of administrative law we have an unusual wealth of material bearing on matters of public law, such as immigration, public lands, mining, railroads, shipping, labor, public hygiene, education, taxation, etc. The description of the various codes, gives us in each case an admirable conspectus of the history, contents, and the various expositions, commentaries, and monographs on special topics. Glossaries of Spanish and Portuguese terms increase the availability of this vast amount of bibliographic information.

The author states that the threefold aim of this guide has been: "first, to furnish the lawyer and the student of comparative law with information as to the institutions and literature of the public and private law of the countries

<sup>13</sup> Strong, *op. cit.*, 98-99.

<sup>14</sup> J. B. Scott, Introduction to CHOATE'S THE TWO HAGUE CONFERENCES. See also J. B. SCOTT, AMERICAN ADDRESSES AT THE SECOND HAGUE CONFERENCE, for Choate's arguments in favor of international courts and arbitration.



under discussion; secondly, to acquaint the legislator and the man of affairs with the recent development of legislation, particularly that designed to meet the social and economic problems of the day; and, thirdly, to give the jurist and the historian some guidance to the contributions made in these countries to the history, the theory, and the philosophy of law." These three aims, however, are not equally well met. Any one who wants to find the law of Argentina, Brazil, or Chile, on any given topic, will find ready references here. But despite the vast amount of historic social and political information which Professor Borchard has put into this volume, this guide cannot, in the nature of the case, give us adequate references to the historic, social, political, and economic literature which will enable us to understand the genesis and actual workings of these laws. In South America, as elsewhere, we must distinguish between the law in law books and the law in action. As to the third aim, it must be admitted that these countries have not as yet made any substantial original contributions to the history, theory, and philosophy of law. Narrow traditional Catholicism, as in Chile, and an equally arid Positivism as in Brazil and Argentina, have not proved favorable for fruitful reflection.

The proof reading of the multitudinous Spanish and Portuguese terms seems to have been performed with praiseworthy care.

It is interesting to note among Brazilian authors Octavio Kelly and Sacramento Blake. M. R. C.

THE ESSENTIALS OF AMERICAN CONSTITUTIONAL LAW. By Francis Newton Thorpe. New York: G. P. Putnam's Sons. pp. 279.

This is a small and compact volume which discusses in elementary fashion the ordinary theories of constitutional law. Its twelve chapters cover all the more important problems summarily, and with a single exception its doctrine is that of other books. The exception is a rather curious interpretation of the "Necessary and Proper Clause" which is interpreted to include all the purposes involved in adopting the Constitution as set forth in the preamble. Under this construction the doctrine of delegated powers is entirely overthrown. The text is generally interspersed with full quotations from the leading cases to serve as an informal introduction to the inductive method of legal inquiry. The volume contains a copy of the Constitution and table of cases and an index. It is difficult to see exactly what purpose it is intended to serve not already supplied by a hundred existing books of the kind. H. M., JR.

INCOME TAX LAW. By G. N. Nelson. New York: Macmillan.

AMERICAN MUNICIPAL PROGRESS AND THE LAW. By H. L. McBain. N. T. Columbia University Press. [To be reviewed.]

NORMAN INSTITUTIONS. By C. H. Haskins. Cambridge: Harvard University Press. [To be reviewed.]

HUBERICH ON TRADING WITH THE ENEMY. New York: Baker, Voorhis Co. [To be reviewed.]

GERMAN LEGISLATION FOR BELGIUM. By Huberich and Speyer. 12th Series. Nijhoff. The Hague.

ATLANTIC PORT DIFFERENTIALS. By J. B. Daish. Washington: W. H. Lowdermilk.

CLARK'S CRIMINAL PROCEDURE. By Mikell. St. Paul: West Publishing Co. [To be reviewed.]

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## JURISTIC SCIENCE AND LAW

THE common law on any point," says Judge Baldwin, "existed, in theory at least, before any case in which it may be applied. It was the practice of the people, or the rule which to them seemed naturally right."<sup>1</sup> Hence he argues that the teacher or writer who endeavors to put scientific method behind the reported cases which form the chief jural materials of our Anglo-American system is too academic. His teaching has "created a new peril" in our law since it leads to neglect of the "human element" of popular practice, of which the rule is a mere formulation.<sup>2</sup> Others reach in another way a similar conclusion adverse to logical analysis and systematic development of legal materials. Thus we are told that "the rules of law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker."<sup>3</sup> Again: "The law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately

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<sup>1</sup> "Education for the Bar in the United States," 9 AMERICAN POLITICAL SCIENCE REVIEW, 437, 447.

<sup>2</sup> *Id.* 448.

<sup>3</sup> BROOKS ADAMS IN CENTRALIZATION AND THE LAW, 45.

"Upon conditions that the ruling class finds profitable to its aims and advantageous to its power, are built codes of morality as well as of law, which codes are but reflections of those all-potent class interests." MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 8.

"From this point of view we get the meaning also of the statement often made that law tends to spread, to generalize itself. The spreading, the generalizing, is dominated entirely by interest-group needs." BENTLEY, THE PROCESS OF GOVERNMENT, 287. Compare Mr. Dooley: "The Supreme Court follows th' illiction rethurns."



these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign.”<sup>4</sup> Hence “there are . . . no abstract legal principles.”<sup>5</sup> “The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves.”<sup>6</sup> It is futile to do more than perceive the ideal of justice that “favors most perfectly the dominant class”<sup>7</sup> and observe how the law inevitably conforms thereto. On either theory the jurist is no more than an observer; the legislator or judge is but the subconscious instrument through which the popular practice is formulated or the will of the dominant class is made effective. There is nothing for the teacher of law to do beyond orderly arrangement for the purpose of dogmatic exposition. The rules are given. He is to set them forth as so many propositions of a unique series of independent phenomena.

Such views are in large part to be explained as a reaction from the nineteenth-century theory of eternal legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction. Indeed Judge Baldwin speaks the language of that doctrine when he says that the common-law rule existed in theory before the case in which it was discovered and applied. Moreover it would be idle to pretend that there are not rules in any legal system of which one or the other of the foregoing views gives an accurate account. Thus the rules as to indorsement of negotiable instruments arose out of the custom of merchants, and our law of mining on the public domain had its origin in the custom of miners. Likewise there is much in the ephemeral penal legislation of every country which fails to maintain itself in the legal system precisely because it is an expression of the self-interest of the dominant class for the time being and nothing more.<sup>8</sup> Yet before we accept

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<sup>4</sup> CENTRALIZATION AND THE LAW, 23.

<sup>5</sup> *Id.* 45.

<sup>6</sup> *Id.* 63-64.

<sup>7</sup> *Ibid.*

<sup>8</sup> Compare legislation as to cutting weeds to prevent their going to seed (Indiana, BURNS' ANN. STAT. 1914, §§ 5524-25; Texas, MCEACHIN'S CIV. STAT., Arts. 6601-02) with the common law as set forth in *Giles v. Walker*, 24 Q. B. D. 656 (1890); *Hamdon v. Stultz*, 124 Iowa, 734, 100 N. W. 851 (1904). Also compare the common law as to contributory negligence with recent American statutes altering the rule solely for the benefit of railway employees, leaving the common law in force for all other cases.

either as an adequate account of the genesis of law in general, and so give over the attempt to deal academically with law as a rational phenomenon, it may be worth while to try them with reference to typical rules of everyday application. The rules selected for this purpose should be well established, should be rules that dwell at peace with their neighbors in the legal system, are questioned neither by theoretical writers as arbitrary and anomalous, nor by practitioners as theoretical and over refined, and should have an authentic history. Two such cases will be considered.

In Roman law if a tree set in the land of Titius takes root in the land of Maevius, it belongs to Maevius; if it takes root in the land of each, it is common property.<sup>9</sup> What is the common law on this point? In *Masters v. Pollie* (1620)<sup>10</sup> it is held that in such a case the tree belongs to the owner of the land in which it is planted, because "the main part of the tree being in the soil of the plaintiff, the residue of the tree belongs to him also." It is added that Bracton so holds. But this is an error, for Bracton lays down the Roman rule in the very words of the Institutes.<sup>11</sup> In *Waterman v. Soper* (1697-98)<sup>12</sup> Lord Holt, apparently in ignorance of the prior decision, ruled that "if A plants a tree upon the extremest limit of his land and the tree growing extend its root into the land of B next adjoining, A and B are tenants in common of this tree." The reasons are not stated, but the words used indicate that the doctrine was taken from the Roman texts.<sup>13</sup> In *Holder v. Coates* (1827),<sup>14</sup> on both of the prior cases being cited, Littledale, J., followed the earlier, which he thought laid down the preferable rule, and such is now the recognized doctrine.<sup>15</sup>

Obviously the two distinct doctrines which contended in our law books for two hundred years do not represent a divergence in the practice of the English people or a divergence in popular, extra-

<sup>9</sup> INST. II, I, 31.

<sup>10</sup> 2 Rolle, 141.

<sup>11</sup> "For reason does not permit that a tree belong to anyone else than to him in whose land it has struck root." (1569 ed. fol. 10.)

<sup>12</sup> 1 Ld. Raym. 737. Cf. Anon., 2 Rolle, 255 (1623).

<sup>13</sup> Cf. "And therefore a tree planted near a boundary, if it stretch out its roots into the neighbor's ground also, becomes common property." INST. II, I, 31.

<sup>14</sup> Moody & M. 112.

<sup>15</sup> *Lyman v. Hale*, 11 Conn. 177 (1836); *Dubois v. Beaver*, 25 N. Y. 123 (1862); *Skinner v. Wilder*, 38 Vt. 115 (1865).



legal views of what was naturally right. The English people did not practise one rule in this connection from the thirteenth to the seventeenth century, another from the end of the seventeenth century to the second quarter of the nineteenth century, and then revert to the seventeenth-century practice, except as the decisions of the courts may have determined individual action. Nor were these divergent lines of decision due to disagreement as to what was naturally, in contrast with what was legally, right. So far from trying to decide upon non-technical, non-legal grounds, in each case the basis of the rule announced was found either in authority or in juristic reasoning from analogy. Nor may these divergent lines of decision be attributed to class conflict or to any struggle of a dominant class to "impose its will upon those who are weaker." In each case the parties to the dispute were adjoining landowners — squires as like as not — and it is futile to search for any interest of landowner or landless on one side or the other. Moreover the origin of each rule may readily be traced.

To understand the doctrine of the Roman law we must go back to Aristotle, who lays down that plants are composed of the two elements earth and water drawn from the soil where they root.<sup>16</sup> Hence if the tree planted in the land of Titius takes root in the land of Maeivius, the tree is composed of earth and water belonging to Maeivius taken from Maeivius by the tree on the land of Titius, but added in a definite tangible form, namely the tree, not in an undistinguishable form as in the case of alluvion. Thus the rule adopted by the Roman jurists grows out of the Aristotelian theory as to form and substance. One has in his mind the idea of a saw. He has in his hand the materials of steel and wood. By shaping these materials according to the idea of a saw he gives them the form of a saw.<sup>17</sup> Form, therefore, is the idea objectively realized. Accordingly the form of the tree is the material of the earth and water, taken from the soil, realizing the idea of a tree. Whoever owns the materials should also own the form. The very language of the jurists on this question of ownership of border trees, as preserved in the Digest,<sup>18</sup> is palpably taken from Greek philosophical

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<sup>16</sup> HIST. ANIMAL. V, 1; METEOROL. IV, 8. See SOKOLOWSKI, PHILOSOPHIE IM PRIVATRECHT, I, 148 ff.

<sup>17</sup> BENN, THE GREEK PHILOSOPHERS (2 ed.), 282.

<sup>18</sup> DIG. XXIX, 2, 9, § 2, XLI, 1, 26, § 1.

treatises. It represents, not the practice of Romans in the third century A. D., nor the resultant of class struggles at Rome, then or theretofore, but the philosophical ideas of Greece in the fourth century B. C., seven centuries before, to which the jurists turned in their desire to decide controversies upon principles and in accordance with reason. And when Bracton, ten centuries later, felt called on to state a rule for such controversies, he did not take a referendum of the English people as to their views of what was naturally right, nor even ask himself what he thought was naturally right, nor did he send out a questionnaire as to what rule the people practised, if indeed they practised any on such a point, but he turned to the book which to him stood for an authoritative version of legal reason, and assumed as a matter of course that the rule there set forth should and would be followed by an English tribunal. Thus he laid down a rule in language seven hundred years old derived by a process of legal reasoning from a philosophical theory nearly seventeen hundred years old. When three centuries and a half later the Court of King's Bench ruled that "if a tree grows in a hedge which divides the land of A and B and by its roots takes nourishment in the land of A and also of B, they are tenants in common of this tree,"<sup>19</sup> the Greek-philosophical Roman-law reason that the roots draw nourishment from each tract shows that the court relied upon Bracton.<sup>20</sup>

In the seventeenth century, as has been seen, the Court of King's Bench broke away from the Roman-law doctrine. Whether it did so intelligently and intentionally may perhaps be doubted, since Bracton was cited for a rule quite different from the one which he had announced. But in any event the basis of the new rule, which ultimately prevailed in Anglo-American law, was clearly enough the analogy of the old Germanic notion of seisin which had become one of the chief premises in common-law reasoning. In 1620 Coke had but recently been dismissed from his office of Chief Justice and had fourteen years yet to live. The judges and practitioners in the common-law courts were full of the ideas and methods made

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<sup>19</sup> Anon. (1622), 2 Rolle, 255.

<sup>20</sup> Probably this was a case where it was not known on which side of the line the tree had been planted or one where it was originally planted on the line. But if the latter, why not hold that each owns the part on his land? It is reasonably evident that Bracton's text was a determining influence.



familiar to us by Coke upon Littleton. The Court of King's Bench was thoroughly in the grip of the strict law. Hence in endeavoring to decide a question according to reason it turned to a time-honored common-law analogy. Titius planted the tree and is seised of the trunk, which is the main thing, no matter where the roots may stray, and he cannot restrain these roots from wandering.<sup>21</sup>

When Lord Holt went back to the rule of the Roman law, a different spirit was becoming manifest in the common-law courts. The advocate of the economic interpretation may tell us, and tell us rightly, that a new economic order was behind the liberalizing of law throughout Europe which is marked on the Continent by the rise of the law-of-nature school and in England by the development of equity and the reception and absorption of the law merchant. But for the most part this liberalizing movement did no more than make thoughtful lawyers restive under the arbitrary rules of the strict law. Judges did not dream of finding law otherwise than through authority or through legal reason. If, therefore, there was no express rule in the common-law books, or if the old English authorities were not known to them, it was natural that they turn to the Roman books, which were regarded as an embodiment of pure legal reason. Lord Holt in particular was much inclined to cite and to rely upon the civil law.<sup>22</sup> When a particular Roman rule was taken over under the influence of this idea it by no means followed that it actually expressed sound legal reason. Often it had been formulated by the accidents of Roman legal history and expressed ideas which had lost their vitality already in antiquity.<sup>23</sup> Such exotics in our legal system are not to be explained by looking to the practice of the English people or to popular ideas of natural justice, nor can they be traced to struggles of class with class in English history or the self-interest of the dominant class for the moment. They derive rather from the belief

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<sup>21</sup> "Le plaintiff ne poyet limit le roots del arbor how far they shall grow and go." 2 Rolle, 141 (1623).

<sup>22</sup> *Lane v. Cotton*, 1 Ld. Raym. 646, 652 (1701); *Knight v. Cambridge*, 2 Ld. Raym. 1349 (1724); *Coggs v. Bernard*, 2 Ld. Raym. 909, 915 (1703); *City of London v. Wood*, 12 Mod. 669, 686 (1701). In *Lane v. Cotton* he says: "The principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things." 12 Mod. 472, 482.

<sup>23</sup> I have discussed one remarkable example in a paper entitled "Legacies on Impossible or Illegal Conditions Precedent," 3 ILL. LAW REV. 1, 23.

of judges in an absolute justice discoverable through reason and an overtrusting faith that the Roman jurists possessed the key to reason.

When the rule which now prevails was established (1827), the Romanizing tendency was spent. The maturity of law has no little affinity with the strict law. It regards reason as much less important than adherence to the established rule.<sup>24</sup> As between what appeared to be the old historic English rule and a Roman intruder, the court did not hesitate. Just as in Coke's day,<sup>25</sup> lawyers took pride in the common law as an indigenous system, in competition with the Roman law, and the existence of a common-law rule was its own justification.<sup>26</sup>

Another instructive case for our present purpose is afforded by the law as to gifts of movables *inter vivos*. In the Roman law according to the *ius civile* title might be transferred by formal conveyance (*mancipatio*), and in that case no delivery was necessary. Or there might be delivery, in which case, if the subject of the gift was *res Mancipi* possession for one year (*usucapio*) would transfer title. Until that period had elapsed, whether there was gift or sale, the title remained where it was prior to delivery. If, however, the subject of the gift was *res nec Mancipi*, title passed by delivery (*traditio*) in any lawful transaction. There was also a third possibility. Without transfer of title, the donor might promise gratuitously to transfer the subject of the gift to the donee. If this was done by formal contract (*stipulatio*) the obligation was enforce-

<sup>24</sup> "We in England have long ago committed ourselves to the principle that, within limits to be settled by the House of Lords and Court of Appeal, uncertainty in the law is a worse evil than unreasonableness, and judges of first instance must continue 'falsely true' to the errors — if they are such — of their predecessors." Note in 24 L. QUART. REV. 117. "It is generally more important that the rule of law should be settled than that it should be theoretically correct." Lord Cottenham in *Lozon v. Pryse*, 4 My. & Cr. 600, 617 (1840). "It must be remembered that the rules which govern the transmission of property are the creatures of positive law, and that when once established and recognized, their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable." Lord Westbury in *Ralston v. Hamilton*, 4 Macq. 397, 405 (1862). "Uncertainty is the gravest defect to which a law can be exposed, and must at whatever cost be avoided." HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 43.

<sup>25</sup> E. g., the remarks as to LITTLETON'S TENURES in the preface to COKE ON LITTLETON and in the preface to 12 REP.

<sup>26</sup> *Cochrane v. Moore*, 25 Q. B. D. 57 (1890). See DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 171 ff.



able by a condictio, which lay for *certa pecunia* or *certa res* due upon contract.<sup>27</sup> For the Romans enforced such an obligation through a claim of the promisee to the very thing promised, exactly as in our law we once allowed debt for a horse due upon an exchange of horses.<sup>28</sup> In each case the action preserves the memory of a time before the use of coined money when the promisor, typically a borrower, was thought of as one who wrongfully detained the creditor's property, although it might be property of a pecuniary character, so that return of an equivalent would suffice. But just as in debt for a chattel, or detinue, as it came to be, the plaintiff might have to be content with the money value of the thing, since his execution ran in the alternative, so under the Roman formulary procedure, unless the judgment debtor handed over the thing itself, there was ultimately a *pecuniaria condemnatio*.<sup>29</sup> Only a formal contract was so enforced.<sup>30</sup> Yet there was an obvious similarity between the gift without delivery and the gratuitous creation of an obligation to do or pay something. Hence it was easy to think of a contract of gift.<sup>31</sup> And as, on the one hand, the formal contracts lost their vitality and, on the other hand, the clumsy device of *actiones arbitrariae* was superseded by execution *in natura* (specific enforcement), the distinction between gift as a transfer of title and an agreement to give as the creating of an enforceable duty to transfer, was easily lost. As the enforcement *in specie* of the duty of the seller to transfer gave rise to a rule that the risk of loss was on the buyer, the thing sold being treated as part of his substance from the date of the sale regardless of delivery,<sup>32</sup> so specific enforcement of the contractual duty of the donor gave rise to an idea that the gift was complete upon acceptance, without more. The law of Justinian required no form. The *pactum donationis* was legally enforceable by compelling delivery, and so it could be said that the gift was complete without delivery.<sup>33</sup> The Roman

<sup>27</sup> A brief account of this may be found in ROBY, *ROMAN PRIVATE LAW*, I, 527-28. As to the *condictio certi*, see DIG. XLV, 1, 74; DIG. XII, 1, 24.

<sup>28</sup> FITZHERBERT, *NATURA BREVIVM*, 119, I.

<sup>29</sup> GAIUS, IV, §§ 48-52.

<sup>30</sup> VAT. FRAGM. § 263.

<sup>31</sup> COD. V, 11, 6. See WINDSCHEID, *PANDEKTEN*, II, § 365.

<sup>32</sup> DIG. XVIII, 6, 8, pr.; DIG. XLVII, 2, 14; INST. III, 23, § 3.

<sup>33</sup> "Moreover they are complete when the donor has manifested his will in writing or without writing; and our constitution, after the example of a sale, has directed that

law world has received this doctrine from Justinian's books.<sup>34</sup> But the great Romanist generalization of the legal transaction (*Rechtsgeschäft, acte juridique*) — the declared will to bring about a legal result, given effect by the law — has led to a new way of treating it. In the Institutes, gift appears as a mode of acquiring title to property. In recent systematic works it appears among obligations.<sup>35</sup> Systematic writers indeed confess that so regarded it does not fit neatly into the general legal scheme. But this is of little moment under a legal system by which one who has a contract right to property is as assured of getting it *in specie* as is one who has title, or, to put it in the language of our law, the equitable title is as good as a legal title.

At common law the question was first definitely decided in *Irons v. Smallpiece* (1819).<sup>36</sup> The action was trover for two colts. The plaintiff (donee) was the son of the donor and defendant was the donor's executrix and residuary legatee. Six months before the donor's death he orally gave the colts to plaintiff, but they remained in the donor's possession till his death. It appeared, however, that the donee agreed to pay a stipulated price for the hay furnished the colts after the gift. Thus on the one hand the gift so near in time to the donor's death had a certain testamentary flavor, on the other hand, the agreement to pay for the hay amounted to an acceptance of the gift, and if a legal transaction of oral gift and acceptance were to be recognized by the law as having the effect of passing title, there was enough. The Court of King's Bench took the view that property did not pass. Abbott, C. J., relied on the undoubted rule requiring delivery in case of gifts *causa mortis*, which he said could not be distinguished. Holroyd, J., said that "to change the property by a gift of this description [*i. e.* without deed] there must be a change of possession." But Lord Hardwicke had expressed a doubt whether the analogy of gifts *causa mortis* was applicable,<sup>37</sup> and after *Irons v. Smallpiece* many judges in-

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they involve a duty of making delivery, so that although there has been no delivery, they have full and perfect effect and the donor is under a duty of making delivery." INST. II, 7, § 2. Compare conversion by contract in the Anglo-American law as to vendor and purchaser of land.

<sup>34</sup> FRENCH CIVIL CODE, Art. 938; BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL (11 ed.), III, §§ 803-06; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW, §§ 199-200.

<sup>35</sup> See DERNBURG, PANDEKTEN (8 ed.), II, § 363, note 2.

<sup>36</sup> 2 B. & Ald. 551.

<sup>37</sup> Ward v. Turner, 2 Ves. Sr. 431, 442 (1752).



sisted *arguendo* that a clear distinction between gifts *inter vivos* and gifts *causa mortis* ran through the books and had been ignored in that case.<sup>38</sup> It was argued that "the question to be determined is not whether there has been an actual handing over of the property manually, but whether . . . there has or has not been a clear intention expressed on the part of the donor to give and a clear intention on the part of the recipient to receive and act upon such gift."<sup>39</sup> It was said that retention of possession could only be evidentiary upon the real question as to intention.<sup>40</sup> It was said that in case of a gift *causa mortis* there was a reason for requiring some formal act, whereas in case of a gift *inter vivos* it was enough that "the conduct of the parties should show that the ownership of the chattel has been changed."<sup>41</sup>

After controversy had raged for seventy years or more, some approving the doctrine of *Irons v. Smallpiece*,<sup>42</sup> but more disapproving it, the matter was set at rest in *Cochrane v. Moore*.<sup>43</sup> Now the historical method was at the height of its vogue. Accordingly the elaborate opinion of Fry, L. J., proceeds neither upon analogy nor upon analytical reasoning as to the elements of the legal transaction of gift, but upon an elaborate historical investigation, beginning with Bracton and carried down through the Year Books, as a result of which he concludes that "according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery."<sup>44</sup> The resulting rule, requiring delivery in case of gifts *inter vivos*, has been generally accepted.

Looking back over the development of the divergent doctrines of the civil law and of our own law upon the two subjects discussed,

<sup>38</sup> Crompton, J., in *Winter v. Winter*, 4 L. T. (N. S.) 639, 640 (1861). See Serjt. Manning's note (a), 2 M. & G. 691 (1841).

<sup>39</sup> Pollock, B., in *Re Harcourt*, 31 WKLY. REP. 578, 580 (1883).

<sup>40</sup> Cave, J., in *Re Ridgway*, 15 Q. B. D. 447 449 (1885).

<sup>41</sup> Crompton, J., in *Winter v. Winter*, *supra*.

<sup>42</sup> Kelley, C. B., in *Douglas v. Douglas*, 22 L. T. (N. S.) 127, 129 (1869). *Contra*, Parke, B., in *Ward v. Audland*, 16 M. & W. 862, 870 (1847), and *Oulds v. Harrison*, 10 Exch. 572, 575 (1854).

<sup>43</sup> 25 Q. B. D. 57 (1890).

<sup>44</sup> *Id.* 72-73.

we may see five different processes by which legal rules have been worked out juristically and judicially in the past.\* The first and crudest is a method of eking out binding authority by differences and analogies, illustrated by the common-law adjudication of the question of ownership of border trees on the analogy of seisin of the trunk, by the controversy as to the analogy of gifts *causa mortis* and gifts *inter vivos* in the English cases, and by the Roman rule that no delivery is necessary in case of gifts *inter vivos*, rested in the Institutes on the analogy of a sale.<sup>45</sup> The second is generalization from procedure, illustrated by the Roman-law doctrine of gift *inter vivos* without delivery as an inference from specific enforcement of a *pactum donationis* and the common-law doctrine of gift by deed without delivery as an inference from the procedural force of a seal in estoppel by deed. Out of these two develop the scientific method of systematic analysis, illustrated in the civil law by the theory of a gift as a legal transaction, in which the declared will to give and to accept is given effect as such, without more, and in the common law by the theory of gift as made up of the elements of declared intention to give plus manifested intention to accept, a theory obviously related to the Romanized conception of obligations which had no little currency in nineteenth-century England. It should be noted in passing that although this theory did not establish itself in the case of gifts *inter vivos*, it has left its mark in the rule as to gratuitous declarations of trust without transmutation of possession, so that "I give" and "I accept" are nugatory without delivery, and "I promise to give" and "I accept" are nugatory without consideration, while "I hold in trust for you" is good upon the sole basis of intention without anything more.<sup>46</sup>

A fourth method disclosed is historical. The history of legal institutions and legal doctrines is relied upon to give us a conception or a principle from which the rule for a particular situation may be reached. This is illustrated by the decision in *Cochrane v. Moore*. Lastly, we see a philosophical method, a method of deduction from some extra-legal philosophical principle, illustrated in Roman law by the doctrine as to border trees, derived from Aristotelian metaphysics and Aristotelian natural philosophy, and

<sup>45</sup> See *supra*, note 33.

<sup>46</sup> *Ex parte Pye*, 18 Ves. 140, 150 (1811). See the concise statement of these distinctions in WILLIAMS, *PERSONAL PROPERTY* (17 ed.), 70.



the civil-law doctrine of gift as a legal transaction, based ultimately in part on analysis and in part on philosophical theories of the intrinsic binding force of promises, fortified by nineteenth-century philosophical theories as to free assertion of the individual will. In short, instead of the conscious or subconscious search for or formulation of the practice of the people, or of what seemed naturally just to the lay public, or the inexorable operation of the self interest of a dominant class, which have been pictured to us, we see the gradual development of a scientific technique, designed to preclude vague gropings for extra-legal ideas of the naturally just, which vary with the impulse of the moment or the character of the magistrate, and to repress the pressure of individual or class self-interest by imposing objective standards of finding, interpreting and applying the law. Beginning by imposition of a hard and fast yoke of authoritative rule, literally interpreted and mechanically applied, men learn to eke out authority by distinctions and analogies and presently to generalize cautiously from established remedies and established procedure. Later they learn to use three truly scientific methods — the analytical, the historical and the philosophical. Under our eyes they are beginning to learn a further 'method of taking account of the social environment of the application of legal rules, of their social effects in action, of the interests to be secured and the effective means of securing them. The significant feature of this scientific development is not the occasional failure to keep down the eternal pressure of self-interest, but rather the success which has attended centuries of persistent human effort to overcome instinctive action and put in its place conscious direction of the human will toward an ideal justice.

Law is a practical matter. Legal traditions have persisted largely because it is less wasteful to keep to old settled paths than to lay out new ones. If one were laying out streets anew in the older portion of one of our modern cities that dates back to colonial times, and were proceeding solely on the basis of convenience of travel from place to place, proper accommodation for use of the streets by public utilities and light and air for the buildings that now rise on each side, we may be sure that the map would look very different. Often the streets got their form by chance. They were laid out at the fancy of this man or that according to his ideas for the moment, or, laid out by no one, they followed the lines of travel

as determined by the exigencies of the first traveler. Today it may well be more wasteful to relay these lines than to put up with the inconvenience of narrow, crooked, irregular ways. Many legal paths, laid out in the same way are kept to for the same reason. When the first case on the new point called for decision, judge or jurist, seeking to decide in accordance with reason, turned to a staple legal analogy or to an accepted philosophical conception and started the legal tradition in a course which it has followed ever since. Thus the really universal truth in the economic interpretation is to be found in a conception of law as a social device to eliminate friction and to prevent waste; as one of the means by which civilization conserves energy and conserves the goods of existence to meet human wants.

But the great source of friction is human wilfulness<sup>47</sup> and the great cause of waste is insecurity. Hence throughout legal history men have been solicitous above all things to hold down arbitrary and capricious action, whether of private individuals or of magistrates, and to conserve the general security. Undoubtedly magisterial arbitrariness has sometimes been a bogie. Aristotle feared to allow recovery of eighteen *minae* proved due in an action for twenty *minae* lest to permit the dikasts to do anything but decide the formal issue might turn orderly legal adjudication into mere haphazard arbitration.<sup>48</sup> Scaevola thought it required a strong judge to allow a set-off.<sup>49</sup> The English Serjeant at Law who replied to Doctor and Student objected to injunctions against enforcement of a bond paid but not formally released "for as moch as conscience is a thinge of greate uncertaintie."<sup>50</sup> Selden thought the measure of equity might quite as well be the chancellor's foot.<sup>51</sup> Jefferson would have received English law as of the first year of George III, in order to "get rid of Mansfield's innovations" in the way of absorbing equity and the law merchant into the common law.<sup>52</sup> Thus the paramount social interest in the general security

<sup>47</sup> "Man . . . just in his intelligence and perverse in his will." DEMAISTRE, DU PAPE, Bk. 2, chap. 1.

<sup>48</sup> POLITICS, II, 8 (Jowett's translation, I, 48-49).

<sup>49</sup> CICERO, DE OFFICIIS, III, 17, § 70.

<sup>50</sup> HARGRAVE, LAW TRACTS, 326.

<sup>51</sup> TABLE TALK, tit. Equity.

<sup>52</sup> TYLER, LETTERS AND TIMES OF THE TYLERS, I, 265. Compare the quotations in note 24, *supra*.



has dictated orderliness, certainty, system and rule in the administration of justice so that men may rely on appearances and act with assurance in their everyday activities unworried by the aggressions of others and unharassed by the caprice of their rulers. The intense desire to exclude the personality of the magistrate for the time being at almost any cost has left its mark on the law beyond any other factor in law making.

Primitive law sought to insure that one will should not be subjected arbitrarily to the will of another by reliance upon chance. The strict law relied instead upon hard and fast rule, upon form and upon mechanical procedure. Equity and natural law relied rather upon reason and an attempt to identify law and morals at a time when philosophical or religious systems of morals were generally accepted and appeared to furnish universal standards. The maturity of law turned to logical development of conceptions derived from supposed ultimate metaphysical data, at a time when men believed in the absolute, or to logical deduction from principles derived from history, under the influence of positivist views derived from the analogy of scientific study of external nature. So far from being means of allowing popular ideas of natural justice to play freely upon the magistrate's conscience or to enable him to formulate effectively the postulates of the self-interest of a dominant class, these were all conscious devices to enable him to resist himself and his fellows and conscious attempts to attain an absolute objective standard of justice.

A prime cause of difficulty in all discussions of this subject grows out of the mistake of thinking of a body of developed law as wholly made up of rules. Austin was a chancery barrister at a time when English equity was chiefly taken up with the enforcement of family settlements and trusts, and the equity lawyer was of necessity an expert in the law of real property. Hence he thought of law largely in terms of rules of the law of property. This attitude has undoubtedly colored Anglo-American analytical jurisprudence ever since.<sup>53</sup> Moreover lay writers who have urged the economic

<sup>53</sup> Thus, MARKBY, *ELEMENTS OF LAW*, § 7 (1871), defines law as a "body of rules;" HOLLAND, *JURISPRUDENCE*, chap. 3 (1880), defines a law as "a general rule of human action" and, after BENTHAM (*WORKS* (Bowring ed.), I, 141) takes law to be an aggregate of such laws; ANSON, *LAW AND CUSTOM OF THE CONSTITUTION*, I, 8 (1886), speaks of law as made up of "rules of conduct;" POLLOCK, *FIRST BOOK OF JURISPRUDENCE*, 17 (1896), defines law as "the sum of the rules of justice administered in a state."

interpretation in various forms have thought of law in terms of penal legislation and have assumed that it is a body of definitely fixed rules imposed by a definite authority.<sup>54</sup> Primitive law may show us a hard and fast rule for every case with a tariff of exactly fixed compositions for every cognizable species of wrong. But in its maturity law is much more complex. In truth, developed law exhibits three types. First we find rules, such as Austin wrote of, *e. g.*, the rule in Shelley's Case, the rule against perpetuities, the rules as to when and what covenants will run with the land, the rules as to what is a negotiable instrument, how it may be transferred and the effect of different modes of transfer, and the sections of a penal code.<sup>55</sup> The advocate of the economic interpretation goes to the latter for illustrations. Second, we find standards, such as the standard of due care or of the diligence of a reasonable man, the standard of the reasonable man in the objective view of fraud, duress and mistake, the standard of reasonable service in the law of public utilities; or in the Roman law of contracts the standard of *diligentia quam suis*, of *diligentia cuiusvis hominis*, of *diligentia boni et diligentis patrisfamilias*. We have sometimes been told that these are not law at all.<sup>56</sup> And they are not if we think of law as an aggregate of rules. The rule, so we are told, is that a certain standard be applied to certain situations. These standards have a variable application with time and place, and contain a large moral element. Yet they are significant legal institutions. The legally defined measure of conduct, applied by or under the direction of a tribunal is as much a part of the machinery by which organized society secures interests as the precise rules which it uses for the same purpose in other situations.<sup>57</sup> It is here that Judge Baldwin's proposition as to the practice of the people and popular ideas of what is naturally just finds its justification. For the cardinal notion is one of protecting the public at large in a reasonable re-

<sup>54</sup> See my discussion of this subject in 25 HARV. L. REV. 162, 167, 500.

<sup>55</sup> Compare the common-law principle as to what is a misdemeanor with the rules in our penal codes.

<sup>56</sup> Hence the attempt, now generally given over, to establish a body of fixed rules that this or that thing — *e. g.*, not stopping, looking or listening at a railroad crossing, getting on or getting off a railroad car when in motion — is negligence absolutely in and of itself without reference to circumstances. Hence also the attempts to fix degrees of care or degrees of negligence. Compare also KEENER, QUASI CONTRACTS, 104-07.

<sup>57</sup> See HOLMES, COMMON LAW, Lect. 3.



liance on the way in which others will conduct themselves in this situation or that, as a means of promoting the general security. Third, we have what may be called principles, that is premises for juristic deduction, to which we turn to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards, and to reconcile them when they conflict. These principles are the living part of the legal system and are its most significant institution. Here also the hand of the jurist and the work of legal speculation are most conspicuous.

Examples of such principles or general premises of the legal system are the Roman conception of *negotia bonae fidei*, resulting in a relation or obligation with incidental duties of good faith on each side, quite apart from what had been expressed; the modern civilian conception of the legal transaction, the declared intention given effect as such by law in order to effectuate the will of the actor; the principle that one person is not to be enriched unjustly at the expense of another; the doctrine that a loss is not to be shifted from one innocent person to another equally innocent, which plays so large a part in Anglo-American equity; the principle that liability is a corollary of fault, which was so fruitful in our nineteenth-century law of torts, and the more recent principle that harm intentionally caused is actionable unless justified. Some of these make their way in the law and become permanent acquisitions of the system of administering justice. Some prove ephemeral. Some for a season do positive harm before they are rejected. In any event these general principles and conceptions, through which jurists endeavor to make the law as it has developed logical and intelligible, react powerfully upon the law itself and have much to do with shaping its course. Thus the generalization that liability to repair an injury is a corollary of culpability has had much to do with departures from and limitations of historical common-law rules as to absolute liability of carriers and absolute liability of keepers of animals, and with the attitude of American courts toward the doctrine of *Rylands v. Fletcher*. And the principle that intentional injury must be justified has been molding the whole chapter as to injuries to advantageous relations which the courts have been writing in the last generation.

William James tells us that "the course of history is nothing but the story of men's struggle from generation to generation to find

the more inclusive order.”<sup>58</sup> Certainly such has been the course of the history of legal doctrine. But here, too, the endeavor has been to prevent friction and eliminate waste. In law this means an endeavor to eliminate the arbitrary and illogical; a conscious quest for the broad principle that will do the work of securing the most interests with the least sacrifice of other interests, and at the same time conserve judicial effort by flowing logically from or logically according with and fitting into the legal system as a whole.

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<sup>58</sup> THE WILL TO BELIEVE, 196.



## THE WORLD WAR AND ITS EFFECT ON FUTURE PRIVATE INTERNATIONAL LAW. II

### II. THE CONDITION OF FOREIGNERS

THE ideas which I have expressed about restrictions upon associations in their international relations indicate the nature of my opinion on the restrictions which in the future should be imposed by each nation upon foreigners.

Under the influence of philanthropic theories professed by French philosophers in the eighteenth century and for more than a hundred years, most lawmaking has had a tendency to suppress the difference which used to exist in each state between its subjects and persons who were not subjects. Particular instances are the Dutch Civil Code of 1836 and the Italian Civil Code, which in a general way class foreigners with citizens save for the single exception of political rights. The Institute of International Law made itself the mouthpiece of this liberal tendency when at Oxford in 1888 it passed a famous resolution saying that in all countries the rule should be: "The foreigner, no matter what his nationality or religion, shall have the same civil rights as the citizen."

These generous aspirations are difficult to maintain in the presence of the lesson drawn from actual events. The latter have shown that there are distinctions which must be established between the guests of a nation welcomed in its territory, that there are some such guests of a nation whose business constitutes a most serious danger, and that it is therefore imprudent to make all foreigners without exception equal in law to citizens.

Italy is a country which has for a long time professed and applied the most favorable theories toward foreigners. Moreover, it is interested in welcoming them as kindly as possible, because the money of tourists is perhaps the most important part of its revenue. But taught by the most painful lessons, and enlightened by the war, Italian public opinion has come to understand that a people may not safely let the representatives of another nation install themselves in great number, acquire houses, country estates, and

mines, and grasp, openly or secretly, its commerce, its industry, its shipping companies, and worst of all, its banks.

The cry of alarm from Italy found its voice through two eminent professors of law, Fedozzi<sup>1</sup> and Giovene.<sup>2</sup> There is no doubt that these sentiments will be echoed and that important legislation will result from it, like that which came twice in France from similar circumstances. The first was when during the drafting of the Civil Code certain articles<sup>3</sup> were put into it which marked a profound reaction against the too great liberality of the Revolution, and the second, when in 1849 the government of the Second French Republic found that it had to revoke its own decisions in favor of internationalism and set up against foreigners who had abused its favor procedure for their expulsion.

The experience of all times and all countries shows that it is extremely dangerous for a state to give too much liberality to foreigners who come within its boundaries. Sooner or later the fatal day comes when such imprudence is regretted, and the two phrases of La Fontaine's Fables are brought to mind:

*"Laissez-leur prendre un pied chez vous,  
Ils en auront bientôt pris quatre."*<sup>4</sup>

In a general way, lessons of experience and common sense both indicate that the differences between citizens and foreigners are necessary and inextinguishable. The law must take them into account, no matter what the theories of doctrinaires and Utopians.

In every country citizens can be kept in the right way by moral considerations much more forcibly than by the fear of punishment through the law. While one may hope to escape the consequences of the law, it is difficult to avoid the reproaches of one's relatives and friends, or to be surrounded by fellow citizens who do not trust one. Living in the place where one is born or has always lived, one must always hesitate before making trouble. No similar sentiment affects foreigners. None of these moral barriers hold them back when they start on the road to crime. And thus it

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<sup>1</sup> 18 REVUE SCIENTIA DE ROME, 419 (1915).

<sup>2</sup> 15 RIVISTA DI DIRITTO COMMERCIALE, 657 (1917). See also Bartolo Balotti, NUOVA AUTOLOGIA (May 1, 1917), 80.

<sup>3</sup> Articles 11, 14, 18, 726, 912.

<sup>4</sup> LA FONTAINE, LA LICE ET SA COMPAGNE, Livre II, 7.



follows, and statistics prove, that among criminals the proportion of foreigners is always considerable. The same is true of prostitutes.

This sociological phenomenon may also be explained by other causes. The man who abandons his native soil to plant himself somewhere else is often one of those restless spirits satisfied by nothing, desirous to start some revolution against social institutions and to bring them into accord with his dreams. Often such a man is also a criminal, a bankrupt, or a deserter.

Hence it is not astonishing that these individuals, who have shown in their own country that they are incapable of obedience to authority, or of discipline, should carry away with them a spirit of insubordination and revolt. Even when they do not commit common and ordinary crime they find it easy to stir up mutiny, strikes, revolutions, and whenever the public peace is disturbed they take occasion to make it worse.

In order to deal with the menace of these dangers the government of Great Britain, theretofore celebrated among anarchists for its liberality and its hospitality, was forced to pass in 1905 its famous Aliens Act, which gave the necessary power to prevent dangerous foreigners from access to the country and to expel them if necessary.

No one should believe that I consider all foreigners as dangerous. My thought is quite otherwise. I simply say that among them there are always many who are disposed to join the army of criminals. But I also say that even those whose conduct is not opposed to the penal law should be the object of particular measures. We ought to remember that the more honest men are and the more they understand the duties of a good citizen, the less likely they will be to forget their obligation to their native land, merely because they have emigrated. We should infer that there is just cause to believe that they will help their own country by spying. It may be merely commercial and industrial. And many things of this kind have turned up both before and during the present war.

Before the war broke out there were many proprietors of hotels and restaurants, many servants, employees of business houses, workmen, even merchants, professors, and students, who abused the hospitality of the country where they were residing, to get every kind of information and every kind of secret to be put to some use in their native land. But even if they do not do this sort of thing

we ought to fear that any great number of foreigners would, by their presence alone, inevitably affect the traditions, habits, and virtues of the population with which they mix. A Swiss writer, taught by what has been passing before his eyes, expressed this thing profoundly in a single phrase when he said: "Foreigners are a denationalizing force."<sup>5</sup> This work of denationalizing is particularly to be feared in any nation which has been as rash as Switzerland or the United States. In those countries foreign professors are trusted to instruct the young. Whether it be children, more mature students, or even those in universities, the danger is the same. If the teacher does his work well he will be a man who cannot forget his native land. He will, therefore, teach ideas which are not those of the fathers and mothers of his students. These ideas will, in their turn, be a ferment causing denationalization.

We should then exclude entirely from our consideration the theory of jurists like Pillet and Rolin, who say that every foreigner should have, merely because he is a man, a legal right to enter every social and legal institution. We should, however, remind ourselves that every state has for its first cause of existence the interest of its citizens. Working from this idea we should declare that foreigners should receive every right which humanity demands for them, but that their rights should stop short of the point where native citizens begin to suffer. It is citizens who pay taxes and serve as soldiers; it is for them and through them that the state is organized. It necessarily follows and is the only just result that they should have advantages from which others should be excluded.

These considerations ought to inspire legislatures and govern in the future the condition of foreigners. Under such rules foreigners in every country will necessarily be more rigorously supervised in the future. There is more than one reason for this. Long before the war the thing had begun by reason of the inconvenience caused by the presence of certain foreigners, and legislation had begun to subject them to special rules. I have already cited the British Aliens Act. The world is familiar with the successive laws through which the United States of America has protected its population against the disagreeable results of immigration. In France for many years every man from every nation has had the most absolute

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<sup>5</sup> Cernesson, *REVUE DE PARIS* (August 1, 1914), 530.



liberty. There has been but one distinction: the foreigner could be expelled. But the day finally came when our guests abused our hospitality. Some thirty years ago the behavior of the anarchists called our attention to the fact that both the authors and the inciters of acts of anarchy were generally foreigners. Then the decree of October 2, 1888, followed by the law of August 8, 1893, required foreigners residing in France to make a declaration to the police authorities and to carry papers which should be *visé*, in the commune to which they moved, each time that they changed their residence.

The war has shown that this was insufficient. Hence the decree of April 2, 1917, which requires every foreigner who remains more than fifteen days in France to receive a permit to remain, describing his person and carrying his photograph. In the United States the authorities have taken even greater precautions. Having used the Bertillon system to identify criminals they have completed the permits issued to German residents requiring on each the thumb print of the bearer. This is a wise course. Berlin had learned how to substitute one photograph for another on a passport, even when the first was impressed with a stamp.<sup>6</sup>

Doubtless after peace comes these measures will not be so strict. But in a general way they will probably continue, in view of the hard experience we have had. And that experience will probably lead to other measures interesting in private law. Some countries will forbid foreigners to own land or buildings. I think this interdict, which may already be found in certain countries, is not a wise thing. It is likely to drive foreigners out of fields of enterprise in which they might otherwise engage to the benefit of the country in question. On the other hand, it is of little value as a precaution. The foreigner who really has some dangerous scheme in his mind can accomplish it without much difficulty, either by leasing the thing he is forbidden to buy, or having it bought by a man of straw. The furthest I would go in this case would be to say that foreigners, as I have proposed in the case of foreign associations, should be forbidden to buy real property situated in places of military importance. Even such precautions are likely to be dodged without very much trouble by any skillful and unscrupulous person.

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<sup>6</sup> 23 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC (1916).

If we are to work along this line it would be much more practical to forbid foreigners to engage in public service or affairs which affect directly or indirectly the national defense. The laws of many countries require that the captain and officers of every ship shall be citizens. Others make the same regulations for railroad work. It is probable that the present experience will lead to the imitation of these examples.

For the same reason every public function ought to be prohibited to foreigners. As I write this I have received a profound shock upon learning that the mayor of an American city is an unnaturalized German.<sup>7</sup>

I prefer the wiser French law, which absolutely refuses every kind of public function to foreigners. They may not become members of the bar. And that is reasonable, for the influence of a lawyer may be most considerable, and he is a man likely to be trusted with secrets of great importance. Lawyers ought to be held up in their respect toward the duties of their profession by the very same moral considerations of which I have spoken above and which are always more forcible in the case of native citizens.<sup>8</sup>

The next question is whether other restrictions are needed upon the rights to be granted to and enjoyed by foreigners. I say no. As I have already observed, the more reasonable we think it is to take measures against dangerous foreign influences, the more we see how reasonable it is and how economically necessary that we should not put up barriers like the Great Wall of China which would block off ordinary international relations. That sort of thing is both disagreeable and injurious to the very people whom it seeks to protect.

Beyond all these matters there is a whole series of new problems which have been brought before jurists because of the progress of scientists. These arise out of those scientific inventions which the war has turned from theory to practice. The application and development of such things go far beyond the dreams of romance. Thus, when peace comes again between nations, even when it is more complete than it ever was before, we must profit by the

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<sup>7</sup> The American newspapers have published the fact that a suit was brought in the District Court of Indianapolis to prevent a German named Fred C. Miller from assuming office, January 7, 1918, as the Mayor of Michigan City.

<sup>8</sup> See, on this subject, my *MANUAL*, § 333.



lessons of war and regulate severely aërial navigation, wireless telegraphy, and submarines, including those for commercial purposes. Here we have questions which interest both public and private international law, questions of the greater interest because of the difficulty of any present solution. Yet as none of them can be seriously studied unless we begin with research and meditation, I can merely announce the problems.

### III. CONFLICT OF LAWS

It is usual to employ the expression "conflict of laws" to indicate the cases in which it is necessary to decide whether a legal relation is to be governed by the law of the country in which the question arises or by the law of some other country. This phrase has been deservedly criticized. Literally understood it would make one believe that in cases of this sort two laws engaged in a controversy, each one possessing the same authority and the judge intervening, 'like a sort of arbiter, to award the victory. Truly there are jurists who conceive of things in this light, but I am one of those who consider it a most inexact conception. In reality in every country there is but one law, its own. Nevertheless there are cases in which that law may declare that on particular points the rules to be followed are those enacted by a foreign legislature. This may arise from reasons of practical utility, of courtesy toward other nations, or of plain justice. When this happens there is no conflict between the local law and the foreign law. The first borrows from the arrangements made by the second. If I may make a somewhat trivial comparison, it is as if a host inviting strangers to his table should think himself bound to serve up to them dishes prepared according to the usage of their own country, not because he is bound to do this, but to be agreeable to them, or perhaps to conserve their health.

The expression "conflict of laws" is therefore inexact. But it is most useful, and it has not been possible up to the present time to find another which denotes under so brief a phrase the case in which the presence of a foreign element in a legal relation may require the application to this relation of some foreign rule. Thus it is improbable that any transformation of judicial theory, such as present events may bring forth, will carry with it any abandon-

ment of this expression and, conforming to common usage, I shall continue to make it serve me.

But even if this expression is likely to continue to be honored, nevertheless there is reason to think that the problem which it expresses will receive new and different solutions, after the general peace, very different from those which have been given to it in the past.

At first sight this suggestion is a surprising one. How can one suppose that a gigantic battle, such as we now witness, can exercise any influence whatsoever on the conflict of private laws when that conflict, as has just been said, is not a real controversy? Once peaceful relations have been restored between those states now at war, why should not the inter-relation of their citizens be governed by the same rules as in the past? To this I answer: The actual war has rolled forward under atrocious conditions. It will leave profound and painful marks on the souls of millions of men and women who have suffered through it. These are people who were confident in the theory inspired by Rousseau,<sup>9</sup> a theory admitted and taught in all continental Europe. They had been led to believe that if war should break out the evils which follow in its train would touch civilians only indirectly and, as it were, by rebound. All the world knows that there has been nothing of this sort. Following on the German brutality, great populations have been forced to undergo physical and moral suffering a hundred times worse than that of the soldiers. The national dignity of the Belgians has seen their territory invaded by one of the guarantors of their neutrality. Their goods have been sacked and pillaged; they have suffered in their most dear affections by the massacre of so many innocent victims, by so much rapine and sacrilege that an honest pen cannot describe it. They have suffered by having all their youth shackled in a most degrading physical slavery. Can one then believe that they will be in a hurry to forget the authors of such evils?

And the English: Will they not remember, when peace comes, the women and children whose death has been the subject of

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<sup>9</sup> "La guerre n'est point une relation d'homme à homme, mais une relation d'État à État, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats." (CONTRAT SOCIAL, Livre I, chap. 4.)



celebrations and public rejoicings? Can they forget the enthusiasm with which Germany welcomed the exploits of its submarines against passenger steamers and those of its Zeppelins against unfortified towns? How many years will Serbia need to get back to normal life? And there is France, which wanted nothing but peace, which had lulled itself to sleep with generous ideas of international fraternity. Can France ever forget the attempt on her very life? Can she forget the millions of her men folk who have been sacrificed to save her from destruction? Above all, can she forget the stupid barbarity directed against her most respected monuments, her most feeble and frail beings, her greatest artistic glory, and against the apple trees which adorned her gardens?

Peace will come. At some time it must come, but at the bottom of hearts hate will remain. It will be a long time before Turks, Germans, Austrians, and Bulgarians can make themselves tolerable as visitors to the victim nations.

The legislation which in all countries reflects the current of popular opinion will feel a fatal necessity to follow its tendencies. Laws and decisions will accentuate the differences which exist today between citizens and foreigners; on the other hand treaties will diminish these same differences in the relations among the Allies.

Can it be possible that in the future the German will receive in France the same rights and privileges as an Englishman or an American? I have spoken of this above, but I now return to the question to point out a consequence which follows from it when we consider the future rules about conflict of laws.

From the time of Bartolus everyone has admitted that cases exist in which the law governing a legal relation is the personal law of the individuals who are interested. But when we begin to give precision to the idea of personal law, discord breaks out between systems of legislation. Some, faithful to the ancient theory of *statuts*, consider the personal law of an individual to be that of his domicile. This is especially true in England and in the United States. Other systems take their inspiration from the principle laid down by article 3, section 3, of the *Code Napoléon*, and apply to each individual the law of his nation. Most of continental Europe has adopted the French rule.

The progressive extension of this second theory is an argument

in favor of its merit. In particular, this theory has the advantage of being easier to apply with precision than the older one.<sup>10</sup>

And even in internal relations it is not always easy to give precision to domicile. Often and especially in our time where people move about according to their occupations, their caprice, or even the weather, it may well be embarrassing to decide what country is the principal residence of the person with whom one is dealing. Moreover an individual may often change his domicile easily and without leaving any clear evidence of what he has done.<sup>11</sup>

On the contrary, it is generally easy to be sure of the nationality of an individual. In the future it will be even simpler if, as I have thought likely, the law of most countries will require more and more evidence from the foreigner. It is probable that he will be required to make a declaration to the local authorities and to receive a permit to remain, which declares his nationality. Further, all contests about the nationality of individuals, no matter how frequent we may think they are likely to be, are in reality the reverse of frequent if we consider how many millions of individuals have a nationality not open to dispute. And finally, the number of those who change their nationality is relatively unimportant. Even among those the change is accomplished in practically every case by formalities which give it sufficient publicity.

But from now on it seems to me we shall have one further reason for preferring nationality to domicile. As I have said, we cannot possibly treat a German, after this war, in England or America, as if he were a citizen. It will not be enough that he is domiciled there. We cannot even treat him like an ordinary foreigner. By reason of his nation we shall subject him to certain special police measures and we shall refuse him certain rights. Now if, in the future, law draws this distinction, must it not also be prepared to

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<sup>10</sup> Mr. T. Baty has published an interesting and original work under the title of *POLARIZED LAW* (1914). He has endeavored to prove that the rule of domicile is superior to that of nationality (pages 18 *ff.*). But the cases which he cites to support this thesis [*Mette v. Mette*, 1 S. & T. 416 (1859); *Ogden v. Ogden*, [1908] P. 46; and *Sussex Peerage Case*, Cl. & F. 85 (1844)] are really against it. They indicate that the application of the law of domicile causes difficulties and injustice which would not be produced by the law of nationality.

<sup>11</sup> I may further add that since systems of legislation do not agree upon the determination of domicile, a person is likely to be considered by an English court as domiciled in France when the French court would consider the same person to be domiciled in England. See my *MANUAL*, § 114.



take nationality adequately into account when it starts to determine the manner in which this German may exercise such rights as are granted to him? There would be an evident contradiction if we should consider nationality to know whether a man may acquire one piece of property or another, or sue, or have the benefit of a treaty, and if we should neglect it when we came to determine the conditions to be imposed upon his acquisition of property, his rights in the courts, or his advantages under a treaty. Thus it seems to me that in the nature of things those countries which until now have remained faithful to the idea of domicile will be forced to accept the other theory as put forward by the authors of the *Code Napoléon*, because it is the one which suits modern conditions. Great Britain has already made one step in this direction. Her Trading with the Enemy Statute of 1916 abandons the traditional principle of English law. Before that statute, even in time of war, the question of whether a person was an ally, an enemy, or a neutral depended upon domicile. Now the criterion is nationality. Sir Edward Grey, as Minister of Foreign Affairs, in a letter to the Ambassador of the United States of America explaining this measure says: "The former test of domicile has been shown by experience to be insufficient in view of the conditions under which modern business is done."

And this is true. In our time the nationality of persons has acquired such importance that it must necessarily replace domicile as a test in international relations. Of course it will still be possible to consider domicile in all proper cases. But those will be the exception, and there is every reason to believe that the Anglo-Saxon nations, taught by current experience, will follow the example of the Latin nations. Soon they will have to recognize that nationality is a necessary test and to decide what law to apply to each foreigner according as he is friendly or hostile.

This will be more necessary, and uniformity among nations will also be more necessary if the jurists realize their hope that private international law will make new progress through the conclusion of many international conventions. These conventions are useful only to the citizens and subjects of the states which have made them, and this is just one more reason for the theory of nationality. For everyone who relies on any such convention will have to prove his nationality.

The next thing to consider is whether there is good reason to hope that new international conventions will improve private international law and in what respect the world war is likely to have an influence in this connection. Its principal influence just now flows from the circumstance that many treaties relating to private rights have lost their force with the outbreak of war. This is particularly true of the relations between France and Italy on one side and Germany and Austria on the other side. Are these treaties suspended or did they come to an end? The question is premature and will doubtless be settled in the treaty of peace.

But even if that should not be, I am driven to believe that all those conventions must be considered dead. Germany violated the treaty which guaranteed the neutrality of Belgium. Turkey tore up the Capitulations. The Central Powers trampled under foot all arrangements intended to diminish the horrors of war. What was this but a proclamation of an intention to be free from such engagements? What dupes other nations would be if they should let such enemies choose among conventions and pick those which they like and which are to their advantage! Surely the just and logical course is to declare that all are dead letters.<sup>12</sup>

But that is a secondary question. The principal thing, as I have already said, is to inquire whether civilized states ought to set to work again to establish whole series of conventions like those in force before the war and to govern questions of private international law by such conventions to as great an extent as is possible. I confess that I cannot share the enthusiasm which has been expressed by many international lawyers. Experience ought to have destroyed their illusions. There are so many cases in which the existence of a convention causes more complications instead of solving the questions toward which it is directed.<sup>13</sup> Take the French-Swiss treaty of 1869. It was intended to suppress all conflict of law upon a whole series of questions of civil right and legal comity. But it has given rise to no end of litigation in both countries. This

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<sup>12</sup> This opinion has been expressed in Germany by Professor Eltzbacher in his very recent book *TOTES UND LEBENDES VÖLKERRECHT* (1917). But it should be observed that in the relations between France and Germany the convention relative to the protection of the rights of authors has been respected. <sup>13</sup> *REVUE DE DROIT INTERNATIONAL PRIVÉ*, 370 (1917).

<sup>13</sup> Compare the just reflections on this subject of Professor Pillet in his book on *CONVENTIONS INTERNATIONALES*, 9 (1913).



is proved both by the volumes of reports and particularly by the evidence in the *Journal du Droit International Privé*.

This is not all. It is well known that for some time past representatives of the principal nations of continental Europe have met periodically at The Hague to draw up plans for international arrangements. The idea has been to cause a progressive disappearance of conflicts between the laws of the countries which share in these arrangements. Many of these conventions had already been signed. Some had begun to be put into effect. But then (and it was some months before the war), France, which had cordially welcomed the general idea, denounced these treaties, one after another, leaving in effect only the convention upon certain matters of procedure.

The reasons which led the French government to this action are not clearly understood. Probably it was caused by the following considerations. When a convention between two countries regulates the manner in which a right shall be exercised, the result is that each one of these countries deals with a controversy differently, according as it arises in the case of subjects of the other contracting power or arises in the case of other persons. The result is that private individuals, lawyers, and courts are exposed to a dangerous trap; one may easily forget the conventions, and the results of forgetfulness are unpleasant. This inconvenience is particularly serious when one country makes a number of conventions on the same subject with several other foreign nations. Then one must know first whether to apply the law of the country or of the treaty, and beyond that one must know which treaty is to be consulted. And for the latter purpose one must, to act with certainty, determine at his own risk the nationality of the parties.

It is true that this inconvenience is less when a single convention binds a number of nations, as in the case of The Hague Conventions. But then a different sort of inconvenience arises. In order to make a general international arrangement it is necessary that the convention which expresses it shall not be too seriously out of tune with the essential principles of the laws of any one of the contracting parties. When the supernumeraries in a theatre are supplied with costumes, it is not possible to make them fit in each case, since the wearer is likely to change at every performance. One may well expect them to be too large or too small, and we know what a

grotesque result we see on such occasions. The same is true of a legislative text. If it is to be used in several countries it is almost necessarily vague. Then the convention does not give sufficiently definite answers, and the very absence of precision leads to resort to the courts. It brings about the very suits which the convention was to prevent, and it is likely to cause different interpretation of the text in the different countries. Before long things are likely to be in about the same condition as if the treaty had not been made.

A notable example of this is The Hague Convention upon the signification of judicial acts. Although it was redrafted in July, 1905, from its first form of 1896, I may fairly say that even now it scarcely improves the previous conditions and that, on the other hand, it has raised some difficult questions of interpretation.<sup>14</sup>

Another sort of inconvenience is likely to result from these conventions common to several nations. One country is likely to push forward its own judicial system. There is good reason for fearing this, and if it happens the traditional institutions of other countries are likely to be upset, although those institutions are probably the things which fit the historical development and practical needs of those other countries. This would surely have happened if the plan for a uniform law of negotiable instruments had been adopted. The representatives of thirty-two nations worked on this at The Hague for several years, and it would probably have been adopted had it not been for the outbreak of the war. But that would have been a German victory; for this draft was thoroughly permeated with the ideas of German jurists and commercial men, the ideas embodied in German legislation on this subject. Then German merchants would for several years have reaped a very substantial harvest in other countries. Those other countries would have been obliged to go to school to the new order of things, and while they were learning there would have been disorder in their commerce, their industry, and their credit establishments.

Thus, notwithstanding the way in which this draft was expressed by men of theory, practical men in French Chambers of Commerce rightly criticized it, and public opinion, now enlightened upon the dangers and effects of German penetration, should set itself against any revival of this scheme.<sup>15</sup>

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<sup>14</sup> See my *MANUAL OF PRIVATE INTERNATIONAL LAW*, § 539.

<sup>15</sup> For the bibliography, see my *MANUAL*, § 197.



And lastly, if we have a general treaty relative to the manner in which private rights are to be exercised, one consequence is likely to be that upon certain points the courts of each one of the contracting states will give the language a different interpretation. If this happens, the treaty will multiply difficulties instead of reducing them. There is too much ground to believe that this will happen; if so, the more the countries, the more the international discord.

These are the different reasons which make me think that we ought to give up in the future the making of general international conventions intended to diminish the conflict of laws. That is one of the lessons of the war. But I do not draw the conclusion that we ought to give up dealing with the questions of private international law.

Certain sorts of conventions about them will still be desirable means of solving questions which can only be dealt with by agreement between nations. One of these questions is the determination of the rights which will reciprocally be given to the subjects of the contracting parties. I have already pointed out the objections to any provision that strangers may exercise special rights in an unusual way. The result of that is that certain persons within a given territory are not subject to general law. Such conventions may even cause a situation like that in the countries which have Capitulations,<sup>16</sup> and that would be a serious matter. On the other hand there is no like objection when an international treaty authorizes the subject of one country to enjoy certain normal rights of the citizens of another country. There one does no more than remove inequality. By doing so analogous concessions can be obtained in the other nation which makes the agreement.<sup>17</sup>

It is easy to see that there is an essential difference between conventions which grant to foreigners the enjoyment of certain usual rights and others which say in what manner rights shall be exercised in cases of private international law. The latter necessarily replace the ordinary rules of law. Thus something which a

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<sup>16</sup> In a country of Capitulations each person obeys only the law of his nation. He may even be free from all but the law of his race or that of his religious body.

<sup>17</sup> It is interesting to remember that more than a century ago article 11 of our Civil Code provided for this system of diplomatic reciprocity.

Parliament has voted after debate and after full discussion may be replaced by clauses drafted by diplomatic representatives which no legislature has had a chance to consider, ratify, or reject. Why should one be surprised that conventions of this kind result in the sort of inconvenience which I have indicated? On the other hand, in dealing with a convention which grants to foreigners the usual rights of citizens, those who sign it really act as the agents of their own country to grant rights already available, and it is not likely that any trouble or any interference with the normal working of legal institutions will follow. Another advantage worth remarking is that conventions which grant such usual rights cause very little interference with private persons. Such conventions merely make foreigners better off, and that is the proper rôle of diplomacy which seeks to protect the interests which it represents.

Like reasons make it desirable that more and more conventions should be made upon the question of nationality. Such conventions deal entirely with international points. They cannot interfere with the working of domestic institutions. Indeed, such conventions are properly the business of the state, for it is the state which is particularly interested to know what persons owe allegiance to it. And so I believe that no matter how many of such conventions we have, it will only be in the rarest of cases that we shall have trouble over the question of what nation claims a subject or whether a man is free from any national tie. Now, since the world war has introduced military service almost everywhere, since notwithstanding all dreams about a league of nations for peace there is good reason to believe that some new catastrophe may come to set people against people, and since even the present war is likely to continue in the economic field, we have more reason than ever to take precautions against conflicts in the matter of nationality. The so-called Bancroft treaties of the United States of America and others like them have had most happy results along these lines in the relations of that country with more than one foreign power.

But I submit that each treaty of this class ought to set up an international tribunal, composed of delegates from both countries and with a neutral umpire, which should consider all cases of the application of the treaty. Thus we should avoid conflicts in interpretation such as are only too likely to arise when the courts of



each of the states deal with the same treaty, conflicts which merely create new difficulties in place of old ones.<sup>18</sup>

I am thus led to consider the question whether we should not look forward in a general way to the establishment of international tribunals which should consider every sort of lawsuit depending upon any question of private international law. This is a most seducing notion of long standing. It is pleasant to dream of having questions settled by impartial tribunals presided over by judges skilled in the subject under review. One can think that the decisions of such an authority would be respected everywhere and that they will put an end to the present scandal of conflicting decisions. The thought will be that these become conflicting merely because they are the judgments of courts in different countries. When one meets such decisions one is likely to exclaim with Pascal: "Truth this side of the Pyrenees, error the other."

But I fear that those who support this beautiful dream have not reflected sufficiently upon the obstacles which stand in the way of realizing it. There is one of these obstacles which seems to me practically fatal, for it depends upon the very nature of the institution which is proposed. Such international courts, obviously, could only be set up in small number. Hence their sittings would probably take place far from the domicile of the parties; it would follow that if either party were poor, or if the subject of litigation was not of money importance, the duty to appear before a distant court and the necessity of employing advocates and pleaders who understand that court would be too burdensome. Justice would then be sold at too high a price or denied, and each would be as bad as the other. In France this very inconvenience is bad enough when a case is appealed to the Court of Cassation, and the same is true in like case in other countries. But that sort of thing does not happen very often, and moreover when it does, the case has already been dealt with by an inferior tribunal and very likely an intermediate tribunal. It gets in a sense digested and sufficient light is thrown upon the questions which the supreme tribunal is to

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<sup>18</sup> For the differences of interpretation between the German and the American authorities on the subject of the Bancroft treaties, see BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD*, 240 (1915). For remarks on the conventions about nationality made by France, see my *MANUAL*, §§ 214-16, 260.

decide. There is little reason to fear that the latter will not comprehend the arguments.

It is quite another thing to set up a court of the first instance for suits depending upon private international law. Such a court would take up a divorce suit brought by a poor workman. A Greek might sue a Russian for a few hundred francs. Someone in Syria might sell merchandise of small value to someone in Norway. No matter how the litigation arose, it is reasonable to suppose that in any one of these cases the person who wanted justice would give it up rather than resort to a distant tribunal. Now there is a grave moral objection when any right is made dependent on difficulties of this kind. The social objection is at least as great. I mean that the masses are likely to be excited against the classes and made particularly bitter if they get the idea that it is not possible for the common people to get justice. And this is especially true when a poor man gets into court against a rich adversary.<sup>19</sup>

Hence I conclude that maritime affairs are about the only class suitable for an international tribunal or jurisdiction. The ordinary maritime suit is generally a matter of some importance, and the parties to it generally have both money resources and a knowledge of how to do their business. There is another reason why if we set up any international tribunal we should confine its activity to this class of cases. Maritime law in all countries has a general resemblance. In no other division of either law or legislation have different nations borrowed so much from each other. Hence the task of an international tribunal would be relatively easy. But if we take up any other kind of business we find for converse reasons very serious obstacles to such tribunals. For instance, what legislation or system of private law is one to apply? That problem is insoluble unless all the nations should join in one common code of private rights, which in turn is not a reasonable notion. Even where they have mixed tribunals, as in Egypt, those tribunals apply only the Egyptian law and have a very limited competence.

And finally if we should wait for such a court before we started to better the situation of private international law we should certainly have to wait until the Greek Calends. Just think of

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<sup>19</sup> Cf. those statutes of the Roman Emperors which forbade the assignment of causes of action to rich or powerful persons. (*Ne liceat potentioribus patrocinium litigantibus protestare*, CODE JUSTINIAN, Book II, Tit. 14.)



the conferences and the various deliberative assemblies and legislatures which would have to be consulted before any valuable or definite agreement could be reached!

For these reasons it seems to me that the present difficulties of international law are more likely to respond to the private efforts of individuals. Generally speaking, wherever the state has interfered it has been slow and clumsy and unskilled.

When peace is restored and the world begins to live in quiet and without trouble there will be two methods by which men skilled in this sort of thing through their life or profession will be able to do something toward removing the difficulties which stand in the way of juridical acts which are to have a consequence beyond the limits of the territory where they are executed. The first of these will be the development of what is called an arbitration clause. I mean the ordinary stipulation in a contract which provides that differences arising out of it shall not be submitted to a court but to one or more umpires chosen by the contracting parties. Article 1006 of the French Code of Civil Procedure denies validity to these clauses, and the same is true of Italian law. I do not think there is any serious justification for this denial and it ought to disappear from the law in which it is found. If that happens these clauses will come into greater use and very considerable advantage should result. The length and expense of ordinary procedure can be avoided. There will never be any occasion to discuss the jurisdiction, a question upon which so much time is often wasted, before the case reaches any discussion of the merits. And these are the principal causes of the problems which private international law has to solve.

The weak side of this proposal is that it can only be applied to contracts, practically only to commercial contracts. But there are other fields for the same idea. Generally speaking, almost all the juridical acts which a man does of his own free will can be helped by another procedure. It is possible to diminish the frequency of conflicts of laws upon such matters by a plan which is not new but which has so far been seldom employed. This is merely that one should state in each juridical act, whether it be a contract, a will, or a marriage, that it is to be governed by the legislation of a specific country. One can easily know in advance when such an act is one likely to be called in question in a foreign country or deals with the rights of persons of different nationalities. And if in such

cases this precaution should be taken it certainly would avoid a great number of lawsuits; I mean the suits which turn upon the law of the personality of the individuals interested in the act. Or it may be the law of the place where the contract has been made or that of the place of performance. No one will contest the substantial advantage which would follow from an extensive application of what I may call the principle of the autonomy of the free will. And what do we need before we can accomplish this? Nothing, except that the lawyers who draw wills, contracts, gifts, and other like acts should acquire the habit of inserting in their documents this which I call the clause of legislative competence.

In France and I believe in other countries it is common to provide in such an act that any dispute about it shall come before a specified court designated in advance. Now as clauses like this are common and current why should we not give equal currency to those which state with precision and in advance the law applicable to the act itself?

The more people study private international law the more this hope of mine will stand a chance of being realized. One thing is sure: this branch of the law did not receive serious or scientific attention up to about fifty years ago. And in many cases the questions which arise within its field have become complicated, and indeed have arisen at all only because of the ignorance and insufficient skill of the interested parties or their lawyers or the judges who rule their acts. The better private international law is known the more simple it will become. I have just given one proof of this in my proposal about legislative competence, but I believe that what I say about simplicity is broadly and absolutely true.

From this point of view it would seem to me probable that the war may have one happy consequence. More than once in this study I have pointed out the general mixture of men of all nations, the increase of international contracts, and the conflicts of interest which have been caused by this great war. These in turn will cause a great number of controversies over private international law. That division of our science will in consequence attract the attention of lawyers more than ever before, and from this will come progress which may be very fertile.

There is more to this line of thought. Although I have no great confidence in the effect of international conventions, and although



I have felt bound to say much the same thing about the aspirations and drafts of congresses and associations of lawyers, I have for long believed that we have great benefits to expect from the relations among men which are brought about by such congresses, reunions, and meetings to draft treaties. Here we have people distinguished by their education, by their knowledge of the world and their social condition. Many of them have served in legislatures, others are lawyers, professors, and judges. Still others are leading merchants, bankers, or manufacturers. When these people meet and exchange ideas each teaches the others both the institutions and the necessities of his own nation, and the instruction is much more vivid than anything which can be communicated by books or articles in reviews. And when these men go home they cannot help sowing this seed of foreign origin, and if that seed falls upon a fertile soil something grows which means progress.

Moreover, the better one understands any foreign legislation, the greater the possibility that one can borrow some good legal institution from it. Something of this sort may be lacking in a country and it may be plainly worth adopting. This phenomenon is of frequent occurrence. Let me cite the numerous codes which were modeled on the *Code Napoléon* and conversely the different French laws about checks, warrants, and other commercial devices which have been passed in imitation of good English legislation. Everything drives one to believe that the reciprocal penetration of thought will multiply this borrowing and lending between systems of legislation.

There are many distinctions today between the laws of different countries which are bound to grow less for such reasons as these. Before long we may see general principles established and admitted nearly everywhere and resulting in something like the *jus gentium* of other days, that system of rules in force throughout the entire Roman Empire.

Now at the present time many of the problems of private international law arise out of the differences between the legislation of different countries. Suppose that English law should admit of the adoption of children, should permit natural children to be made legitimate and spendthrifts to be put under guardianship. Then certain lawsuits would disappear. I mean lawsuits which now arise both in British courts and Roman law courts out of the

circumstance that the one system possesses and the other does not possess these provisions.

And then just think of the many and most objectionable lawsuits which would be avoided if the validity of marriage was everywhere regulated by the same conditions. Perhaps it would be too much to suggest that divorce should be granted in every country for the same reasons. Litigation on these subjects is not only bad in itself, but bad because of the family and social troubles which follow on it.

Now the influence of the present war upon these subjects may be a happy one. On the one hand it separates, on the other hand it brings nearer together. Think of the different people who have come from the ends of the earth to fight on the soil of my country. Against the common enemy of law, liberty, and beauty we have true crusaders arrayed as truly as in the days of Peter the Hermit, and these men come from every class; merchants, lawyers, manufacturers, magistrates, bankers, and statesmen may all be found. And when they take their intervals of rest, it is likely that each will teach the others. All will see and hear and understand about the customs and morals and institutions and even the legal organization of France and Italy where they do their bit. Now if there is anything in what I have said about the value of the casual relationships between men who go to an international congress of the ordinary sort, if such things as that have had a beneficial influence on international law, am I a dreamer if I believe that much more valuable results will flow from the continued presence of such allies on our territory? There is at least good ground for this hope. We, on our part, are already going to school to our visitors. We ask them questions on all the things that are not answered in books and we grasp with avidity the opportunity to learn, especially because it is presented at the same time that we enjoy the pleasure of being hospitable.

One thing of this sort has already been accomplished: a few months ago the French and the Italian jurists formed an association intended to promote uniformity of civil and commercial law in those countries. And a similar attempt ought to be made in some general way to bring together all the Allies and help them to be allies in the future. May we not even hope to throw a bridge across the gulf between Anglo-Saxon and Roman law?



The best way to build up anything of this kind would be, I think, to start the publication of something in the nature of a review of comparative jurisprudence. There are some reviews, illustrated by the example in France of the *Journal du Droit International* and the *Revue du Droit International Privé*, which sometimes publish decisions of foreign courts, even when those decisions do not deal with international questions. But when they do that they go out of their province, and they do it very little in any case. On the other side the publications of our *Société de Législation Comparée* and of other like societies in other countries do very little to enlighten their readers. They print practically nothing but the text of statutes. They throw no light on how things work. But no one can fairly say that you can get any notion of what the law of a country is by reading texts in books. The result is a little like looking through one of those lenses which slightly distort the objects which at the same time they bring nearer to the eye. If we want to understand foreign law in the sense of having any concrete notions about it, we must do what corresponds to touching the object which cannot be properly seen through a glass. And the only practical way to get in touch with operation of laws is to study the decisions which apply them.

And so I say that a review of comparative jurisprudence is needed and would render great service to the international progress of law. Such a scheme would need a committee of jurists in each nation. They should choose the characteristic decisions of their courts. Then these decisions should be translated into the language used by the review. This sort of translation must be done by people who really understand how to translate legal ideas. And beyond that it would be practically necessary to annotate each one of these decisions, and such annotation requires some skill.

It seems to me that those who are interested in the theory or practice of law, and particularly international law, might well applaud any realization of this plan. It would make it easier to know and understand foreign legislation, and that would contribute to the prevention of conflicts of law. For fairly often such conflicts arise from the application of foreign law in error. A French tribunal may divorce Irish persons who, being Catholics, are bound by the law of indissolubility of marriage. Parties contracting in England may grant a right or easement in some piece of real prop-

erty situated in France, such as is not recognized by French law. Then neither the decree of divorce nor the grant can have any effect in the country where it is intended to operate. This sort of error, however, would probably be patent as soon as any court had passed on it. And the whole thing could have been avoided if there had been greater legal skill on the part of the persons who believed that they knew the Irish law, or how to apply the French law, in the cases cited.

The moving about of individuals which will be caused by military operations is likely to contribute to the exchange of knowledge and the comparison of law. Sometimes it will cause a case of conflict. Sometimes it will make the solution easier. Sometimes it will prevent conflict. But these are not the only results which we may well expect from the new contacts among nations brought about by our fight against German dominion and our league to combat it. There will be at least one other. Today when a question of private international law arises in any country, whether before the legislature or before the courts, very often the elements of the decision are to be found in what I might well call international custom or European common law. I mean the general body of rules, often founded on the Roman law, always based on common sense, justice, and practical necessity, which have been worked out in the course of the past centuries and which have become so familiar that practically no one denies them.<sup>20</sup>

The community of sentiment, of aspiration, and of life, which has been established among the states comprising the Entente, will certainly widen the scope and power of this international custom. *Eadem velle atque nolle, hoc est vera amicitia* is the true and forcible saying of a great Roman historian. Therefore, all the Entente states ought to try to solve their problems of this kind along similar lines, and some community of thought ought to be a necessary consequence of their alliance. We may forecast, from the close relations which have been established among them, not only a tendency of their legislation to borrow freely when good things are found and thus to diminish differences, but also an increasing tendency towards harmony, especially towards harmony in the decision of points of private international law. If this happens, there will follow a system much more satisfactory than any which

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<sup>20</sup> See my MANUAL, § 12.



can be established by treaties, for it will be more supple. Then it will adapt itself to situations and to the needs and institutions of the different countries, and so the inconvenience of handling and of interpreting an international treaty is likely to be avoided.

The countryside rarely appears more smiling than after a violent storm. Black clouds cover the heaven and darken the earth; torrents of rain fall and seem to threaten a new deluge; the wind cries, the thunder sounds, and the lightning glares and fills the souls of men with fear. Then comes the sun again, and under his rays the sea, the plains, and the mountains take on a new appearance; the foliage becomes deliciously fresh, the air with marvelous limpidity lets one see far off the very smallest details of the picture laid before our happy eyes. The birds begin to sing again and the farmer turns to his toil. So on the day when our great tragedy, already four years long, in which every citizen of the world has played a part, comes to the end of its final act, humanity will commence a new era. If the battle between the nations is not followed by domestic strife, if we learn from hard experience the lesson which it can teach us, our human atmosphere will have been purified by so much blood and heroism that we ought to be able to see better than ever before the road which we wish to travel to lead civilization to new and important fields of progress.

And I hope that private international law will at least be one of the branches of human activity on which the war will have this beneficent effect. The considerations which I have submitted to my readers seem to me to give fair ground for this prophecy and this hope.<sup>21</sup>

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<sup>21</sup> Translated by Richard W. Hale, Boston.

## THE SPANISH CIVIL CODE

**P**OLITICAL, criminal, and adjective laws are important, but the test of a civilization is the Civil Law, that controlling the relations of man and man. It covers his status, whether a man be considered as an individual or as a member of the family, his property, whether in land or in movable things, and the many relations which he sustains to his fellow man by consent in the shape of contract or by wrongful act. It is, so to speak, the core of law, all else being but a protecting shell.

To a lover of Spain the nineteenth century is an absorbing study. The deposition of Charles IV by Napoleon was no great loss, but neither the well-meaning Joseph backed by French influences on the one side, nor the Junta Central and Constitution of 1812 backed by the English on the other side, could prevail. The fall of Napoleon saw the return of Ferdinand VII and reaction. Ferdinand's abrogation of the Salic law in favor of his daughter Isabella II brought on the Carlist civil war upon his death, and even when that was subdued the immoralities of the queen and the political controversies under Espartero, O'Donnell, Narvaez, and others deprived the country of influence, if not of the respect of Europe.

Public affairs were indeed distressing, and yet there was a tendency which promised the regeneration of Spain. Ever since the Constitution of 1812, which for the first time called for a uniform code instead of the multifarious *Recopilacion* and the many local *fueros*, there had been aspirations for codifying the civil side of the Spanish Law. In 1851 the leaders of the *Cortes* prescribed thirty-six fundamentals for such a code, proposed by the same Code Commission which had drawn the successful Criminal Code of 1848. In part they were based on the *Code Napoléon*, and much of their value was due to De la Serna.<sup>1</sup> Although the plan was not carried out, earnest men continued seeking public improvement. Unfortunately the Latin desire for uniformity sought legislation from above rather than civic development from below; but the simplifying of the civil

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<sup>1</sup> 1 JURISCONSULTOS ESPAÑOLES, 177, 231; 2 *Ib.*, 144.



laws was a movement which enlisted the support of great men who might differ in political aims. Among them ranks highest Manuel Alonzo Martinez, coming from the old Castilian capital, Burgos, but through his work belonging to all Spain. He was the author of the Law of Waters of 1866, based on the Moorish customs, and, trusted by all parties, was under later administrations the head of the movement. He was president of the General Commission on Codification, and when Minister of Grace and Justice, from the death of Alfonso XII in 1885 until the end of 1888, carried through the work on a civil code. He had had much experience, but his great work was this code.<sup>2</sup>

The two principal difficulties related to marriage and the local *fueros*. The first he overcame by negotiations with Pope Leo XIII, and the second by conciliation, particularly through his book *El Código Civil en sus Relaciones con las Legislaciones Forales*, 1884-85. He carried through the Cortes the law of May 11, 1888, for twenty-seven bases, aiming at retaining the old historic principles of the Spanish Law, simplified and harmonized, but taking modern scientific principles into account for the new provisions deemed necessary.<sup>3</sup> There had been propositions by him and Silvela earlier, but the new code followed the bases prescribed in 1888, whether as to authorizing civil marriages, or as to family and property rights, in which modifications entered from the old Foral legislation. The subject of obligations, including contracts, remained largely Roman as before, regard being had, however, to modifications in favor of third persons arising from the Mortgage Law. While the new Civil Code was only supplemental, *supletorio*, in Aragon and other districts having their own *fueros*, it abolished or rather fulfilled the laws and customs of Castile, which substantially made up the code itself. The work as reported was slightly amended by the Codification Commission and became effective July 29, 1889, under Canalejas; but no one questioned that the work as a whole was that of Alonzo Martinez.

In the criticism of the new code much attention was paid to the formal matter of its division into four books instead of three like

<sup>2</sup> Martinez attributed much of the credit for the adoption of the Code by the Cortes to German Gamazo. 1 JURISCONSULTOS ESPAÑOLES, 231.

<sup>3</sup> Base I of the Law of May 11, 1888, in 1 MANRESA COMENTARIOS, 3; 2 JURISCONSULTOS ESPAÑOLES, 224, 269.

the *Code Napoléon*. Of the *Code Napoléon* the first book relates to persons, the second to property and the third to acquisition of property. It seemed to the Spanish codifiers better to have four books, thus dividing the law into Book I on Persons, Book II on Property, Ownership, and its Modifications, Book III on the different ways of acquiring ownership, and Book IV on Obligations and Contracts.<sup>4</sup>

The scientific basis of these distinctions, which go back to the Roman Gaius, is that Law like Nature is made up only of Persons and Things, otherwise called Property. Civil Law therefore is concerned with these in their five combinations. (1) Persons as such, in their relations to each other; a right is the bond, *vinculum juris*, connecting them. (2) When a Person's right directly affects Property it is real, over the Thing, whether movable or immovable, personalty or land, — for the use of "realty" for land is a Common Law term. (3) When the right can be exercised only through another, it relates to Obligations, whether contractual or arising from wrongs or delicts, including negligence. It is here personal, against another person. (4) But persons have rights growing out of the natural relation called the Family, and also (5) out of the artificial relation of Succession, whereby a dead Person now as in Ancient Law is considered as still surviving in the Property he leaves behind him.

Practically these five subjects touch on many facts, but they can at least be treated separately as subjects of study. This the Spanish Code does, but by combining Persons and Family in the first book and Property and Succession in the third.

### PERSONS

The old law of Persons was not much changed in the Spanish Code, and indeed, as Bluntschli truly says, law will have little

<sup>4</sup> The Civil Code is published in English as part of WALTON'S CIVIL LAW OF SPAIN AND SPANISH AMERICA (1900); also in 1909 by the House of Representatives of the United States as PUBLIC DOCUMENT NO. 1484 of the Sixtieth Congress, second session; and as part of the Compilation of the Revised Statutes and Codes of Porto Rico in 1913 as SENATE DOCUMENT NO. 813 of the Sixty-first Congress, third session. The language is not clear in many instances. The *Código Civil* was promulgated in Cuba and Porto Rico July 31, 1889, and is still in force in Cuba and in Porto Rico. A convenient late edition with annotations is that of Betancourt, 1916, unlike the Porto Rican revision of 1902, retaining the Spanish numbering.



authority unless it has its roots in the past of its people. New provisions were those allowing civil as well as canonical marriages,<sup>5</sup> divorce, which, however, only suspended life together,<sup>6</sup> and as to the time at which rights should be vested in children.<sup>7</sup> Damages were allowed for breach of promise of marriage, but not its specific performance.<sup>8</sup> The law was made more definite as to what indigent relatives must be supported,<sup>9</sup> and greater attention was paid in the new code than formerly to the subject of natural children, who were now subjected to *patria potestas*, whose extent is defined. Married women were better cared for, although the husband was left administrator of the wife's property. The attention paid to family matters is indicated among other things by the provision that the father must give his daughter at marriage half of what she would inherit from him, which goes back in principle to the *Partidas*.<sup>10</sup> Now for the first time appears the right of a couple contracting marriage to make property settlements in advance, a provision up to this time peculiar to Aragon, which also gave all the goods left by a deceased spouse to the survivor; and this was but carrying out the principle running all through the Spanish law of keeping the estate of a decedent together as a unit. The code did away with the old curators for minors and instituted protutors, but the most striking change was the establishment of the family council. Precedents had been found for it in the *Fuero Juzgo*<sup>11</sup> and in the *Fuero Real*,<sup>12</sup> but this was as shadowy as the declaration of the Roman Digest<sup>13</sup> directing the praetor to consult with the next of kin of an orphan as to his education and support. Indeed the provision was more European than Spanish, as it is found in France.<sup>14</sup> Nor was it exclusive, for there is also a provision for the interposition of a court on the application of any one in interest.<sup>15</sup>

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<sup>5</sup> CIV. CODE, Arts. 75, 83; PORTO RICO CIV. CODE, § 131.

<sup>6</sup> CIV. CODE, Art. 104.

<sup>7</sup> *Ib.*, Art. 29 (P. R. § 24).

<sup>8</sup> *Ib.*, Arts. 43 and 44.

<sup>9</sup> *Ib.*, Arts. 143 and 153 (P. R. §§ 213).

<sup>10</sup> Part IV, Tit. XI, Leyes 8 and 9.

<sup>11</sup> Bk. IV, Tit. III, Ley 3.

<sup>12</sup> Bk. III, Tit. VII, Ley 3.

<sup>13</sup> Lib. XIII, Tit. IV, Lex. 5, § 1.

<sup>14</sup> COÛTUME DE PARIS, Art. 1.

<sup>15</sup> CIV. CODE, Art. 219 (P. R. § 255). The Family Council is omitted from the Porto Rican Code.

The twelve titles of Book I after the introductory one cover the subjects of Spaniards and Foreigners, Birth and Extinction of Civil Personality, Domicile, Marriage, Paternity and Filiation, Support of Relations, Parental Authority, Absence, Guardianship, Family Council, Emancipation and Majority, and Registry of Civil Status, which includes marriage, birth and death. This shows how much of Spanish law is taken up with the subject of status, which Mr. Bryce has declared to be the distinguishing feature of the Civil Law in general.

### PROPERTY

Book II, on Property and its modifications, has fewer changes, although it is said that Civil Law now centers about Property and not Family as in former times.<sup>16</sup> It contains only eight titles, which relate respectively to Classification of Property, Ownership, Community of Property, Special Properties, Possession, Usufruct, Easements, and the Registry of Property. The basic distinction of movables and immovables remains, and among the changes most to be noticed is the emphasis now laid upon possession as a source of title.<sup>17</sup> The old Spanish law acted upon the maxim *res suo domino clamat*, but this had gradually to give way to other rules in the growth of trade and commerce. The subject of registry, however, is merely introductory; its full development is found in the separate Law of Mortgages. In this connection should be mentioned the institution of *Montes de Piedad*, or state pawnshops, in which one could purchase safely.

Spanish social history even from Roman times had tended to the separation of possession from ownership. The same tendency in England had given rise to the Statute of Uses and to the doctrine of Trusts which gave the Chancellor so much of his jurisdiction. In Spain the title of Usufruct, Use, and Occupancy is a long one, carefully defining the rights and duties of all concerned, enforceable in the same courts as other property rights.

The minute divisions of Spanish law sometimes induce duplication. Thus this division of the Civil Code provides for the law of waters,<sup>18</sup> superficial and subterranean, while the same subject had

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<sup>16</sup> SOHM, INSTITUTES OF ROMAN LAW, 163.

<sup>17</sup> CIV. CODE, Art. 464 (P. R. § 466).

<sup>18</sup> *Ib.*, Art. 407-25 (P. R. §§ 414-32).



been quite fully covered by the 1866 Law of Waters for irrigation. So intellectual property<sup>19</sup> was covered also by the copyright law. The most striking instances of this redundancy are outside the Civil Code proper in the elaborate regulations really enlarging the Mortgage and Commercial Codes and going far beyond the American idea of explanatory and administrative provisions.

### SUCCESSION

Book III shows greater changes from the past Spanish law, although it has but the three titles of Retention, Gifts, and Successions, testate and intestate. Thus there is introduced the holographic will, made secretly by the testator, alongside the old testament before a notary, and in this a novelty to Spain, where so much was done by writing before a notary; but there had been already known a nuncupative will proved by the memory of witnesses. Freedom of will was no doubt borrowed from Aragon, Cataluña and Navarre, where there was greater liberty in testaments, although a certain portion of the estate, a *legítima*, could not be willed. In the new code a father could dispose freely of a third of his property, the remainder going to his children in shares which up to a certain point could be varied between them by *mejoras*.<sup>20</sup> The support of the widow was better provided for than previously, for the Partidas only allowed her in case she had no property to take a quarter of what the husband left, and under the new code she takes the share of a child, or a half if there are no descendants or ascendants. Natural children were given greater rights of inheritance; the old Law of Toro (A. D. 1504)<sup>21</sup> had allowed them to be omitted altogether unless there were no other children. The unity of the Succession is maintained, but the heir is not liable for debts unless he has accepted the estate without asking for an inventory.

### OBLIGATIONS

Book IV covers Obligations and Contracts. It is Roman in spirit, but its author, German Gamazo, introduces in Article 1088

<sup>19</sup> *Ib.*, Art. 428.

<sup>20</sup> The third was placed in the Code by the efforts of Castilian representatives over the efforts of Catalonians like Duran y Bass. 2 JURISCONSULTOS ESPAÑOLES, 248.

<sup>21</sup> Law 10.

for the first time in any body of law the scientific classification of obligations as consisting in "giving, doing or refraining from doing a certain thing."<sup>22</sup> The titles are Obligations, Contracts, Contracts relating to Property by reason of Marriage, Purchase and Sale, Exchange, Lease, Annuities, Partnership, Agency, Loans, Depositum, Gambling Contracts, Compromises and Arbitrations, Security, Pledge, Mortgage and Antichresis, Obligations without agreement, Concurrence and Preference of Credits, and Prescription.

The elements of a contract are declared to be: 1. The consent of the contracting parties. 2. A definite object which may be the subject of the contract. 3. The cause for the obligation which may be established.<sup>23</sup> Although the Roman law is closely followed, even as to names of different kinds of contract, the famous provision of title 16 of the Ordenamiento of Alcalá (A. D. 1348) is preserved in Article 1278, as follows:

Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist.

This has been declared to be the triumph of the spiritual, Germanic principle of substance over the formality which had become the guiding rule of the Civil Law from the time of Justinian,<sup>24</sup> and which has been the secret of the art of the Latin nations and of the classicism of the Latin mind. The great tendency to form in Spain has been marked even by visitors from other Latin countries.<sup>25</sup> The preference of substance to form is the essence of the English Chancery Court, derived in part from the Canon Law rule *pacta sunt servanda*, but in Spain this is applied through the ordinary courts, as legislation there prevented the rise of separate jurisdictions. The code suppresses the old Roman literal contract as being unsuited to modern conditions and allows greater freedom in re-

<sup>22</sup> 1 JURISCONSULTOS ESPAÑOLES, 231. CIVIL CODE, Art. 1088 (P. R. § 1055).

<sup>23</sup> *Causa* is analogous to the Common Law consideration, but was not reached by evolution of court procedure as consideration was through the widening of *assumpsit*. [Mouton v. Noble, 1 La. Ann. 192 (1846); HOLMES, COMMON LAW, 253, 256.] It is interesting to see how in such ways the common needs of man bring about substantially the same results even in law; and similarly absolution from fulfilling a contract at Common Law by Act of God is in its results much the same as the *Vis Major* of the Civil Law.

<sup>24</sup> 8 MANRESA COMENTARIO, 690.

<sup>25</sup> DE AMICIS, SPAIN AND SPANIARDS, 210; as to Castelar's oratory, 212.



gard to proof of consideration, based upon the provision of *non numerata pecunia*, mistake as to money paid.

The right of rescission, that of canceling a contract if the property is worth only half of the price, is subject to criticism on economic principles, but it still survives except so far as it affects third persons under the Mortgage Law.<sup>26</sup> It rests on the same policy of protecting one from his own improvidence which obtains in the American exemption laws and redemption from judgment sales, neither of which obtain in the Spanish law. The code, however, still allows a co-owner to redeem the share sold by another.

Unless there is a contract before marriage, property is considered as held under the law of conjugal partnership or *gananciales*, which may be modified by judicial decree.<sup>27</sup> Article 1401 of the Civil Code is as follows:

To the conjugal partnership belong: 1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only. 2. That obtained by the industry, salaries, or work of the spouses or of either of them. 3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses.

Purchase and sale is elaborately provided for, including obligations of both sides, and warranty defined as covering possession and defects.<sup>28</sup>

There could be rescission for loss (*lesion*) of a quarter of the price of property of minors when the tutors sold without the consent of the family council, or court in some cases,<sup>29</sup> and the same principle was applied to agents of persons absent. There were also some changes as to leases, for, contrary to the old rule, the lessee can now sublease without permission of the lessor unless there is an express prohibition in the contract. Curiously enough, however, the rate of interest was not prescribed, and it had to be supplied by judicial construction as six per cent.

The same causes which had separated possession from owner-

<sup>26</sup> CIV. CODE, Art. 1293 (P. R. § 1260).

<sup>27</sup> *Ib.*, Art. 1407 (P. R. § 1322).

<sup>28</sup> *Ib.*, Arts. 1445, 1461, 1474 (P. R. §§ 1348, 1364, 1377).

<sup>29</sup> *Longpré v. Diaz*, 237 U. S. 512 (1915).

ship make annuities, *censos*, important, and with this the subject of *emphyteusis* by which an annual rent in kind is charged upon land. The *censo* is still common. It originated with Roman taxation, but, as Montesquieu shows, became in the Middle Ages the very different thing of a charge or easement by contract between individuals, and particularly in favor of the Church.<sup>30</sup>

Life estates received attention. Philip II prohibited these for more than one life, but this was later extended to two, and the Civil Code removes the limit, leaving it to contract. Partnership is covered, but the form so well known as *sociedad en commendita*, a limited partnership derived from Italy, by which one puts a special amount into the business without further liability, is left to the Code of Commerce. Agency also looms larger, for much business is done by agents, and bailment, *depositum*, pledge, and mortgage, are important from the same tendency to do business through another.<sup>31</sup> Mortgage is discussed but is also the subject of the fuller Mortgage Law, but there remains the anomaly that while land and personality are both things, *res*, and are considered alike, there can be a mortgage of land but not a chattel mortgage by contract, and the reason is that by Preferences the law has already established all the liens it thinks are proper. The old Roman *antichresis* survives, by which a creditor becomes as it were a mortgagee in possession, applying the produce to interest and principal.<sup>32</sup> Gaming has been a favorite amusement, if not a vice, of the Spaniards perhaps from Gothic times; De Soto's soldiers in the wilds of America gambled away their pearls and even clothing. Charles III found it necessary to declare what was lost at game recoverable by suit, and the new code maintains the same policy, although in different words.

The Civil Law idea of obligation is something that legally binds one person to another, whether by contract, express or implied, or what the Common Law calls tort. The subject of contract is, therefore, largely developed, as in the Roman Law, from which it is mainly taken. Tort is confined principally to sections 1902 and 1903, declaring a person liable for the results of his act, and limit-

<sup>30</sup> CIV. CODE, Arts. 1604, 1628 (P. R. §§ 1507, 1531); CODE JUSTINIAN, IV, 47, Lex 2; ESPRIT DES LOIS, Livre XXX, chaps. 14-15.

<sup>31</sup> CIV. CODE, Arts. 1665, 1709, 1758 (P. R. §§ 1556, 1611, 1660).

<sup>32</sup> *Ib.*, Art. 1881 (P. R. § 1782).



ing his liability for the acts of others to a few specified classes,<sup>33</sup> as follows: —

Art. 1902. A person who by act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

Art. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage.

The term "good father of a family" bears the imprint of a jurisprudence which highly regards status.<sup>34</sup> An Employers' Liability Law was enacted in 1901 supplementing the general provisions of the Code as to negligence.

#### PREScription AND PROCEDURE

The Common Law thinks of the Statute of Limitations as a bar to suits, and only as barring the remedy is it a means of vesting rights. The Civil Law is more logical and classes Prescription, — that is time, good faith and paper title, — amongst the modes of acquiring title, although rather illogically both the *Code Napoléon* and the Spanish Code put Prescription in Book Four on Obliga-

<sup>33</sup> *Scoville v. Soler* (P. R. Fed. Court, MS.).

<sup>34</sup> *Ortiz v. Bull Insular Line* (P. R. Fed. Court, MS.).

tions and Contracts. The ordinary prescription of property rights, what is called acquisitive prescription, requires possession in good faith, that is the belief that the grantor owned the property, and under a title apparently valid. Good faith is presumed, but proper title must be proved.<sup>35</sup> Having taken up Acquisitive Prescription, that of rights and property, the code goes on to provide in a separate chapter for Prescription of Actions, barring remedies for the recovery of property and rights, although strictly this would seem to be a matter for a Code of Procedure. The period for a suit as to ownership of personal property, the so-called real action, is three years, but six years if without good faith.<sup>36</sup> As to suit for ownership of lands, also a real action because for the thing, the time is ten years for residents and twenty for non-residents, with a special prescription of thirty years for cases of absent persons holding without title or good faith.<sup>37</sup> Actions prescribe by mere lapse of time, being generally six years as to personalty and thirty as to lands.<sup>38</sup> There are special shorter terms for special cases, such as mortgages, co-owners, rents, fees, wages and innkeepers, one year being the term for possessory actions and torts. Prescription is interrupted not only by suit and acknowledgment, but by demand or extrajudicial claim of the creditor, which opens a wide field for evidence. The prescription for acquiring ownership of property is therefore far different from that of a remedy to enforce rights to property, two things confounded at Common Law.

Procedure in general is covered by the Code of Civil Procedure, earlier in date and still in force, but rights and their enforcement have always been closely identified. The Civil Code declares that a person may have an action on the one side for property or title as such, being what is known as a real action, *reivindicacion*, as under the Roman law, and on the other may sue for its use or possession, this being in the nature of a personal action.<sup>39</sup> So a *redhibitory* action to cancel contracts as to defective animals is also provided

<sup>35</sup> CIV. CODE, Arts. 1940, 1950, 1952, 1954 (P. R. §§ 1841, 1851, 1853, 1855). These provisions as to good faith and title are similar to the *Code Napoléon*, Art. 2265.

<sup>36</sup> Art. 1955 (P. R. § 1856).

<sup>37</sup> Arts. 1957, 1959 (P. R. § 1858).

<sup>38</sup> Arts. 1961-63 (P. R. §§ 1862-64).

<sup>39</sup> CIV. CODE, Art. 348 (P. R. § 354). As Porto Rico has an American Code of Civil Procedure, that of California, it is an interesting question how far *reivindicacion* and the American remedies coincide. As to land it is practically identical with ejectment.



for.<sup>40</sup> The order of preference of debts becomes important as to this distinction between real and personal actions, as the distinction is in connection with the record or Mortgage Law, which is expressly recognized by the Civil Code as in force.<sup>41</sup> The principles of evidence and proof in general are defined in connection with written contracts, presumptions not being favored and documents being regarded as superior to other evidence.

Other striking instances of remedial matters embraced in the substantive law are the titles of Rescission and Nullity, which are much like those in English Equity and based upon the same principles, although differing in detail.<sup>42</sup> Rescission applies where there is inadequate consideration, *lesion*, and particularly to contracts in fraud of creditors, and necessitates return of the articles with their produce or interest. Nullity applies particularly where the contract is void for lack of the forms of law or lack of capacity of a party, whether or not a crime is involved, and covers both void and voidable contracts. The prescription for Rescission or Nullity suits is four years.

#### PREFERENCES (LIENS)

The subjection of property, particularly land, to debts was a long evolution in England on account of feudal obstacles. Spain had no such trouble, and a debtor's property, present and future, is subject to fulfilment of his obligations.<sup>43</sup> In compensation, liens grew up in Common Law countries, such as those in favor of mechanics making repairs and improvements to articles movable in nature, and these have been extended to realty. The state has also prescribed the order or priority in which the proceeds of the property shall be distributed after the death or bankruptcy of the owner, these being necessary exceptions to the common law freedom of contract. It is characteristic of the wider general control of the government on the Continent that the Civil Law goes further and prescribes the order in which a man shall pay his debts while

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<sup>40</sup> CIV. CODE, Art. 1496 (P. R. § 1399).

<sup>41</sup> CIV. CODE, Art. 462 (P. R. § 464).

<sup>42</sup> Rescission, CIV. CODE, Art. 1290 (P. R. § 1257); Nullity, CIV. CODE, Art. 1300 (P. R. § 1267). When either matter comes up in the Federal Court in Porto Rico the procedure is by bill on the Equity side of the docket.

<sup>43</sup> CIV. CODE, Art. 1911 (P. R. § 1812).

in the discharge of business;<sup>44</sup> and this is quite apart from merchants: whose matters are controlled by the separate Commercial Code. Such order of payment is called a Preference and is akin to a lien,<sup>45</sup> although it may affect one's whole estate and not as at Common Law and Admiralty be confined to specific articles, and is not enforced by separate proceedings or in special courts.

Preferences on specific personalty in the Code are graded as follows: first, for construction, repair, and purchase price, then successively pledge, warehouse and the like, transportation, hotel lien, agricultural lien for advances, landlord's claim for current year;<sup>46</sup> and the lien follows the goods. As to realty, the priority of preference is taxes, two years' insurance, registered agricultural credits (*refacciones*), registered attachments, and unregistered agricultural credits. There are also preferences on property in general, such as local taxes, judicial expenses, funeral and family expenses, last illness, wages for one year, family supplies, and bankrupt's support. Preferences lowest in the scale are for debts evidenced by an instrument before a notary and then for a judgment after litigation.

In case of conflict among claims of the same class, date controls, except that as to unregistered agricultural advances the last comes first, and advances are preferred to rents.

At the same time with Preferences the Code takes up the subject of Insolvency. Bankruptcy is a separate subject, peculiar to commercial law and will be found in the Code of Commerce, but any one may become unable to pay his debts at least for a time, and the Civil Code therefore prescribes for suspension of payment and compromise;<sup>47</sup> the matter of Preferences comes into special play in this connection. Under the American system as applied in Porto Rico the Spanish law of Preferences is also applied in Receiverships and Bankruptcy.<sup>48</sup>

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<sup>44</sup> CIV. CODE, Arts. 1911, 1920 (P. R. §§ 1812, 1822).

<sup>45</sup> *Re Pilar Hermanos*, 8 P. R. Fed. 605, 610 (1916); *Yankee Blade*, 19 How. (U. S.) 82, 89 (1856).

<sup>46</sup> CIV. CODE, Arts. 1922-24 (P. R. §§ 1823-25).

<sup>47</sup> CIV. CODE, Art. 1917 (P. R. § 1818).

<sup>48</sup> *Welch v. San Cristobal*, 7 P. R. Fed. Rep. 205 (1914). It is enforced in Porto Rico under the United States bankruptcy law inasmuch as the federal law recognizes local "liens." *Re Pilar Hermanos*, 8 P. R. Fed. 605 (1916).



## FUEROS

This Code is the consummation of over a thousand years of legal development in Spain. There had coexisted side by side a movement towards general laws, applying first to Castile and then to the whole of Spain, of which Castile was the dominant factor, having for its foundation the old Roman system, originally co-extensive with the peninsula itself, and also for most of this time local systems, contained in municipal or provincial *fueros*, which looked to the preservation of the freer kinds of law which had come down from the Goths and had had their origin, like the English Common Law, in the sands and forests of what is now Denmark and Holland. Each system had its advantages. The one aimed at a general system for the whole country; the other, at local self-government as to civil law. It was found impossible to harmonize them entirely, except in Castile and its provinces. Elsewhere a code could only be supplemental, *supletorio*, as the Spaniards have it, applying to subjects, many in number, it is true, which are not covered by local legislation. The compromise arrived at was expressed in the preliminary sections of the new code as follows:<sup>49</sup>

The provisions of this title, in so far as they determine the effects of the laws, statutes, and general rules for their application, are binding in all the provinces of the Kingdom.

In all other matters the provinces and territories in which the law of the *fuero* is in force shall preserve it for the present, no change being made in the actual judicial administration, whether written or customary, by the publication of this code, which shall be enforced only as a supplementary law in the absence of that which is such by their special laws.

Notwithstanding the provisions of the foregoing article, this code shall go into effect in Aragon and in the Balearic Islands at the same time as in the provinces not under the foral law in so far as not conflicting with those foral provisions or customary ones which are actually in force.

And thus the Civil Code of 1889 came into being, covering the subjects which must be embraced in every civil code, — Persons, Family, Succession, Property, and Obligations. A large field of

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<sup>49</sup> CIV. CODE, Arts: 12, 13.

usefulness and growth lies open before it, not only in Spain and its possessions,<sup>50</sup> but as an inspiration and goal for Spanish America, and a model of clear legal statement for the world.<sup>51</sup>

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UNITED STATES DISTRICT COURT,  
PORTO RICO.

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<sup>50</sup> A royal decree of July 31, 1889, made the Civil Code applicable to Cuba, Porto Rico and the Philippine Islands, what were called the provinces of Ultramar. After the American occupation of Porto Rico the code was slightly revised in 1902, — for instance, omitting the provisions as to family council, — and is still in force.

<sup>51</sup> The modern codes had generally appeared before the Spanish Civil Code and so could not formally be influenced by it; but the German Civil Code, adopted 1896 to go into effect 1900, is based upon the same principles of the Roman Civil Law, so far as it was not directly copied from the *Code Napoléon* in force on the Rhine and Frederick II's Landrecht of 1794. The Austrian Civil Code dates from 1811. SOHM'S INST. OF ROMAN LAW, 7.



## RIGHTS IN OVERDUE PAPER

[Dedicated to EZRA RIPLEY THAYER]

ONE reason for the slow progress of law as compared with medicine or the natural sciences is the impossibility of experimentation. A law professor cannot try out his new descent and distribution statute on the community to see how it works, as a research doctor tries out antitoxins on a guinea pig. The lawyer cannot deliberately isolate legal transactions for investigation, but must take the tangled facts as he finds them. Another scientific method is, however, open to us. Although we cannot artificially produce simplification, we can search for it. After all, law only faces the same difficulties as the other social sciences and even psychology. Like them it can sometimes understand a complex group of factors which constitute a normal situation by finding and observing an abnormal situation from which some of these factors are absent. Mme. Montessori has worked out new theories for the training of a child of average intelligence after studying the slower development of the feeble-minded. Drunkenness removes the inhibitions and preoccupations of daily life, revealing a few primitive emotions in a magnified form. In like manner, the true nature of a legal right becomes more apparent if we can find it transported to foreign soil in a conflict-of-laws case,<sup>1</sup> and such an everyday phenomenon as the interest of a beneficiary under a trust was thrown into a glaring high light by the peculiar facts of *In re Nisbet and Potts' Contract*,<sup>2</sup> after prolonged examination of the normal situation had not revealed the correct theory of the nature of the interest to so able a thinker as Maitland.

This article is an endeavor to test a theory of negotiable instruments by its application to the abnormal conditions of overdue paper. The investigation will be directed toward one problem, the position of a *bonâ fide* purchaser for value after maturity from a

<sup>1</sup> See for instance the recent cases on the extraterritorial operation of Workmen's Compensation acts; and *Alcock v. Smith*, L. R. (1892) 1 Ch. 238 (C. A.), discussed *infra*, page 1143.

<sup>2</sup> L. R. (1905) 1 Ch. 391; L. R. (1906) 1 Ch. 386 (C. A.), showing that a *cestui que trust* has an equitable right *in rem* against the land and not merely a right *in personam* against the holder of the legal title.

wrongdoer, of an instrument which is payable to bearer or properly indorsed to the purchaser, and free from defenses as regards the original obligor, but subject to claims of ownership of which the purchaser has no notice. In other words, the person from whom he buys has no right to sell and is wrongfully seeking to deprive some one else of the paper or its proceeds when collected. Can the *bonâ fide* purchaser keep and enforce the instrument, or must he surrender it to the victim of the wrong?

### I. THEORIES OF NEGOTIABILITY

Examination of the decisions and text-writers<sup>3</sup> shows not only a wide difference of opinion as to which of these two innocent persons should prevail, but also great uncertainty as to the theoretical nature of an overdue negotiable instrument. Indeed, it is sometimes said not to be a negotiable instrument at all. Thus Langdell, Ames, and some judges have called it an ordinary chose in action,<sup>4</sup> which must mean a non-negotiable chose in action. If this were literally true, consideration would not be presumed and the holder could not sue in his own name. Of course no one supports such a conclusion, and Ames is careful to state that the instruments are still "by an anomaly, assignable." A radically different view is taken by Lord Campbell and Justice Erle in the first English case to consider our problem carefully,<sup>5</sup> and by some American

<sup>3</sup> References to discussions in textbooks, articles, etc., as to equities of former holders and outsiders in overdue paper: "Some Problems in Overdue Paper," Francis R. Jones, 11 HARV. L. REV. 40; AMES, CASES ON BILLS AND NOTES, I, 747, 894, notes; II, 853; (but these passages were written about 1881 and do not altogether represent Mr. Ames' later views); NORTON ON BILLS AND NOTES (4 ed), 271; 1 DANIEL ON NEGOTIABLE INSTRUMENTS (6 ed.) §§ 724 ff, 782; STORY ON PROMISSORY NOTES (6 ed.), §§ 178, 179; CHALMERS' BILLS OF EXCHANGE (7 ed.), 128; EWART ON ESTOPPEL, 423; 46 L. R. A. 753, note; 2 L. R. A. (N. S.) 767, note; 5 A. & E. ANN. CAS. 581, note.

<sup>4</sup> AMES, CASES ON BILLS AND NOTES, II, 853. "The career of a bill properly ends with its payment, or dishonor at maturity. If paid, it is *functus officio*; if dishonored, it can no longer adequately perform its function as a representation of money, but is transferred into an ordinary chose in action. But by an anomaly, bills and notes, though overdue, are assignable."

Hinckley v. Union Pacific, 129 Mass. 52, 61 (1880), per Lord, J.: "After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action." (This passage embodies Langdell's views. AMES, LECTURES ON LEGAL HISTORY, 481.) Hinckley v. National Bank, 131 Mass. 147 (1881); Henderson v. Case, 31 La. Ann. 215, 216 (1879).

<sup>5</sup> Ashurst v. Bank, 27 L. T. 168 (1856). Lord Campbell, C. J.: "Though called a negotiable instrument it was in truth a chattel, and only transferable like any other



courts,<sup>6</sup> that an overdue instrument ceases to be negotiable and becomes a chattel, ordinary personal property like a horse. A chattel which gives rise to an action of assumpsit is well worth investigation.

On the other hand, it is repeatedly stated on the highest authority that an overdue instrument is negotiable.<sup>7</sup>

The clash of opinion on this point of negotiability is, however, more apparent than real, and is caused either by the use of analogous instances as if they were identical instances, or else by the employment of the word "negotiable" in two very different senses. Crompton, J., in the early English case just mentioned, points out the need of care in the use of this term.<sup>8</sup> In what sense is an overdue instrument negotiable, and in what sense not? A negotiable instrument not yet due differs from a mere chose in action in several ways, two of which are often called "negotiability." *First*, the transferee is not forced to sue in the name of the original obligee, but sues in his own name. *Secondly*, equities are cut off. (A further distinction, that consideration is presumed, the instrument itself giving a right of action, is also possessed by non-negotiable bills and notes and hence is never a source of confusion like the two other characteristics of negotiable instruments.)

Now if by "negotiable" we mean transferable, then it is clear that an overdue instrument is just as negotiable as it ever was. Aside from questions of the effect of wrongdoing, it is treated

chattel." Erle, J.: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferor can only pass such title as he himself had." But see the view of Crompton, J., in note 8.

<sup>6</sup> *Wylie v. Speyer*, 62 How. Pr. (N. Y.) 107, 110 (1881). *Van Vorst, J.*: "After their maturity, the coupons lost the attribute of negotiability, and they dropped into the category of ordinary property, to which title does not pass by delivery."

*Wood v. McKean*, 64 Iowa, 16 (1884).

<sup>7</sup> *Crossley v. Ham*, 13 East, 498 (1811), *Bayley, J.*, and *Ellenborough, C. J.*; *Graves v. Key*, 3 B. & Ad. 313, 317 (1832), *Tenterden, C. J.*; *Baxter v. Little*, 6 Met. (Mass.) 7, 10 (1843), *Shaw, C. J.*; *Fisher v. Leland*, 4 Cush. (Mass.) 456, 459 (1849), *Shaw, C. J.* See also the early caution of *Buller, J.*, in *Brown v. Davies*, 3 T. R. 80 (1789).

<sup>8</sup> *Crompton, J.*, in *Ashurst v. Bank*, 27 L. T. 168 (1856): "I do not think it correct to say that after maturity it becomes like a mere chattel, for the negotiability continues in all its strictness. In these cases, two things are to be considered. Generally, a chose in action is not assignable; but, with regard to negotiable instruments, as bills and promissory notes, a different rule obtains, and they are negotiable by delivery. But the question of negotiability is different from the question of title."

exactly the same as before maturity.<sup>9</sup> It is transferred in the same way, by delivery or by indorsement, and by the same form of indorsement, the word "order" not being a necessary part thereof.<sup>10</sup> An indorser after maturity promises to pay on demand, but his liability otherwise is identical. Demand and notice are necessary to charge him.<sup>11</sup> The holder sues in his own name upon the instrument, as was settled by Lord Holt and the merchants at conference on a summer's day of 1699,<sup>12</sup> and the holder can do this even if suit had been started by his predecessor in title.<sup>13</sup> An overdue note is consequently negotiable within the terms of a statute exempting debts secured by "negotiable promissory notes" from garnishment.<sup>14</sup> In short, after maturity as much as before, the paper is intended to circulate and the transferee is himself the promisee of the contract. The promise is not limited to the payee or first holder alone or even to holders before maturity, but runs as a direct promise to every "bearer" of the instrument or to every person duly constituted the "order" of the payee. This direct promise continues up to the very moment that the instrument is discharged.

Therefore, those authorities which declare that overdue paper is not "negotiable" refer only to the second meaning of the word, the complete cutting off of equities by transfer. It is the presence

<sup>9</sup> *Capwell v. Machon*, 21 R. I. 520, 522, 45 Atl. 259 (1900). Stiness, J.: "The fact that a negotiable note is transferred after maturity is not important, except as to equities between prior parties."

<sup>10</sup> *Leavitt v. Putnam*, 3 Comst. (N. Y.) 494 (1850). Hurlbut, J.: "A bill or note does not lose its negotiable character by being dishonored. If originally negotiable, it may still pass from hand to hand *ad infinitum* until paid. . . . Thus, the paper preserves its mercantile existence, and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. . . . Both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes."

<sup>11</sup> *Colt v. Barnard*, 18 Pick. (Mass.) 260 (1836).

<sup>12</sup> *Mutford v. Walcot*, 1 Ld. Raym. 574, 575 (1701): "And Holt, chief justice, said that he remembered a case where an action was brought upon a bill of exchange and the plaintiff declared upon the bill, where it was negotiated after the day of payment; and a question was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus assumpsit*. And he said, that he had all the eminent merchants in London with him at his chambers at *Sergeants-Inn* in the long vacation about two years ago, and they all held it to be very common, and usual, and a very good practice."

<sup>13</sup> *Deuters v. Townsend*, 5 B. & S. 613 (1864).

<sup>14</sup> *Oakdale Mfg. Co. v. Clarke*, 29 R. I. 192, 69 Atl. 681 (1908). The historical discussion in this case is wrong in saying that equities were not cut off before 1745. See Holdsworth in 31 L. QUART. REV. 173, 184; 32 L. QUART. REV. 20, 26-27.



of this quality which constitutes the difference between current and overdue paper, aside from the necessary postponement of payment because of the dishonor at maturity. So far there is no disagreement.

And now we arrive at our main problem. When we ask, "Is this quality of cutting off equities wholly absent from overdue paper so that all equities run after maturity, or are some equities cut off and not others?" war unceasing rages. Here lies the special task of this article. If overdue paper is wholly non-negotiable in this second sense, then the *bonâ fide* purchaser from a wrongdoer after maturity will never be protected. If, on the other hand, equities are cut off under some circumstances and not under others, it is highly important for business men as well as lawyers to know with accuracy what those circumstances are. And if this accuracy be unattainable in the welter of decisions, at least we can endeavor to learn what the rules as to the position of the *bonâ fide* purchaser ought to be, and to secure those rules by legislation in all the States.

The solution of this problem which is supported by this article as most in accord with the true principles of bills and notes is: *Bonâ fide purchase for value after maturity gives legal title and cuts off equities of ownership but not equities of defense.* In other words, the *bonâ fide* purchaser for value without notice of an overdue instrument payable to bearer, indorsed in blank, or specially indorsed to him, has legal title to the instrument and can keep it, regardless of any wrongs committed upon prior owners or other persons, and can recover upon it against any prior party who has not an equitable defense of his own, but cannot recover against any party who has such a defense.<sup>15</sup>

The theory of negotiable instruments on which this solution rests involves two propositions which it is necessary to discuss at some length. The first relates to the division just mentioned between equities of ownership and equities of defense, the second

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<sup>15</sup> This solution is by no means original with the writer. It was reached by Mr. Ames subsequently to the publication of his "Cases on Bills and Notes," which of course present a different view, and it has been accepted by other teachers of law. Ewart takes the same position in his *ESTOPPEL*, pages 423-24. The best judicial expression is in the recent case of *Wolf v. American*, 214 Fed. 761 (C. C. A. 7th 1914). A slightly different view is presented by Francis R. Jones, "Some Problems in Overdue Paper," 11 HARV. L. REV. 40.

to the passage of legal title to a possessor within the description of the instrument whether overdue or not.

1. *There are two distinct classes of equities affecting a negotiable instrument, equitable claims to ownership and equitable defenses to liability on the contracts*

The second kind of "negotiability," the cutting off of equities, is such a common phenomenon and we are so used to seeing the holder in due course start with a clean slate, that we frequently fail to observe that two entirely different sorts of equities existed before the transfer. Both white and red chalk marks have been sponged from the slate. This distinction between "equities" as to liability and "equities" as to ownership is fundamental, and is one more instance of the dangers lurking in that ambiguous word.

These two kinds of equities correspond to the duplex nature of the negotiable instrument itself. We have seen how some persons call an overdue instrument a chose in action and others call it a chattel. In truth, a bill or note, whether overdue or not, is both a chattel and a chose in action — or more frequently several choses in action. It is a chattel, a tangible scrap of paper, sometimes valuable for its own sake if sufficiently ancient or bearing the autograph of some historic debtor like Dick Steele or William Pitt or Daniel Webster, always available for framing or even papering the wall, for which purpose unlucky investors have used their coupon bonds. As a chattel, it is the subject of conversion which gives rise to trover, has been held to be covered by the designation "goods and chattels" in the Statute of Frauds, and is taxable where situated, though the owner and the obligor reside elsewhere.<sup>16</sup>

Secondly, a bill or note is a bundle of contracts. Its ownership involves not only the right to possess a thing but the right to sue several persons — maker, drawer and acceptor, indorsers. The promises and the chattel are inseparable. The right to hold the paper and the right to enforce the obligation are in the same person.<sup>17</sup> If an illustration from ichthyology be permissible, the duplex

<sup>16</sup> AMES, CASES ON BILLS AND NOTES, II, 799, 800; *Wheeler v. New York*, 233 U. S. 434 (1914).

<sup>17</sup> *Perreira v. Jopp*, cited in 10 B. & C. 452 (1830) note; II AMES, CASES ON BILLS AND NOTES, II, 51 note. Lord Kenyon reports an amusing colloquy between Lord Mansfield and counsel as to the supposititious case of a promissory note engraved on a diamond ring, which would test Mansfield's statement, "he could never bring himself



nature of a negotiable instrument, this piece of property from which depend numerous obligations running in different directions, always reminds me of a jelly-fish with its streamers.

Now, equities must be classified accordingly as they relate to the ownership of the chattel or to liability on some obligation. If the bearer of a note payable to bearer is induced by fraud to deliver it, he has an equitable right to restitution of his property. He is in no danger of liability upon the instrument, but he wants it back so that he may collect it at maturity. He asserts his equitable claim to ownership in an action of trover<sup>18</sup> just like a person from whom a horse has been bought by fraud.<sup>19</sup> The legal proceeding is only a substitute for a bill in equity for restitution,<sup>20</sup> such as the Duke of Somerset brought for "the old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules."<sup>21</sup> A person who never had title to a bill or became a party to it may have an equitable claim to its ownership because it is held in trust for him<sup>22</sup> or because it was wrongfully bought with his money<sup>23</sup> or because his debtor made a conveyance of the instrument in fraud of creditors.<sup>24</sup> The equity in these cases has nothing to do with liability, for there is no liability. The remedy is affirmative and not defensive.

Equities as to liability are entirely different in their nature. If the maker of a note is induced to sign it by fraud, he has an equitable defense at law when he is sued on the contract. In this case the parallel in chancery for his relief is a permanent injunction against the action at law on the obligation.<sup>25</sup> If this were a specialty

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to think for a moment that a man who had no title to the value of a bill or note, could recover in an action of trover for the paper merely, which was of no value whatever."

<sup>18</sup> AMES, CASES ON BILLS AND NOTES, II, 693. The measure of damages is the amount recoverable, *prima facie* the face value.

<sup>19</sup> WILLISTON ON SALES, § 567.

<sup>20</sup> "Purchase for Value without Notice," J. B. Ames, 1 HARV. L. REV. 1, 4, note. (LECTURES ON LEGAL HISTORY, 256, note): "In truth the fraudulent vendee who gets the title is a constructive trustee, and the action of trover against him presents the anomaly of a bill in equity in a court of common law."

<sup>21</sup> Duke of Somerset v. Cookson, 3 P. Wms. 389 (1735).

<sup>22</sup> Turner v. Hoyle, 95 Mo. 337, 8 S. W. 157 (1888).

<sup>23</sup> *In re* European Bank, L. R. 5 Ch. App. 358 (1870).

<sup>24</sup> Sanderson v. Crane, 2 Green (14 N. J. L.) 506 (1834).

<sup>25</sup> Mines Royal Societies v. Magnay, 10 Exch. 489, 493 (1854); Steele v. Haddock, 10 Exch. 643 (1855); Wood v. Copper Miners, 17 C. B. 561, 591 (1856). MASS. STAT. 1883, c. 223, § 14, permits a defendant to allege, as a defense in an action at law, "any

instead of a negotiable instrument, the defrauded obligor would before modern statutes have had to go into chancery to maintain his defense,<sup>26</sup> and the equitable defense on a negotiable instrument is precisely the same kind of relief in a law court, which in effect enjoins suit on the instrument. Instead of waiting until he is sued on the bill or note and setting up his equitable defense at law, the obligor may use it as the basis of a bill in equity to enjoin negotiation and have the paper surrendered for cancellation, so that it may not get into the hands of a holder in due course and the defense be lost. Such a proceeding, though affirmative in form, is defensive in substance and wholly unlike the proceeding in chancery for restitution on the basis of an equitable claim to ownership. The maker of a note asserts an equitable defense, not an equity of ownership. He has no right to get the note back and sue on it. The holder may be forced to surrender the note but it does not go back to the maker. It is canceled and kept by the clerk of the court. A bill for cancellation is so completely unlike a bill for restitution that it does not even necessitate a technical right to the paper upon which the instrument is written. Cancellation will be given even though the obligor's signature was fraudulently obtained upon paper belonging to the obligee, or was forged, so that the obligor never had anything to do with the paper at all.<sup>27</sup>

In short, the two classes of equities are entirely distinct. The equities as to ownership are property rights in a chattel with its dependent obligations, on which the claimant wants to sue as plaintiff. The equities as to liability are at the opposite end of those obligations. Instead of being property rights (the basis of *vindicationes* in Roman law), they are set up by a defendant as defenses (*exceptiones*) to litigation on a contract. Equitable claims to ownership are no more like equitable defenses than a declaration in trover is like a plea of payment. They have been confused because they have both been called "equities" and because the

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facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action."

<sup>26</sup> "Specialty Contracts and Equitable Defenses," J. B. Ames, 9 HARV. L. REV. 49; AMES, LECTURES ON LEGAL HISTORY, 104.

<sup>27</sup> Davis v. Manson, 102 Atl. (R. I.) 714 (1918). Cases in which the cancellation of overdue paper is ordered clearly proceed on defensive grounds. Fuller v. Percival, 126 Mass. 381 (1879); Atlantic v. Tredick, 5 R. I. 171 (1858).



same person is frequently entitled to set up both an equitable claim to the restitution of the instrument and an equitable defense if he is sued upon it. In the illustrations just given only one kind of equity was present, but take the case of an indorser who transfers a note without consideration to an attorney for purposes of collection and the attorney keeps the note and sues the indorser on his indorsement. The indorser will have an equitable defense of lack of value, and also an equitable claim to get the note back. Another reason for the failure to separate the two classes of equities is that there is no practical need to do so in the ordinary case of current paper, since transfer of the legal title before maturity to a *bonâ fide* purchaser for value without notice cuts off both equities of ownership and equitable defenses without distinction.

This brings us to our second proposition. How does the legal title get into a *bonâ fide* purchaser?

2. *The legal title to a negotiable instrument throughout its existence belongs to the person to whom the promises run by the terms of the instrument if he has possession, no matter how that possession came to him.*

This proposition is extremely important for our problem because if it be sound, the fact that a *bonâ fide* purchaser after maturity takes from a wrongdoer, even a defrauder or a thief, will be immaterial to deprive him of protection. He has legal title, and where equities are equal the legal title prevails. On the other hand, if possession by one within the description of the instrument does not always involve legal title, it will be necessary to determine the conditions under which possession does or does not confer legal title upon the *bonâ fide* purchaser after maturity.

The validity of our second main proposition seems plain from the language of negotiable instruments, but it invariably causes uneasiness; because if it be true, a thief has legal title. This is the acid test to which we shall not delay to submit our theory.

A thief has legal title to a negotiable instrument payable to bearer or indorsed in blank. It is high time to stop being squeamish about this. Other bad men are admitted to have legal title to negotiable instruments, and sometimes to chattels as well, — defrauders, absconding trustees, impersonators. Of course the thief

is, like them, subject to the equities of his victim, but like them he does have legal title.

It is usually assumed that the victim retains legal title after the theft. This cannot be, for the instrument is by its terms payable to bearer and no one who is not a bearer can sue upon it in a court of law. If the thief is bearer but has not legal title, then the legal title has temporarily ceased to exist, for there is no one else to whom the promise runs. Lord Holt put the matter clearly in 1699: "The course of trade . . . creates a property in the assignee or bearer."<sup>28</sup> The *bonâ fide* purchaser from the thief gets the legal title because it was first in the victim and then in the thief and then in the purchaser, passing with the possession. The title did not jump over the thief or pass through some mysterious legal subway. The effect of the *bonâ fide* purchase is not to create a fresh legal title but to cut off the equities of the victim.

The promisee owns the promise and with it the instrument. If the promise runs to bearer, any bearer, however iniquitous, is the promisee, with the legal right to sue and the legal ownership of the paper. If the promise runs to the order of the payee and it appears within the four corners of the instrument that the payee directed payment to a certain indorsee who holds the paper, that person is the promisee, the legal owner, no matter how he obtained the possession.

This result follows after maturity as much as before, since the instrument is just as transferable. The direct promise to the holder remains. The only effect of maturity is, as we have seen, upon the cutting off of equities.

Consequently, payment to the person described by the instrument and producing it to the payor is a valid payment, and the payor is not affected by the wrongful acquisition unless he has notice thereof. The instrument is discharged whether this payment is made at or after maturity.<sup>29</sup> Here is a strong proof that the

<sup>28</sup> Anonymous, 1 Salk. 126 (1699).

<sup>29</sup> *Payment to one within the description though wrongful owner is a valid discharge.*

*At maturity:*

Anonymous, Style 366 (1652), time not stated;

Vinson v. Vives, 24 La. Ann. 336 (1872), payment to payee, who was subject to equity, time not stated.

Chappelear v. Martin, 45 Oh. St. 126, 132, 12 N. E. 448 (1887), *semble*.

Minshall, J.: "Such is the general rule as to the payment of a note payable



wrongful holder has legal title, since payment to a person without legal title, *e. g.* a holder under a forged indorsement, is not a discharge.<sup>30</sup>

Possession plus description equals legal title.

This view runs back to the early cases on negotiable instruments. Lord Holt has already been quoted, and Chief Justice Eyre stated it more fully:

"For the purpose of rendering bills of exchange negotiable the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves.

to bearer; any person having it in possession may be presumed to be entitled to receive payment, unless the payor has notice to the contrary."

Proctor v. M'Call, 2 Bailey (S. C.) 298 (1831), *semble*.

Greve v. Schweitzer, 36 Wis. 554 (1875), time not stated, bearer note.

*After maturity:*

Cone v. Brown, 15 Rich. (S. C.) 262 (1868), bearer note, paid to agent for safe-keeping.

King v. Fleece, 7 Heisk. (Tenn.) 273 (1872), *semble*, order note indorsed in blank, payment in Confederate money to agent for collection after death of principal is good because bearer had legal title; but bad here because payor knew of the agency.

Lamb v. Matthews, 41 Vt. 42 (1868), bearer note, paid to holder who had duty to return it to her transferor.

Some of these cases say that the person paid had "authority" to receive the money, but it is clear that no true authority existed.

*Contra as to payment after maturity:*

Hinckley v. Union Pacific, 129 Mass. 52 (1880).

Bainbridge v. Louisville, 83 Ky. 285 (1885).

AMES, CASES ON BILLS AND NOTES, II, 822, 854; but Ames is known to have altered his opinion.

These cases, however, rest on another ground as well, that information had been given to the payor of the theft of the instrument. Although the purchaser of an instrument is not affected with notice of a theft because he had previously received information about it, *Raphael v. Bank of England*, 17 C. B. 161 (1855); *Lord v. Wilkinson*, 56 Barb. (N. Y.) 593 (1870); a payor is affected because he may reasonably be required to keep a record of his own outstanding obligations. The cases should properly rest on this ground alone.

The Negotiable Instruments Law prevents any further controversy as to the effect of payment after maturity, for section 119 (1) says, "A negotiable instrument is discharged by payment in due course by or on behalf of the principal debtor;" and section 88, "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective." See also section 51.

<sup>30</sup> *Smith v. Sheppard*, CHITTY, BILLS (10 ed.) 180, note; S. C. 1 AMES, CASES ON BILLS AND NOTES, 804.

The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession.”<sup>31</sup>

The United States Supreme Court has also stated: “The title and possession are considered as one and inseparable.”<sup>32</sup>

Various attacks have been launched against this legal title theory. Thus Ewart says, “Property and possession of bills, as of aught else, are separable; otherwise I could never bring trover for bills against my book-keeper.”<sup>33</sup> The reply has been explained already.<sup>34</sup> The plaintiff in trover does not have legal title but recovers on the equitable right to restitution, just like the defrauded seller of goods, whose interest must be only equitable since it can be cut off if the fraudulent buyer sells to a *bonâ fide* purchaser for value without notice.

Another objection is that if the thief had legal title he could sue on the instrument. Two answers are possible. The thief is subject to the true owner’s equity of ownership, and in jurisdictions which allow the maker, acceptor, etc., to set up the equity of a defrauded owner, that of a robbed owner could be set up just as well.<sup>35</sup> Some jurisdictions, however, take the sounder view that the *jus tertii*, the right of a person who is not a party to the suit, cannot be set up as a personal defense.<sup>36</sup> Even so, the thief would have no standing in court, on grounds of illegality and public policy, for no court would lend its aid to carry through a crime and enable him to cash in his plunder. Once the thief gets into the purview of justice, the criminal law cuts across the law of property and nullifies the advantages of his legal title, just as it disregards the legal title of the counterfeiter to his plates and acids and hands them over to the police.

A final difficulty in the legal title theory is its inconsistency with

<sup>31</sup> Collins v. Martin, 1 B. & P. 648 (1797).

<sup>32</sup> Clifford, J., in Goodman v. Simonds, 20 How. (U. S.) 343, 365 (1857).

<sup>33</sup> EWART ON ESTOPPEL, 394, note.

<sup>34</sup> See discussion on page 1110, and notes 19 and 20.

<sup>35</sup> Eyre, C. J. in Collins v. Martin, 1 B. & P. 648 (1797): “This all proceeds upon an *argumentum ad hominem*. It is saying you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience.” And see the language of Shaw, C. J., in Wheeler v. Guild, 20 Pick. (Mass.) 545 (1838).

<sup>36</sup> See page 1141, *infra*, and notes 122, 123 and 124.



the oft-stated doctrine that delivery is necessary to pass title to a negotiable instrument. Since there is no delivery to a thief, legal title must logically remain in the victim instead of passing to the thief. But if this is so, how does it ever get to the *bonâ fide* purchaser from the thief? If delivery is essential to the passage of legal title as a genuine indorsement is essential, then want of delivery would be as fatal as a forged signature. In fact, want of delivery like fraud or any other equity is cut off by transfer to a holder in due course. A plaintiff suing on an instrument need only prove his possession and the genuineness of the indorsements, but not delivery by the indorsers. Legal title to a properly issued negotiable instrument depends upon facts which can be ascertained by inspection of the instrument and identification of the parties, *i. e.*, who possesses it, what is written upon it, who signed it. Extrinsic facts, which cannot be so ascertained, are equities and do not affect holders in due course.<sup>37</sup> A thief has legal title subject to the equity of want of delivery as a defrauder has legal title subject to the equity of fraud. Legal title passes, not by delivery, but by transfer of possession within the terms of the instrument.

It must be admitted that many authorities instead of recognizing this legal title theory, take an alternative view, that the *bonâ fide* purchaser before maturity from a wrongdoer has legal title because the wrongdoer had authority to give it.<sup>38</sup> This implied authority is obviously a fiction just like implied promises in quasi-contract. To say that the Northampton Bank gave any authority to the masked burglars who removed the bonds from its safe on the night of January 18, 1876 to sell those bonds, is as absurd as to declare that the owners of the derelict steamer *Grotkau* in Kipling's "Bread upon the Waters" promised to pay salvage to McPhee, the Scotch engineer who swam over and took her in tow. This assumed agency is only an instance of the judicial tendency to explain results created by law as if they were due to the will of the parties. Instead of looking to the scope of the authority to define the protection afforded the *bonâ fide* purchaser, as we should do in genuine

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<sup>37</sup> Want of delivery at the inception of the instrument is a defense in some jurisdictions at common law but not under section 16 of the Negotiable Instruments Law. L. R. A., 1915, E., 351, note.

<sup>38</sup> *Marston v. Allen*, 8 M. & W. 494 (1841).

cases of agency, the courts must necessarily first decide the extent of the protection and then invent an "authority" of equal extent to account for it. And furthermore this artificial authority attributed to the wrongdoer is so much like a legal title subject to equities, that the refusal of the courts to admit such a title recalls the statement in the school-boy's composition, "The Iliad was not written by Homer, but by another man of the same name."

A much sounder theory adopts an agnostic position, rejects this unknowable authority given by nobody, and says that the *bonâ fide* purchaser of a negotiable instrument before maturity is protected because the law thinks him worth protecting, like a purchaser in market overt or under the Factor's Acts. The law of its own volition takes the title out of the victim and puts it into the buyer by an intermediate process which baffles explanation. The wrongdoer is said to have a power to pass title, yet this power is admittedly not given by the victim, but created by law to attain justice. This agnosticism, while honest, overlooks the express promise on the instrument running to the wrongdoer by virtue of his possession, and furnishes no aid in the different situation of purchase after maturity except that it is a strong analogy favoring the protection of *bonâ fide* purchasers in general. That is to say, the extent of the "power" depends on the justice of the particular case, and when new circumstances are considered, a new "power" must be affirmed or denied to reach a just result in the new situation. The "power" is co-extensive with the protection which the law thinks should be afforded to a *bonâ fide* purchaser.

Apart from this empirical quality of the power theory, it is possible that it is not essentially at variance with the legal title theory. With the disappearance of the division between law and equity, it is probable that the terminology of legal and equitable titles will gradually disappear, and that in the scientific property law of the future, the present equitable title will be regarded as the true ownership of the thing, while the present legal title will be regarded as a power created by law to deal with the thing and not a property right at all.<sup>39</sup> In short, all legal titles are only

<sup>39</sup> Hodges, J., in *Arnold v. Southern Pine Lumber Co.*, 58 Tex. Civ. App. 186, 198, 123 S. W. 1162, 1168 (1909): "Under our system the *cestui que trust* is the real owner of the property, and the trustee merely the depository of the legal title. His is



powers. Whether the wrongdoer's dominion over a negotiable instrument be called legal title or power is perhaps only a matter of terminology. The vital point upon which I insist is that the limits of his dominion are not determined solely by the *ipse dixit* of the law, but by the terms of the instrument. By virtue of those terms this dominion over the instrument, call it what you will, passes with the possession of the instrument to any person within its description, after maturity as well as before, regardless of the manner in which that person obtained his possession. The terms of the instrument prevent an arbitrary termination of the "power" at maturity.

In other words, so long as the advocates of the "power" theory recognize that the holder of an overdue negotiable instrument has the same power that a trustee has of cutting off equitable ownership of the *res*, I need not stop to quarrel with them; but it seems to me more logical and less confusing, so long as the present dual terminology continues in use, to say that both the trustee and the holder to whom the promise runs have a legal title. It is hard to see why if the law can give the thief a power without the consent of his victim, it cannot also give him legal title without consent.

One more theory is presented by Mr. Ewart,<sup>40</sup> who anticipates the main conclusions of this article very closely. I find myself in frequent agreement with him as to details, but not convinced of his fundamental belief that the protection of the holder in due course is based on estoppel.<sup>41</sup> According to his theory, the wrong-

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not a property right, but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed, but a power that may be exercised."

C. A. HUSTON, *THE ENFORCEMENT OF DECREES IN EQUITY*, *passim*, especially page 148: "Had the courts of common law been less entangled in the nets of form — to use the damning phrase of Mansfield — the legal estate of the trustee with its possibilities of injustice might have been reduced to a mere power in law as well as in equity, and the trustee treated there, as on the other side of the court, as the agent which in reality he is."

<sup>40</sup> EWART ON ESTOPPEL, chap. XXIV.

<sup>41</sup> See a review of Mr. Ewart's book in 13 GREEN BAG, 50.

The broadness of his principle of estoppel is a reason for doubt as to its validity. If the liability of a man who issues a note payable to bearer for \$1,000 and of him who issues one for \$5, so carelessly written that it is raised to \$1,000, are both based on estoppel, we do not get anywhere because we have got to work out two different types of estoppel to explain the results. So with those philosophers who make selfishness the basis of all conduct. The generous man is the most selfish because he gets a higher satisfaction from his self-denial than the man who keeps everything for

doer has not legal title; but his possession is an apparent title, so that the true owner though retaining title is estopped to set it up against a purchaser who relies on the ostensible ownership. Since the wrongdoer's "apparent" title, like his "authority," has all the qualities of a genuine legal title subject to equities, we may conclude with Bishop Berkeley that the appearance is the reality.

With respect to *bonâ fide* purchase before maturity, it is entirely immaterial to the substantial rights of the parties which of these various theories is held. There will be differences as to pleading and burden of proof, but the holder in due course will always be protected from equities of both kinds on any theory. It is the abnormal situation, dishonor, which forces us to choose between the various views, and in particular reveals the serious difficulties of the orthodox authority doctrine.

The previous discussion may be summed up as follows. Transfer to a *bonâ fide* purchaser for value without notice and within the terms of the instrument has three results before maturity:

1. It passes legal title with the possession.
2. It cuts off equitable claims to the ownership of the paper.
3. It cuts off equitable defenses to the liability of parties on their contracts.

The first result follows equally by a similar transfer after maturity. Our remaining task is to explain why the second result should also continue, while the third is no longer effected.

## II. THE DISTINCTION BETWEEN THE TWO CLASSES OF EQUITIES AFTER MATURITY

Apart from questions of notice the *bonâ fide* purchaser after maturity of a negotiable instrument, since he has legal title, should be protected from equitable claims to ownership just like the *bonâ*

himself. So be it — but if the man who waits on a sinking steamer until all the women and children are put off is as selfish as the man who jumps into the first life boat and stays by main force, we have solved nothing, for we must find some way to create more of the first kind of selfishness and less of the second.

No doubt a policy similar to that on which estoppel by reliance on special situations rests underlies the law as to the general operation of negotiable instruments, that is, the policy in favor of the security of *bonâ fide* transactions. But it is better to limit the term estoppel to abnormal situations where the truth cannot be set up because of misconduct.



*fide* purchaser for value of any other chattel, who of course takes free from the equities of a *cestui que trust*, defrauded seller, etc. Even if an overdue instrument be regarded as a non-negotiable chose in action, instead of a chattel, the same result will follow. Several courts<sup>42</sup> protect the *bonâ fide* purchaser after maturity on the basis of Chancellor Kent's doctrine in *Murray v. Lylburn*,<sup>43</sup> that the assignee of a chose in action takes subject to the equities of the obligor but not to "latent" equities. The same view was held by Ames, that the assignee having a legal power should be protected in his ownership of a chose in action.<sup>44</sup> If this protection is given to the assignee of a chose in action, it should certainly be given to the holder of an overdue negotiable instrument (always on the assumption that maturity is not notice of these "latent" equities). It is true that *Murray v. Lylburn* is rejected in many jurisdictions, including New York;<sup>45</sup> and the case has been criticised on the grounds that the assignee of a chose in action has only an equitable interest and that the *bonâ fide* purchaser of an equitable interest is not entitled to protection against prior equities.<sup>46</sup> We need not launch out upon that stormy sea. The objections to Kent's doctrine do not apply to the holder of an overdue instrument, because he has legal title and consequently is within the scope of the principle that where equities are equal the legal title prevails. Consequently Mr. Williston, in arguing that the assignee of an ordinary chose in action has only an equitable interest, believes that the holder of an overdue instrument should take free from equitable claims to ownership.<sup>47</sup>

<sup>42</sup> *National Bank v. Texas*, 20 Wall. (U. S.) 72, 88, (1873) per Swayne, J.; *Mohr v. Byrne*, 135 Cal. 87, 67 Pac. 11 (1901); *Crosby v. Tanner*, 40 Iowa, 136 (1874); *Hibernian v. Everman*, 52 Miss. 500 (1876).

<sup>43</sup> 2 Johns. Ch. (N. Y.) 441 (1817).

<sup>44</sup> "Purchase for Value without Notice," 1 HARV. L. REV. 1; LECTURES ON LEGAL HISTORY, 254; CASES ON TRUSTS, 309, 310, the notes to *Cave v. Mackenzie*, 46 L. J. (Ch.) 564 (1877).

<sup>45</sup> 30 HARV. L. REV., 103, note 10; Williston's *Wald's Pollock on Contracts*, 284, n. 78.

<sup>46</sup> "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" Samuel Williston, 30 HARV. L. REV. 97, 102. For other articles by Mr. Williston and Mr. Walter Wheeler Cook on this question see 29 HARV. L. REV. 816; 30 HARV. L. REV. 449; 31 HARV. L. REV. 822.

<sup>47</sup> 30 HARV. L. REV. 103: "A distinction must be taken where the chose in action has a tangible form, especially if it is by law assignable. The assignment of an overdue negotiable promissory note though often likened to that of an ordinary chose in action

A pertinent question here presents itself. Are equities really equal? It is clear that they are not if the purchaser takes with notice of the equitable claims to ownership. It will be urged that maturity is equivalent to such a notice, that after that critical day an overdue instrument has no right to be in circulation at all. The fact that it is overdue is like a red flag which gives warning of every conceivable kind of danger and puts the purchaser on inquiry as to all infirmities without distinction. This is clearly going too far. It is well settled that certain defenses on the instrument are not let in after maturity. For example, in England and a large number of States a set-off does not run against the purchaser. In many jurisdictions the defense of accommodation is cut off by a transfer after maturity. Evidently maturity does not force the purchaser to proceed at his peril and make him voluntarily assume all risks. A particularly interesting example of the principle that a purchaser after maturity does not thereby become a purchaser with notice of all unknown defects is furnished by the case of *Re Clover*.<sup>48</sup> A New York statute provided for proceedings against a judgment debtor supplementary to execution, and the appointment of a receiver who was given title to all personal property in the hands of the debtor at the time when he was ordered to attend for examination concerning his property. But the statute did not affect the "title of a purchaser in good faith, without notice, for a valuable consideration." After the service of the order upon the judgment debtor, he transferred overdue negotiable notes to a purchaser for value without actual notice. The receiver contended that the immunity clause would not enable the purchaser to keep the notes, because maturity prevented him from being "without notice" and the fact that the paper was overdue put him upon inquiry as to what, if any, defenses, liens or equities existed. According to him, the purchaser of an overdue instrument is in a worse position

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does not properly involve such a discussion as is contained in this article. Even after maturity the transfer of such a note by the holder unquestionably transfers a legal title and though the circumstance that the transfer is after maturity puts the taker of the note on inquiry as to any defense the maker may have (since if he had had no defense the instrument would presumably have been paid) yet the fact that the instrument is overdue gives no reason to suppose that there are collateral equities affecting the transferor's title. In such a case, therefore, the *bonâ fide* purchaser of the note is protected."

<sup>48</sup> 8 App. Div. (N. Y.) 556; 154 N. Y. 443 (1897).



than the assignee of an ordinary chose in action which has no maturity to put the purchaser on inquiry. Both the Appellate Division and the Court of Appeals rejected this distinction and decided against the receiver, holding that maturity did not *ipso facto* create notice or bad faith, but was at most only evidence bearing upon the question of good faith, so that this purchaser was without notice and took the notes free from the creditor's lien. Martin, J., said:

"It is true that all of the notes purchased, except one, were past due, yet that fact was in no way inconsistent with a good title in the holder or with his right to transfer them. . . . The fact that most of the notes had previously matured would not naturally have indicated that the holder was not the owner, nor would it have suggested that any proceeding was pending against him which would affect his title."<sup>49</sup>

The same reasoning applies to all equities of ownership. Maturity indicates nothing about them. Instead of being a red flag to give warning of all hidden dangers, it resembles more closely a printed placard calling attention to one special peril. A person approaching a grade-crossing and seeing the sign, "Stop, Look, and Listen," is bound to watch for trains, but he does not assume the risk of a savage bull-dog maintained on the railroad right of way to scare off track-walkers.

At this point it is necessary to keep the distinction between the two classes of "equities" firmly in mind. Equitable defenses are let in after maturity for a good reason, but that reason does not apply to equitable claims to ownership.

The rule that a purchaser of overdue paper takes subject to equitable defenses was established in England comparatively late,<sup>50</sup> largely by the influence of Justice Buller, and was accepted with reluctance in 1789 by the Court of King's Bench.<sup>51</sup> Even then, Chief Justice Kenyon doubted its validity, and concurred with the other judges only because he thought that there was actual notice. There is much vague explaining in these early cases, that transfer after maturity gives rise to suspicion and is out of the common

<sup>49</sup> 154 N. Y. 443, 448 (1897).

<sup>50</sup> In *Banks v. Colwell* (1788), cited in 3 T. R. 81, Justice Buller said that it had been repeatedly ruled at Guildhall that the indorsee after maturity was subject to equitable defenses. And see 3 T. R. 83, (1789) note. *Brown v. Davies* seems to have been the first case decided *en banc*.

<sup>51</sup> *Brown v. Davies*, 3 T. R. 80 (1789). For Kenyon, see also *Boehm v. Sterling*, 7 T. R. 423, 429 (1797). And see the discussion of the Civil Law in note 131, *infra*.

course of dealing. Overdue paper is often said not to be commercial paper at all,<sup>52</sup> with entire disregard of the frequency with which it is bought and sold. Such general statements are responsible for the frequent judicial hostility toward overdue paper, and the desire to subject it to all infirmities and not merely to equitable defenses.

Fortunately Chief Justice Shaw has put the rule as to equitable defenses on a definite and rational basis:<sup>53</sup>

"The question instantly arises, Why is it in circulation, — why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry."

Other judges state the reason for constructive notice well:

"Ordinarily a bill or note when due becomes *functus officio*, because it was made to be paid at maturity, and if it fails of its intended operation and effect, the presumption is that it is owing to some defect which has furnished a sufficient reason to the party apparently chargeable for not having punctually performed his obligation."<sup>54</sup>

"The bare fact that a negotiable instrument is unpaid at its maturity, is a circumstance sufficient to raise the presumption of fraud, and that there exists some valid legal reason why it was not paid. The law of merchants being the law of honor, all bills and notes . . . it is presumed, will be promptly paid."<sup>55</sup>

Therefore, because all the contracts on the instrument would naturally be performed at maturity, the equitable defenses of all parties are let in after maturity. It is certain that the primary party to the instrument can set up such defenses, and the peculiar doctrine of a recent Washington case that only equities against the payee run after maturity, so that payment to an indorsee is no defense against the *bonâ fide* purchaser, is indefensible.<sup>56</sup> On

<sup>52</sup> *Thomas v. Kinsey*, 8 Ga. 421, 433 (1850); *Chester v. Dorr*, 41 N. Y. 279 (1869); *Etheridge v. Gallagher*, 55 Miss. 458, 467 (1877); *Henderson v. Case*, 31 La. Ann. 215, 216 (1879); *Greenwell v. Haydon*, 78 Ky. 332, 347 (1880); *Midland v. Hitchcock*, 37 N. J. Eq. 549, 558 (1883).

<sup>53</sup> *Fisher v. Leland*, 4 Cush. (Mass.) 456 (1849).

<sup>54</sup> *Morgan v. United States*, 113 U. S. 476, 500 (1885) per Mathews, J.

<sup>55</sup> *Davis v. Bradley*, 26 La. Ann. 555, 556 (1874) per Taliaferro, J. Unfortunately this case and the preceding do not realize that the reason stated limits the effect of constructive notice to equitable defenses only.

<sup>56</sup> *Reardon v. Cockrell*, 54 Wash. 400, 103 Pac. 457, 50 L. R. A. (N. S.) 87 (1909). *Held*, the maker cannot set up a part payment to the first indorsee who was then



principle, a secondary party who is sued by an indorsee after maturity ought also to be able to avail himself of any equities of his own, although it is sometimes suggested that only the equities of the primary party run.<sup>57</sup> Of course the failure of an indorser to pay the instrument is a much weaker evidence of defenses than dishonor by a maker or acceptor, yet it would be natural for the indorser to take it up and protect his credit unless he felt sure of defeating an action against him. A secondary party expects to pay at maturity if at all and safeguard himself then, by recourse to the primary party, so that transactions after maturity should not cut off defenses which he had at maturity. Such a result would be highly prejudicial to him, forcing upon him the choice of taking up at maturity an instrument on which he has a defense or of running the risk of subsequent liability to a *bonâ fide* purchaser. Furthermore, "the maker often signs for accommodation, and the apparent indorser may be principal."<sup>58</sup> It would be especially unjust in such a case if the indorser's defenses could be cut off, for he would have no recourse against the maker. There is very little authority, but this except for three cases supports the conclusion just reached.<sup>59</sup> It is hardly necessary to add that secondary parties

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holder. See also *Wynn v. Kelly*, 22 La. Ann. 594, 595 (1870). The cases cited in *Reardon v. Cockrell* and the L. R. A. note thereto as in accord are all with the possible exception of *Vinton v. Crowe*, 4 Cal. 309 (1854), set-off decisions, which do not necessarily apply to other equities, set-off being a procedural matter depending on statute and no defense (even if against the payee) to a purchaser after maturity in England and many states.

*Contra* to *Reardon v. Cockrell*; *Eaton v. Corson*, 59 Me. 510 (1871), payment; *Bond v. Fitzpatrick*, 4 Gray (Mass.), 89 (1855), payment or equitable discharge.

The cases holding that a set-off of the maker against an indorsee is a defense would *a fortiori* allow other defenses between maker and indorsee. *Harris v. Burwell*, 65 N. C. 584 (1871); *Wyman v. Robbins*, 51 Ohio St. 98, 37 N. E. 264 (1894).

It is possible that the doctrine of *Reardon v. Cockrell* can be traced to STORY ON PROMISSORY NOTES (6 ed.), § 178: "If the transfer is after the maturity of the Note, the holder takes it as a dishonored Note, and it is affected by all the equities between the original parties."

<sup>57</sup> This seems to be the view of Francis R. Jones in his article in 11 HARV. L. REV. 40; see page 42, top. It is also held by *Hill v. Shields*, 81 N. C. 250, 253 (1879); *Parker v. Stallings*, Phil. L. (N. C.) 590 (1868); *Sanderson v. Crane*, 2 Green (14 N. J. L.), 506, 509 (1834).

<sup>58</sup> *Zeis v. Potter*, 105 Fed. 671, 675 (C. C. A. 7th, 1901).

<sup>59</sup> *Equitable Defenses of Secondary Parties run after Maturity*.

*Drawer*: *Serrell v. Derbyshire*, 9 C. B. 811 (1850), *semble*; *Rounsavel v. Scholfield*.

2 Cranch, C. C. 139 (U. S.) (1817); *Skillman v. Titus*, 32 N. J. L. 96 (1866);

can always set up want of presentment and notice against a purchaser after maturity.

A distinction must be taken between the defenses of parties who become liable before maturity and after maturity. The instrument takes a new lease of life with respect to an indorser after maturity, and his equitable defenses are not let in until a reasonable time after he indorses, although the paper is apparently overdue.<sup>60</sup> The same is true of a drawer<sup>61</sup> or even a maker or acceptor who becomes bound after the date of payment. The promise is to pay on demand.<sup>62</sup> A contract made after maturity has a special maturity of its own, *i. e.*, a reasonable time after execution, and *bonâ fide* purchasers within that time will be protected from all equities of the party who signed, even equitable defenses.

It must also be remembered that the defendant can set up only his own equities when sued by a purchaser after maturity. Thus an indorser cannot set up the defenses of a maker or prior indorser, because he has made a fresh promise. Nor can a maker set up fraud upon an indorser because that is not an equitable defense on the maker's contract, and though the indorser has an equity of ownership, it was cut off by the *bonâ fide* purchase even though the latter was after maturity.<sup>63</sup>

It is clear from the preceding discussion and especially from the language of Chief Justice Shaw and the other judges quoted that a purchaser after maturity is put on inquiry as to equitable

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Bridgford v. Crocker, 3 Th. & C. (N. Y.) 273 (1874); Cowing v. Altman, 1 Th. & C. (N. Y.) 494 (1873); Lancaster v. Woodward, 18 Pa. St. 357 (1852).

*Indorser*: Crossley v. Ham, 13 East. 498 (1811); Chester v. Dorr, 41 N. Y. 279 (1869). *Contra*, Wynn v. Kelly, 22 La. Ann. 594 (1870); but the defense here was collateral, like set-off; Hill v. Shields, 81 N. C. 250 (1879); indorser after maturity, and purchase may have been within a reasonable time, but the opinion allows only maker's equities to run; Parker v. Stallings, Phil. L. (N. C.) 590 (1868).

<sup>60</sup> An indorser after maturity is held to be liable only for the price paid him, in McAdam v. Grand Forks, 24 N. D. 645, 140 N. W. 725 (1913), *sed quare*.

<sup>61</sup> Boehm v. Sterling, 7 T. R. 423 (1797).

<sup>62</sup> NEGOTIABLE INSTRUMENTS LAW, § 7, enacts the common law; "Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand."

<sup>63</sup> An accommodation indorser, being a surety, can set up the equitable defense of his principal, the maker. Livermore v. Blood, 40 Mo. 48 (1867).

The difficult question whether jurisdictions which hold that equities of ownership are *not* cut off after maturity should allow such equities to be set up as defense by a prior party is discussed on page 1141, *infra*. See notes 122, 123, 124.



defenses. But his duty to inquire stops there. The reasoning of the courts does not apply to equities of ownership. The effect of maturity as notice is limited by the fact that maturity does not terminate the life of a negotiable instrument as property. Equities of ownership relate to the instrument as property, but maturity, like equitable defenses, relates to liability on the contracts. It is a term of the respective promises of the parties. The possession of an overdue instrument is a clear indication that there is something the matter with the promises, whether it be a defense or only financial embarrassment or procrastination, but it does not indicate in any way that the possessor wrongfully acquired the instrument from a previous owner. Maturity has an obvious relation to liability on the contracts, and therefore brings into play the equitable defenses which prevent liability. But maturity has no effect upon the existence of the instrument as a thing of value, or its transferability. It is a chattel as before, legal title passes as before, and equities of ownership are cut off by purchase of the legal title for value without notice just as in the case of any other chattel. The purchaser must ask why the instrument was not paid, or take the risk that there may have been a good reason for default, but nothing has happened to make him ask why the transferor instead of some other man has the instrument. Consequently, on correct principles, the purchaser after maturity, unless sheltered under the title of a preceding holder in due course, cannot sue upon any contract as to which there is an equitable defense, but can keep the instrument and sue on contracts which are free from such defenses. Maturity alters contracts which are subject to defenses, crystallizing the defenses, as it were, but contracts not subject to defenses continue as before. The *bonâ fide* purchaser after maturity gets the instrument as it is and owns each contract for better, for worse.

This solution of our problem, that equities of ownership are still cut off after maturity but equitable defenses run after maturity, has been ably presented in the recent Federal case of *Wolf v. American Trust Company*:<sup>64</sup>

"An indorsement of a negotiable instrument to a named indorsee has two aspects. In one, it is a contingent contract of debt as complete

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<sup>64</sup> 214 Fed. 761, 765 (C. C. A. 7th, 1914) per Baker, J.

and definite as if the terms thereof were written out in full above the indorser's signature; and in the other, it is a conveyance to the indorsee of the legal title to the instrument considered as a species of property — as perfect a conveyance as is the ordinary bill of sale of the ordinary chattel. Concerning the indorser's liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the indorser's conveyance of the legal title, the maturity of the instrument is inconsequential. And so in this case, inasmuch as appellee is not counting on appellant's contingent contract of debt but is only asking him to respect his conveyance of the legal title, the principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected against secret equities respecting the title."

### III. ALTERNATIVE VIEWS OF OVERDUE PAPER

The preceding portion of this article solves the problem of the *bonâ fide* purchaser after maturity in accordance with what is believed to be the true theory of negotiable paper, which involves (1) the classification of equities and (2) the passage of legal title to the possessor within the description of the instrument. Other theories as to negotiable instruments have been mentioned, and we must now consider the consequences of the application of these theories to overdue paper, and the views actually adopted by the courts in overdue paper cases.

The estoppel theory reaches the same conclusions as this article by a different course of reasoning as to legal title and the same views as to the two kinds of equities.<sup>65</sup> As Mr. Ewart forcibly expresses it:

"The holder of a bill to bearer appears to be the owner of it —

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<sup>65</sup> EWART ON ESTOPPEL, 423-24.

"Apart from any asserted *ipse dixit* of the law merchant, the only reason for declaring that the holder of an overdue bill or note takes it subject to equities is that he has notice that payment has been refused; this refusal may have been because of the existence of equities; the purchaser should have inquired; if he had he would have discovered equities; he therefore takes with notice actual or constructive of them, and for that reason ought to hold subject to them. . . .

"But we must remember a distinction. The equities of which a transferee is relieved are (1) the equities of the obligors, and (2) the equities of the true owner of the document — or rather the legal title of this true owner. Now the reason for cutting out equities applies very forcibly to the former of these cases; but it has no relation to the latter."

The rest of the passage is quoted in the text above, and in note 99, *infra*.



'the property and the possession are inseparable.' Due or not due does not affect or modify this appearance. The true owner is as much estopped by ostensible ownership of a dead horse (overdue as we may say) as of one still able to trot."

The decisions with regard to overdue paper are much influenced, however, by a very different doctrine from the legal title theory or Mr. Ewart's estoppel theory. This doctrine denies that the wrongful possession of negotiable paper necessarily confers a real or apparent legal title; the wrongdoer, especially if a thief, has only an authority or power to pass title, which terminates abruptly at maturity. After that period, the paper is said to be subject to a general rule that title cannot pass without the consent of the owner. This doctrine also ignores the distinction between equitable defenses and equitable claims to ownership, lumping them all together as "equities." The result is a strong body of judicial opinion, which takes the red flag view of maturity and regards it as warning the purchaser of everything that is wrong about the instrument. This view has long been held in England<sup>66</sup> and is codified by the Bills of Exchange Act, 1882:<sup>67</sup> "Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title<sup>68</sup> affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had."

This English view, as we may call it, is evidently at the opposite pole from the view advocated in this article. Instead of protecting the *bonâ fide* purchaser from all claims to the ownership of the instrument, it subjects him to all such claims, whether made by indorsers, prior owners who did not indorse, or persons who never had any possession of the instrument, and whether the wrongdoer be a thief, a defrauder, or an absconding custodian.

<sup>66</sup> *In re European Bank*, L. R. 5 Ch. App. 358 (1870).

<sup>67</sup> § 36 (2).

<sup>68</sup> CHALMERS ON BILLS OF EXCHANGE (7 ed.), page 129, says that "defect of title" was used to mean "equity attaching to the bill," since that term was unknown in Scotch law, and the Act extended to Scotland: The Scotch law did not subject the *bonâ fide* purchaser after maturity to equitable claims or defenses until Parliament applied the English rule to Scotland in 1856. Mercantile Law (Scotland) Amendment Act, 19 and 20 Vict. c. 60, § 16: "When any Bill of Exchange or Promissory Note shall . . . be indorsed after the Period when such Bill of Exchange or Promissory Note became payable, the Indorsee of such Bill or Note shall be deemed to have taken the same subject to all Objections or Exceptions to which the said Bill or Note was subject in the Hands of the Indorser." See note 117, *infra*.

Although many American courts give apparent allegiance to this doctrine and have adopted its catch-words, that an overdue instrument is mere personal property, title to which cannot pass without the consent of its owner, so that the paper is bought after maturity subject to all infirmities,<sup>69</sup> nevertheless the English view is so harsh upon innocent purchasers that our judges shrink from applying it, at least in its extreme form. Consequently the American law inclines to protect the *bonâ fide* purchaser after maturity, although the authorities are by no means harmonious. The complete protection advocated in this article is not given by any State with the probable exception of North Carolina,<sup>70</sup> but in view of the strong statement of the Circuit Court of Appeals in the Seventh Circuit in *Wolf v. American Trust Company*<sup>71</sup> and the concurring opinion of Justice Swayne in *National Bank v. Texas*<sup>72</sup> in the Supreme Court, it is possible that the Federal courts will eventually cut off all equities of ownership. And in most States it is certain that there are circumstances under which the *bonâ fide* purchaser will get a good title, although the decisions differ very much as to what those circumstances are.

We can roughly place the cases in three divisions, according to the grounds on which they cut off equities of ownership. These grounds are not mutually exclusive. A jurisdiction may cut off equities on all three grounds, or it may recognize only one ground and repudiate the others, and so forth. If it cuts off equities at all, it leans in the direction of the conclusions of this article, although it may draw the line at a point which seems questionable.

1. The first view determines whether protection shall be given to the *bonâ fide* purchaser after maturity by the manner in which the wrongdoer acquired possession of the instrument from his victim. Where the owner purposely transfers the paper under circumstances which enable his transferee to deal with it as if he were the true owner, the transferee can give a good title. Either he is said to have legal title subject to equities which cannot be

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<sup>69</sup> See, for example, the cases in note 52, and also *Wood v. McKean*, 64 Iowa, 16 (1884).

<sup>70</sup> *Parker v. Stallings*, Phil. L. (N. C.) 590 (1868); *Hill v. Shields*, 81 N. C. 250 (1879); *Bradford v. Williams*, 91 N. C. 7 (1884). The first two cases go even farther than this article and cut off equitable defenses of an indorser.

<sup>71</sup> 214 Fed. 761 (1914), quoted on page 1126, *supra*.

<sup>72</sup> 20 Wall. (U. S.) 72, 88 (1873).



set up,<sup>73</sup> or else though he has not title the true owner by conferring on him the *indicia* of ownership is estopped from disputing the rights of the purchaser who has been misled.<sup>74</sup> Usually these two arguments are mingled without discrimination. On this view the purchaser from a thief or finder would not be protected,<sup>75</sup> either because no legal title passes with this kind of transfer, or because legal title never passes to a wrongdoer after maturity and in these cases the true owner is not estopped to set up the wrong. This voluntary transfer view has the largest judicial support of any ground for protection of the purchaser after maturity. It is adopted in many cases,<sup>76</sup> and although there are numerous decisions which allow the owner who voluntarily parted with overdue paper to regain it,<sup>77</sup> the estoppel point was not raised, or else the court recognized the validity of the principle of estoppel but held it was not created by the facts of the particular case.<sup>78</sup> On the other hand, there is no instance of involuntary transfer by the owner where the *bonâ fide* purchaser was actually protected by a court,<sup>79</sup> unless we except *National Bank v. Texas*.<sup>80</sup> The purchaser from a thief or finder gets his only encouragement from dicta and legal reasoning. The voluntary transfer view consequently takes its stand at the high-water mark of judicial protection for the *bonâ fide* purchaser after maturity.<sup>81</sup>

<sup>73</sup> Morton, J., in *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 30, 76 N. E. 455 (1906), citing *White v. Dodge*, 187 Mass. 449, 73 N. E. 549 (1905), which practically adopts the legal title theory, since it compares the wrongful transfer to the conveyance of a stock of goods which the vendor had obtained by fraud. *Gardner v. Beacon* itself practically rejects the view that maturity gives notice of equitable claims, though in the same breath it says the purchaser is subject to all equities. Morton, J., shrank from the plunge.

<sup>74</sup> *Young v. MacNider*, 25 Can. S. C. 272, 279 (1895), per Strong, C. J.

<sup>75</sup> See the dicta as to theft and finding in cases which recognize voluntary transfer as a ground of protection, Appendix, Group B 4.

<sup>76</sup> Appendix, Groups A 2 and A 3, except *Wolf v. American*, and the first two North Carolina cases.

<sup>77</sup> Appendix, Groups B 5, 6, 7.

<sup>78</sup> *Osborn v. McClelland*, 43 Ohio St. 284 (1885), and the Illinois cases against the *bonâ fide* purchaser.

<sup>79</sup> Appendix, Groups B 1, 2, 3.

<sup>80</sup> See Appendix, Group A\* 1.

<sup>81</sup> The voluntary transfer view in its most liberal form corresponds with the protection given to the *bonâ fide* purchaser for value of a document of title by the Uniform Sales Act, § 38 and the Uniform Warehouse Receipts Act, § 40. It is significant that the Uniform Bills of Lading Act, §§ 31, 32, and the Uniform Stock Transfer Act, § 5, protect even the purchaser from a thief.

In spite of the fact that this view reaches a just result in a large number of cases, it is open to two serious objections. First, it separates the possession of the instrument from the power to give a good title, unless it can find some consent on the part of the true owner. Since the last thing that owner really wants is to be deprived of his property wrongfully, the interpretation of his mental attitude becomes a difficult and arbitrary matter. The "authority" given by him to the wrongdoer was wholly fictitious before maturity, and is still far from genuine after the paper is overdue. A Rhode Island court once allowed a will to be completely rewritten after the testator's death by the consent of all the persons interested, and then set itself to construe certain ambiguous passages in the new document and find out "the intent of the testator." Courts which adopt the "authority" theory are similarly embarrassed in their efforts to ascertain the transferor's intention.

Consequently the courts do not agree as to the kind of voluntary transfer which will pass title to the wrongdoer or estop the owner. If consent is obtained by fraud, Indiana, Massachusetts, and Minnesota protect the purchaser,<sup>82</sup> while Illinois and Mississippi class the defrauder with a thief,<sup>83</sup> saying that no title whatever passes, and that even if *bonâ fide* purchase after maturity cuts off equities it does not cut off the legal title. Once the Illinois court had gone outside the four corners of the instrument and announced that the will of the victimized owner must be taken into consideration, it began to draw very fine distinctions to determine whether or not the wrongdoer was "clothed with the *indicia* of title." The result of the Illinois cases is that a pledgee<sup>84</sup> or an agent for safe-keeping and receipt of interest<sup>85</sup> is *purposely* given title, but an agent for renewal is not.<sup>86</sup> Offhand, we should expect the distinction, if

<sup>82</sup> *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673 (1887); *Gardner v. Beacon*, 190 Mass. 27, 76 N. E. 455 (1906); *Cochran v. Stewart*, 21 Minn. 435 (1875).

<sup>83</sup> *Etheridge v. Gallagher*, 55 Miss. 458, 469 (1877); *Y. M. C. A. v. Rockford*, 179 Ill. 599, 604, 54 N. E. 297 (1899); citing *Henderson v. Case*, 31 La. Ann. 215, 216 (1879), in which Spencer, J., said: "We do not think that the authorities cited by defendant to the effect that 'no collateral equities can effect an assignee of commercial paper transferred after maturity' can be applied to the case where there is a *total want of right* in the transferor."

<sup>84</sup> *Y. M. C. A. v. Rockford*, 179 Ill. 599, 54 N. E. 297 (1899).

<sup>85</sup> *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722 (1915, under N. I. L.).

<sup>86</sup> *Hide v. Alexander*, 184 Ill. 416, 56 N. E. 809 (1900); *Merchants v. Welter*, 205 Ill. 647, 68 N. E. 1082 (1903). See also *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885).



there is any, to be just the other way; for the authority to collect small amounts of interest is much narrower than the authority to surrender the instrument itself and take another with a later time for payment.

If estoppel be the ground of these cases, the apparent ownership of the wrongdoer and the reliance of the purchaser are just the same, however the owner lost possession. There is no real basis for an estoppel in these cases except the mere possession of the wrongdoer, and that exists regardless of delivery. If an overdue instrument is only a chattel, estoppel is surprising, for possession of other chattels does not *per se* create estoppel; but if estoppel is created by the possession, it ought to exist in all cases of possession, without these fine distinctions as to the owner's mental attitude and consent.

If passage of title be the ground of these voluntary transfer cases, then title ought to pass whether the victim consents or not, just as before maturity. There is no true consent to be deprived of his ownership in any case. The limits of the wrongdoer's power are fixed by law and the terms of the instrument. The attempt to define them by the intention of the victim only results in uncertainty. There is no reason in nature for giving a thief less power to pass title than a cunning swindler or an embezzler, and as for the finder, it is hard to see why he should be classed with a thief at all.<sup>87</sup> Since a finder's possession entitles him to sue, like the chimney-sweep who discovered the jewel,<sup>88</sup> the finder of a negotiable instrument payable to bearer has before maturity every incident of legal title, and maturity should have no effect on his legal title, especially as he is not a wrongdoer. After maturity he ought to be in as good a position as the agent for collection, who can admittedly cut off the true owner's equities by virtue of his legal title. And when the courts say that there is no intention to pass title to a defrauder or an agent for renewal or an accommodated friend, we have confusion worse confounded.

A second difficulty about the voluntary transfer view is its inability to decide whether maturity is or is not constructive notice of claims of

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<sup>87</sup> The only case as to a finder seems to be *Vairin v. Hobson*, 8 La. 50 (1835), denying protection to the *bonâ fide* purchaser, but the dicta in Appendix, Group B 4, class a finder with a thief.

<sup>88</sup> *Armory v. Delamirie*, 1 Stra. 505 (1722).

ownership. If maturity is not such notice, then the *bonâ fide* purchaser ought to be protected in all cases, as I contend. If it is notice, it puts the purchaser on inquiry in all cases, and there can be no estoppel, since estoppel presupposes justifiable reliance. The purchaser is not misled to overlook the danger, since the red flag of maturity waves before his eyes. Consequently it is incorrect for the voluntary transfer cases to seek support as they often do from *McNeil v. Tenth National*,<sup>89</sup> and similar decisions,<sup>90</sup> which protect from equitable claims of ownership the *bonâ fide* purchasers of tangible choses in action like stock certificates and insurance policies, on the ground that the true owner is precluded by his conduct from asserting his title. Such instruments have no maturity to give warning of defects of title. The analogy is proper only if you limit the effect of maturity to equitable defenses. These voluntary transfer cases let in all equities at the front door and then try to shut them out at the back.

The objection was well put by counsel in a Maryland case:<sup>91</sup>

"The intervention of the equitable principle that 'where one of two innocent parties must suffer, *he* must suffer who misled the other, cannot be successfully invoked by the [purchaser after maturity], because he is not, in the eye of the law, an innocent party. [His] position is worse than that of an assignee of a mere *chose in action* under similar circumstances, for the fact that the note was overdue when transferred to him is of itself *notice* of the fraud, and of the consequent defect in [his transferor's] title. How can a *particeps fraudis* take advantage of this equitable principle?"

Most of the voluntary transfer cases start with the assumption that the purchaser of an overdue instrument takes it "subject to all the equities attached to it." If so, he is not a *bonâ fide* purchaser without notice and ought not to have the benefit of any estoppel or take free from the very equities to which *ex hypothesi* he is subject.

The only way to reach a sound result is to recognize squarely that maturity has nothing to do with equities of ownership. The

<sup>89</sup> 46 N. Y. 325 (1871). It is important to remember that this case rests upon estoppel and not upon Kent's latent equity doctrine, which is overruled in New York.

<sup>90</sup> 30 HARV. L. REV., 104 notes 14, 16, and 17; Williston's *Wald's Pollock on Contracts*, 294, note 88.

<sup>91</sup> *Eversole v. Maull*, 50 Md. 95, 97 (1878).



difficulties of the voluntary transfer view arise from its reluctance to adopt the two fundamental propositions, that there are two kinds of equities, and that the capacity to give a perfect title passes with possession within the terms of the instrument.

2. A second view rejects the English rule that the equities of all persons run after maturity, and lets in only the equities of those persons of whom the prospective purchaser can fairly be required to make inquiry. Thus, it would be extremely harsh to subject him to the claims of persons whose names do not appear on the instrument, who never had possession of it, and were not in the chain of title at all. It is plain that unlimited diligence on the prospective purchaser's part would probably fail to disclose such claims. As Chancellor Kent puts it,<sup>92</sup> "He has not any object to which he can direct his inquiries." Questions addressed to the transferor will hardly elicit the fact that he is a defaulting trustee or obtained the instrument in fraud of the creditors of a prior holder. Yet by the English view, the *cestui que trust* or the creditors could get the instrument from the purchaser. In the leading English case,<sup>93</sup> the agent of a bank wrongfully used its funds to buy overdue bills, which he sold to an innocent buyer. The bank's claim was undiscoverable, for the only person who knew of it, the agent, would not have revealed his misconduct, yet the bank prevailed. There are several cases in this country which refuse to let in such "latent" equities,<sup>94</sup> although authority the other way is not lacking.<sup>95</sup> Since there is no voluntary transfer in most of these cases, there would be no chance to work out an estoppel<sup>96</sup> if the latent equity view be rejected.

It is possible to extend this latent equity view even farther and protect the *bonâ fide* purchaser from the equities of prior owners if the instrument was payable to bearer or indorsed in blank before they acquired it. Their names do not appear on the paper, and it is only by a series of tedious inquiries that he can discover who they are. "It would even be impracticable, if not wholly impossible, for the last purchaser to investigate the history of the note suffi-

<sup>92</sup> *Murray v. Lylburn*, 2 Johns Ch. 441, 443 (1817).

<sup>93</sup> *In re European Bank*, L. R. 5 Ch. App. 358 (1870), equities of undisclosed principal.

<sup>94</sup> Appendix, Group A 4.

<sup>95</sup> Appendix, Group B 8.

<sup>96</sup> *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. 157 (1888). See, however, *Young v. MacNider*, 25 Can. S. C. 272 (1895).

ciently to ascertain the names of all the persons through whose hands it had passed, where . . . it had been transmitted by delivery and not by indorsement. An intending purchaser, recognizing the difficulty and his liability to adverse demands . . . , would wisely refuse to have anything to do with such paper at all."<sup>97</sup> It is also plain that there is no duty to ask such persons about equitable defenses and incidentally learn of equities of ownership. Where a man is under no obligation to pay at maturity, the fact that the instrument is unpaid has nothing to do with him.<sup>98</sup> Consequently, there is a strong argument for cutting off the equities of prior owners who have not indorsed.<sup>99</sup> But no case protects the purchaser on this ground, and there is an overwhelming body of decisions which subject him to such equities.<sup>100</sup> Indeed, some of the cases find it easier to cut off a former owner who has indorsed, saying that the signature is one more element to indicate passage of title and create an estoppel.<sup>101</sup>

It is regrettable that there has not been more discussion in the cases<sup>102</sup> of this position, that a purchaser after maturity takes

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<sup>97</sup> *Sykes Banking Co. v. Morris*, 2 Tenn. Ch. 236, 241 (1901), holding that set-offs against an intermediate holder do not run.

<sup>98</sup> It is by no means certain that inquiry of the person who has the equitable claim will reveal it. The owner may not be aware of the fraud at the time of the purchase. See *Proctor v. McCall*, 2 Bailey (S. C.), 298, 302 (1831).

<sup>99</sup> EWART ON ESTOPPEL, 423: "The holder of an overdue note payable to bearer offers it for sale; the intending transferee inquires of all persons liable upon the note as to equities or claims, and is told that there are none; he then buys the note; afterwards some stranger demands it from him, saying that the transferor was his agent for custody merely; that it was overdue when it was transferred; and therefore that the transferee took it subject to all defects. It is at once apparent that the principle of notice, actual or constructive, will not aid this claimant."

<sup>100</sup> All the cases in Group B 1 of the Appendix; all but one in B 2; the case in B 3; the Illinois, Louisiana, New Hampshire, and Texas cases in B 5; the Georgia, Illinois, Maryland, first New Hampshire, New Jersey, New York, and Texas cases in B 6; and the case in B 7—twenty-seven decisions in all. In the three Illinois cases which do not protect the purchaser, the paper was not indorsed by the owner; but he did indorse in the two Illinois cases in note 101 which do protect the purchaser.

<sup>101</sup> *Y. M. C. A. v. Rockford*, 179 Ill. 599, 604, 54 N. E. 297 (1899); *Kempner v. Huddleston*, 90 Texas, 182, 185, 37 S. W. 1066 (1896). *Justice v. Stonecipher*, 267 Ill. 448, 452, 108 N. E. 722 (1915). And see 2 L. R. A. N. S. 769-70, note. Compare *Eversole v. Maull*, 50 Md. 95 (1878) with *McKim v. King*, 58 Md. 502 (1882). See also the cases which estop the owner of a non-negotiable chose in action who transfers it by writing. 30 Harv. L. Rev. 104, note 17.

<sup>102</sup> *Zeis v. Potter*, 105 Fed. 671, 675 (C. C. A. 7th, 1901) Woods, J., *semble*: "The purchaser of overdue or non-negotiable paper, if required to inquire of the makers



subject to all equities of secondary parties and no others. Much can be said for its validity, and indeed its advocates might direct a powerful attack against the solution of the problem advocated by this article. If the purchaser after maturity is put on inquiry as to the equitable defenses of indorsers, they might argue that according to Chief Justice Shaw<sup>103</sup> he is then affected with notice of all the facts which he would have learned by such an inquiry. Any indorser who has an equitable defense has also in most instances an equity of ownership, and both rest on the same facts. For example, if he was induced to indorse by fraud, inquiry as to his equitable defense would disclose the circumstances of the fraud, and a purchaser knowing those facts would at once be aware of the claim for restitution of the instrument. He would have notice simultaneously of the equitable defense and the equitable claim, and if he purchased would take subject to both. Actual notice of one is necessarily actual notice of the other, and consequently it is objectionable to maintain that maturity gives constructive notice of the indorser's equitable defenses but not of his equitable right to the ownership of the instrument.

My reply would be, that maturity is only constructive notice, and constructive notice is not actual notice, indeed not notice at all, but simply a convenient fiction to express a rule of law that the person affected takes certain risks if he goes ahead with his purchase or other transaction. The extent of the risk depends on the nature of the transaction or the particular fact which gives him warning, "puts him on constructive notice." He is not held to know the facts of which he has notice. The owner of land takes the risk of a prior recorded mortgage, but he is not guilty of fraudulent mis-

whether they have any defense, may equally well be required to inquire into the rights of remote indorsers or others whose names appear on the paper. The payee and each successive indorsee, though he has parted with possession and title, may yet have an interest which, as against all but innocent purchasers for value and without notice, equity would protect; and, if convenience of inquiry is equivalent to notice of the rights of the maker, why not of any other, [when,] by reason of his name being on the paper, or by other means, the proposed purchaser is notified that he once had, and therefore may yet have, an interest? The maker often signs for accommodation, and the apparent indorser may be in fact the principal. The reasonable rule would seem to be that the purchaser of such paper should take subject to the equities of all who appear or are known to have had an interest in it."

<sup>103</sup> *Baxter v. Little*, 6 Met. (Mass.) 7, 11 (1843). "By this fact he is put upon inquiry, and therefore he shall be bound by all existing facts, of which inquiry and true information would apprise him."

representation if he says the land is unincumbered. In the same way, maturity does not actually inform the purchaser of defenses, but merely throws upon him the risk of them and of nothing else. If the purchaser is anxious to hold some wealthy indorser, he will be wise to go to him and make sure *he* has no defense. Then that contract will be safe, and the purchaser need not take the time to interview other parties. But if all equities of indorsers run, the omission to ask one insolvent indorser would be penalized by a loss of rights on all the contracts, should that indorser have been deprived of the paper by fraud. The prospective purchaser would have to ask all down the line to protect himself, and if he could not find one indorser, he would have good reason to worry for fear that this might be the very man who would eventually turn up and take the instrument away from him. On business principles, each promise should stand by itself, good or bad. The conditions of trade in the note market require speedy transactions and make a protracted series of inquiries impossible. Consequently the buyer should be obliged to see only the parties whom he particularly wants to hold. If he omits an indorser, he takes the risk that that man may have a defense, but rights on other contracts remain unaffected.

An extremely liberal view, suggested in a few cases,<sup>104</sup> is that dishonor simply concerns the maker or drawee. The purchaser after maturity is bound to ask the primary party the reason for non-payment, and if he does not ask, he is subject to whatever equities he would have learned about from the maker or drawee. The payee or other holder who loses the instrument or is deprived of it by some fraud must notify the primary party not to pay if he wishes to preserve his rights. The purchaser is taken to know all that the maker or drawee knows, and no more. The reason for non-payment may be an equitable defense of the maker's or it may be theft from the payee, who has stopped payment. This view, though ingenious, would be hard to apply. Questions

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<sup>104</sup> See the authorities cited in note 57, *supra*; *Proctor v. McCall*, 2 Bailey (S. C.) 298, 302 (1831). Harper, J.: "It would seem much more reasonable, to require the payee or true owner to give notice of the loss to the party liable to pay."

*Y. M. C. A. v. Rockford*, 179 Ill. 599, 605, 54 N. E. 297 (1899), the passage quoted in note 107, *infra*.

In *National Bank v. Texas*, 20 Wall. 72, 77 (1873) it appears that the purchaser made inquiries of the maker.



about what the maker knew, whether the purchaser did inquire, and so on, would continually arise. Moreover, the equitable defenses of the indorser who did not notify the maker would be cut off after maturity. Incidentally, the fact that the maker or drawee knows of a theft from the payee does not necessarily justify his refusal to pay the instrument, for the payee's equity may conceivably be cut off. Whether it is cut off, is the very question now under discussion.

The latent equities view is sound in maintaining that the equities of outsiders ought not to be let in, but its supporters admittedly rest it on *Murray v. Lyburn*,<sup>105</sup> so that there is danger that courts which reject Kent's doctrine as to non-negotiable choses in action will treat this view in the same way. However, there is a clear distinction between mere choses in action and overdue paper, and if the judges can be made to perceive this, the unjust doctrine of *In re European Bank*<sup>106</sup> may be permanently repudiated in the United States. Furthermore, the latent equity argument is sometimes used by the cases to reënforce the estoppel argument, and secure protection for the purchaser even against the equitable claims of prior owners.<sup>107</sup>

3. It is arguable that the rights of the *bonâ fide* purchaser after maturity should depend on the time at which the defrauded owner parted with the instrument. If it was then overdue, the fraud could not have been a reason for non-payment, and the purchaser should be protected. Also the "authority" given before maturity may be considered to terminate at maturity, but if it does not commence till after the instrument is overdue, it is still in full effect at the time of the transfer to the *bonâ fide* purchaser.<sup>103</sup>

<sup>105</sup> 2 Johns. Ch. 441 (1817).

<sup>106</sup> L. R. 5 Ch. App. 358 (1870).

<sup>107</sup> *Y. M. C. A. v. Rockford*, 179 Ill. 599, 605, 54 N. E. 297 (1899). Wilkin, J. (after speaking of the rule that the maker's equities are not cut off):: "To extend the same protection to whoever may have acquired some collateral interest in the paper, in the absence of actual notice of the same to a transferee, would be to charge him with knowledge of a fact not within his power of ascertainment and practically destroy the negotiability of overdue instruments. . . . Persons dealing in such securities can without difficulty inquire of the makers if any defenses exist against them, but more than that it is not practicable to do. Of course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter."

<sup>108</sup> *Eversole v. Maull*, 50 Md. 95, 98 (1878), counsel for the purchaser, *arguendo*;

On the other hand, it has been pointed out that if the wrongdoer took the instrument before maturity, it was still negotiable in the fullest sense, and consequently he got the usual title or power which enables him to confer a good title on his transferee. The cases which declare that the theft of an overdue instrument gives no title cannot apply to a theft before maturity.<sup>109</sup> The magic of negotiability is still operative. This argument applies still more forcibly if the transfer to the wrongdoer was voluntary.

Clearly a distinction which works both ways is not worth much, and it is not surprising that the courts have paid no attention to it<sup>110</sup> with the exception of one case in Maryland,<sup>111</sup> which refused to safeguard a transferor after maturity, and even in Maryland the distinction was overlooked by a later case which did allow him to recover.<sup>112</sup>

It should be observed, however, that an owner who indorses the instrument after maturity makes it payable on demand, giving it a second maturity so far as he is concerned, *i. e.*, a reasonable time after he transfers. A *bonâ fide* purchaser for value within that reasonable time is a holder in due course as regards that indorser and should consequently be free from all his equities.<sup>113</sup> To this extent the third view seems sound.

This discussion of the authorities leads to the conclusion that a combination of the first and second views is probable. The *bonâ fide* purchaser of overdue paper may hope for protection from the claims of former owners who voluntarily transferred the paper,<sup>114</sup> and from the equities of outsiders,<sup>115</sup> although the decisions are sharply divided on both points. Once this result is firmly estab-

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and Miller, J., adopted his argument, saying, page 105, "The endorsement was made and the note delivered to (the agent for collection) *after its maturity*, so that the trust reposed in him by (the owner) *originated* after the note had matured, and was *continuing* at the time (the agent) sold it to (the purchaser)." This distinction has not been adopted in any other case. See 2 L. R. A. N. S. 768-69, note.

<sup>109</sup> So argued by Francis R. Jones, 11 HARV. L. REV. 44.

<sup>110</sup> The groups of cases in the Appendix show that it makes no difference as to the position of the owner whether he parted with the paper before or after maturity.

<sup>111</sup> Eversole v. Maull, 50 Md. 95, 105 (1878).

<sup>112</sup> McKim v. King, 58 Md. 502 (1882), not citing Eversole v. Maull.

<sup>113</sup> See the discussion on page 1125 and note 61. If equitable defenses are cut off, it is clear that equities of ownership ought to be, but the point has never been raised in litigation.

<sup>114</sup> Appendix, Groups A 2 and A 3. *Contra*, Groups B 5, 6, 7.

<sup>115</sup> Appendix, Group A 4. *Contra*, Group B 8.



lished, it will be only a step to include theft and finding and cut off equities of ownership altogether.

In view of the great conflict of authorities, however, it would be desirable to adopt a definite rule by legislation through an amendment to the Negotiable Instruments Law. That Act apparently leaves our problem untouched. The last sentence of section 16,<sup>116</sup> goes a long way toward the legal title theory by making the want of delivery an equitable defense even if at the inception of the instrument, but its terms do not extend to a purchaser after maturity, one way or the other. Section 55 is more important:

"The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

By section 57 a holder in due course holds the instrument "free from any defect of title of prior parties."<sup>117</sup> This may imply that a purchaser after maturity, not being a holder in due course, is subject to such defects, but such an implication is not necessary. The law ought not to be crystallized by vague inferences, especially as the section which provides for persons who are not holders in due course subjects them only to "defenses" and does not touch claims to ownership.<sup>118</sup> More significant still, section 36 (2) of the Bills of Exchange Act, which codifies the English view,<sup>119</sup> is not copied by the

<sup>116</sup> "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed." See note 37, *supra*.

<sup>117</sup> "§ 57. "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Defect of title" may possibly mean only equitable defenses and not equitable claims, but this is unlikely, first, because it is used in conjunction with "defenses," so would naturally mean something different, and secondly, because of the broad meaning of the term in the Bills of Exchange Act. See CHALMERS (7 ed.), pp. 101, 129, who says it is equivalent to "equity attaching to the bill." Lindley, L. J., in *Alcock v. Smith*, L. R. [1892] 1 Ch. 238, 263, defines it as "subject to equities." Such a phrase in the English cases includes all kinds of equities. See note 68.

<sup>118</sup> § 58. "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." The overdue instrument is certainly not "non-negotiable" in the sense of non-transferable. The word need not mean more than that equitable defenses are no longer cut off.

<sup>119</sup> See page 1128, *supra*.

Negotiable Instruments Law. Therefore the Act does nothing to settle the common-law conflict. Several cases decided under its provisions protect the *bonâ fide* purchaser after maturity.<sup>120</sup>

Inasmuch as equities of ownership run to a varying extent after maturity, according to the cases, it is useful to consider how these equities may become the basis of relief. Suppose a payee is induced by fraud to indorse in blank, and the defrauder transfers the note when overdue to a purchaser. The payee may, if the equity is not cut off, bring trover or its modern equivalent against the purchaser for the value of the instrument, or a bill in equity for restitution of the instrument itself as a unique chattel.<sup>121</sup> He may notify the maker not to pay any one but himself, and threaten suit, causing the maker to interplead the payee and the purchaser. Can the maker set up the payee's equity against the purchaser without interpleading the payee? He is allowed to do so in many cases,<sup>122</sup> but this procedure seems wrong. An issue which is really between the purchaser and the payee ought not to be fought out in litigation to which the payee is not a party. The judgment will not be *res adjudicata* as to him, so that even if the purchaser wins from the maker he may have to face a suit by the payee for the proceeds of the note. The maker should be required to interplead the payee<sup>123</sup> or else obtain authority from the payee to defend

<sup>120</sup> *Wolf v. American*, 214 Fed. 761 (C. C. A. 7th, 1914), N. I. L. not cited; *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722 (1915), citing and discussing the N. I. L.; *Priest v. Garnett*, 191 S. W. 1048 (Mo. App. 1917), N. I. L. not cited. Even under the Bills of Exchange Act, estoppel is held. *Young v. MacNider*, 25 Can. S. C. 272 (1895).

<sup>121</sup> The legal remedy is inadequate if the purchaser is insolvent.

<sup>122</sup> *Lee v. Zagury*, 8 Taunt. 114 (1817); *Ashurst v. Royal Bank of Australia*, 27 L. T. 168 (1856); *McCormick v. Williams*, 54 Iowa, 50 (1880); *Davis v. Bradley*, 26 La. Ann. 555 (1874); *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999 (1892); *Osborn v. McClelland*, 43 Ohio St. 284, 1 N. E. 644 (1885).

<sup>123</sup> *Warren v. Haight*, 65 N. Y. 171 (1875). In an action upon an overdue note by an indorsee after maturity against the maker, the maker was not allowed to set up the defense that the note represented the proceeds of property stolen from Mrs. N., which had come into the payee's hands with notice of the theft and been lent to the maker without notice to him.

*Lott, Ch. C.*: "If Mrs. N. had an *equitable* right to the money, before its loan to the defendants, and to the note subsequent thereto, that would not have been a legal defense to them if the present action had been brought by (the payee). . . . Mrs. N. is not a party to this action, and her rights could not be litigated in it."

*Dwight, C.*: "The plaintiff was the holder of the legal title to the note. . . . We hold that under such circumstances a party like Mrs. N. having, as is assumed, equitable rights, cannot intervene by mere notice so as to prevent the holder from collecting



in his behalf, so that the payee is the real defendant and will be bound by the judgment.<sup>124</sup>

Questions in conflict of laws are likely to arise because of the wide variance of views about overdue paper in different countries and among the States of this country. It is significant that the English courts, which make no distinction between equitable defenses and equitable claims when the overdue paper is in England, see the matter in a new light as soon as the paper is carried abroad, and recognize the difference between liability and ownership.<sup>125</sup> The liability of a party to a negotiable instrument is determined by the law governing his contract, *i. e.*, the law of the place where he became bound. Consequently, that law must determine whether or not equitable defenses are cut off after maturity. No other law can impose consequences upon his act to which he has not consented.<sup>126</sup> On the other hand, his liability is not directly affected by questions of ownership, for it is indifferent to him whom he pays, so long as he pays the lawful owner. Consequently, the title to an overdue instrument is not determined by the law of the place where it was made, but by the same law which governs the title to any other chattel, ordinarily the place where the chattel is and the physical act of transfer

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the note, but can only assert her rights in the usual mode; that is, by becoming a party to an action in which the respective rights of the parties can be adjudicated."

Ludwig v. Dearborn, 8 Pa. Dist. R. 69 (1899). Beitler, J.: "The defendants cannot resist payment of the note because the indorser notified them that he has failed to get the stock for which he endorsed the note. The maker has nothing to do with that."

Jones v. Broadhurst, 9 C. B. Rep. 173 (1850); Young v. MacNider, 25 Can. S. C. 272, 281 (1895), *semble*. For the general principle that a maker cannot set up the indorser's equities, see Prouty v. Roberts, 6 Cush. (Mass.) 19 (1850); Carrier v. Sears, 4 All. (Mass.) 336 (1862); City Bank v. Perkins, 29 N. Y. 554 (1864); Brown v. Penfield, 36 N. Y. 473 (1867); Kenney v. Kruse, 28 Wis. 183, 188 (1871); *Contra*, Parsons v. Utica Cement, 80 Conn. 58, 66 Atl. 1024 (1907); 82 Conn. 333, 73 Atl. 785 (1909).

<sup>124</sup> This is analogous to the cases when a bailee is sued on his contract, and is allowed to set up the *jus tertii* only if expressly directed by the claimant to defend on his behalf. Biddle v. Bond, 6 B. & S. 225 (1865).

For negotiable instrument cases of the same sort see Adams v. Jones, 12 Ad. & E. 455 (1840); Merchants' v. Savings Inst., 33 N. J. L. 170 (1868); Talman v. Gibson, 1 Hall (N. Y.), 308 (1828); Fulton v. Phoenix, 1 Hall (N. Y.), 562 (1829). But see Warren v. Haight, 65 N. Y. 171 (1875), which thinks the third party must actually become a party to the litigation.

<sup>125</sup> Alcock v. Smith, L. R. [1892] 1 Ch. 238 (C. A.).

<sup>126</sup> Cf. Robertson v. Burdekin, 1 Ross, L. C. Comm. L. 812 (1843), in which a note payable to A and made in Scotland was held to be transferred by indorsement in England, although such a note was not transferable by English law.

takes place. In *Alcock v. Smith*<sup>127</sup> a cheque and an unaccepted bill of exchange, drawn and payable in England, were sold in Norway when overdue against the consent of the owner. Norwegian law, unlike English, cuts off all equities after maturity as well as before. The English Court of Appeals applied the Norwegian law and decided that the purchaser had an unassailable title.<sup>128</sup>

<sup>127</sup> L. R. [1892] 1 Ch. 238 (C. A.).

<sup>128</sup> The obligor is indirectly affected by these questions of title. Suppose he pays the person who would be entitled by the law of England where he contracted, without notice that some one else is entitled as a *bonâ fide* purchaser by the law of the place of transfer. Apparently English law would protect the obligor, under § 72 (2) of the Bills of Exchange Act. See also *Lebel v. Tucker*, L. R. 3 Q. B. 77 (1867). But it is doubtful if the obligor could set up the payment as a discharge if he were sued at the place of transfer by the purchaser. He is not really discharged, but only protected by England as a matter of policy.

The reasoning in *Alcock v. Smith* strongly supports the contention of this article that a negotiable instrument resembles a chattel as respects equities of ownership. The case relies on *Cammell v. Sewall*, 3 H. & N. 617 (1858), 5 H. & N. 728 (1860), which involved chattels.

It seems clear that if the owner of an overdue instrument consents to its presence in a jurisdiction where a *bonâ fide* purchase cuts off equities of ownership, the law of that country governs and the purchaser will be protected everywhere. A more difficult question arises when the instrument is carried to such a jurisdiction without the owner's consent and sold. Two views are possible. (a) The policy in favor of the *bonâ fide* purchaser of such paper may be so strong that the owner's consent to its presence is as immaterial as his consent to the sale. He keeps such an instrument at his peril, and any jurisdiction which gets the paper into its clutches can create new rights therein and divest the old. (b) The new jurisdiction has only a physical power over the chattel but cannot affect the title of the owner who has not submitted such a title to its control. This second view finds support in *Wylie v. Speyer*, 62 How. Pr. 107 (1881). Coupons were stolen by bank-robbers in Northampton, Massachusetts, before maturity, and were purchased *bonâ fide* when overdue in Frankfort-on-the-Main. By the law of Frankfort, the purchaser got a good title. The New York court, however, applied the *lex fori* and held that the purchaser had no title. This is clearly wrong, and the decision can be justified only on the ground that Massachusetts law applied and prevented the thief from having power to pass title after maturity. But see *Embiricos v. Anglo-Austrian Bank*, L. R. [1905] 1 K. B. 677 (C. A.). A cheque payable in England was stolen in Roumania and transferred in Austria under a forged indorsement before maturity. The law of Austria was applied, and the *bonâ fide* purchaser protected. This is contrary to *Wylie v. Speyer* unless the law of Roumania, of which nothing was said, is like that of Austria. The second view can also be supported by certain cases involving chattels. For instance, in *Elderly v. Bush*, 8 N. Y. 199 (1880), horses were removed from New York without the owner's consent and sold in Canada in market overt. It was held that the New York title was not divested. Lord Cockburn took a similar view in *Cammell v. Sewall*, 5 H. & N. 728, 735 (1860). But *Wightman, J.*, and *Crompton, J.*, in the same decision, pp. 735, 745, thought the owner's consent to presence immaterial. They said that if foreign goods were wrecked in England or brought there by a thief, the owner's title could be divested



This concludes our theoretical discussion. It will be seen that the various theories of negotiability which reach a substantially uniform result as to current paper exhibit marked divergences when applied to the abnormal facts of overdue paper. In particular, the attempt to base negotiability upon the will of the victimized owner solves nothing. If he authorizes transfer by the wrongdoer before maturity nothing in his mental attitude or overt acts limits that authority and excludes transfers after maturity. He consents to both — or to neither. And when we find jurisdictions like Illinois recognizing some transfers after maturity on the basis of the victim's so-called deliberate action, certainty has utterly vanished. The authority theory moulds the will of the owner to fit the actual rules of law as a perjured witness moulds his memory to fit the pleadings.

This "authority" theory shades imperceptibly<sup>129</sup> into the doctrine that the wrongdoer has a power given by law to create a good title in the *bonâ fide* purchaser before maturity, but not after maturity. Why does the law stop short at maturity? It is just as easy for it to bestow a big power as a little one. Clearly, the so-called power is only an anthropomorphic method of explaining the result that the *bonâ fide* purchaser before maturity *is* protected. The greater the protection, the greater the power. To explain the protection by the power is hauling one's self up by one's bootstraps. In short, the starting-point in the discussion should not be the wrongdoer but the purchaser. Once the law determines that he is entitled to protection on completing his acquisition of a particular kind of property, the intervention of a wrongful act in his chain of title becomes immaterial.

The legal title theory measures that protection by the terms of the instrument, which make him the owner of a direct promise. The surprising fact is not that some equities should be cut off

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in market overt. In view of these conflicting opinions, the question raised by *Wylie v. Speyer* merits more consideration than can be given at this time.

<sup>129</sup> How imperceptibly, is shown by a typical opinion on overdue paper, *Foley v. Smith*, 6 Wall. (U. S.) 492, 494 (1867), per Miller, J. (The italics are mine.) "If (the owner) *trusted* the (wrongdoer) with her note, it was for a *purpose* which was ended when the note was protested. By indorsing the note she did *trust* the bank with full power to dispose of it before due, *although that was not intended*, and she *trusted* the bank for the return of the money to her if the money had been paid. *This trust the law implied*. But her *trust* ceased, except as to the mere possession of the note as a bailment, after the note was protested."

after maturity but that any equities should be let in, to affect *his* promise by transactions between other persons wholly unknown to him. Lord Kenyon's reluctance in *Brown v. Davies*<sup>130</sup> seems natural enough, especially as the rule of that case is unknown to a large portion of Europe,<sup>131</sup> where a *bonâ fide* purchaser after maturity is protected just as completely as our holder in due course.

The rule that lets in equitable defenses on overdue paper is logical but by no means inevitable. The rule that lets in equitable claims to ownership is neither inevitable nor logical nor just. The legal title theory not only conforms to the terms of the instrument, but gives the *bonâ fide* purchaser the protection to which business policy entitles him. In other words, it reaches the same result as the power theory if that theory be soundly applied, *i. e.*, if

<sup>130</sup> See note 51, *supra*.

<sup>131</sup> *Overdue Paper in the Civil Law*.

The Scotch law paid no attention to maturity with respect to equities until the statute of 1856 compressed it into the English pattern. See note 68, *supra*. Bell, *Principles of the Laws of Scotland*, 6th ed., 1872, § 332.

In France, the Code and subsequent statutes seem to cut off equities of ownership for all practical purposes upon instruments indorsed in blank or payable to bearer. The victim of loss or theft can recover (*revendiquer*) his instrument, but must reimburse the *bonâ fide* purchaser for the price paid. The victim can protect himself by advertising the loss or theft in the *Bulletin du Syndicat*, and purchasers after the advertisement are held to have notice. THALLER, *TRAITÉ DE DROIT COMMERCIAL* (5 ed.), 1916, §§ 900 ff., 1481. Equities of ownership on an order instrument would apparently be cut off in the same way. The authorities differ as to equitable defenses after maturity. LYON-CAEN ET RENAULT, *TRAITÉ DE DROIT COMMERCIAL* (4 ed.), 1907, IV, § 135, say they are cut off, and cite cases to that effect from the Court of Cassation. They argue forcibly that maturity does not cause the essential elements of a bill of exchange to disappear. ADOLPHE PICHON, *DE L'INOPPOSABILITÉ DES EXCEPTIONS AU PORTEUR D'UN TITRE À ORDRE* (1904), 231, takes a position even stronger, that freedom from defenses is necessary to promote circulation before maturity. Thaller, *op. cit.*, § 1475, thinks that equitable defenses ought not to be cut off, but admits that the course of decisions is against him. Story states the French law as like the English (PROMISSORY NOTES, § 179) on the authority of Pardessus, *COURS DE DROIT COMMERCIAL*, I, § 352, who, however, makes the same admission as Thaller.

In Germany (BILLS OF EXCHANGE ACT, Art. 16) and Switzerland (CODE DES OBLIGATIONS, Art. 734) a special distinction is made. If no protest has been made, both equitable defenses and equities of ownership are cut off, but if protest has been made the indorsee gets only the rights of his indorser. *THE COMMERCIAL LAWS OF THE WORLD*, Vol. XXV, 426, London. See LYON-CAEN ET RENAULT, *op. cit.*, § 135 bis; THALLER, *op. cit.*, § 1475, note 3. *Wylie v. Speyer*, 62 How. Pr. (N. Y.) 107 (1881).

In Norway and Sweden, an overdue bill is treated exactly like a current bill with respect to equities. *Alcock v. Smith*, [1892] 1 Ch. 238, 253 (C. A.).

For the law of other countries, see LYON-CAEN ET RENAULT, *loc. cit.*; PICHON, *op. cit.*, 238, note.



the power be coextensive with the protection due the *bonâ fide* purchaser after maturity.

#### IV. PRACTICAL CONSIDERATIONS

Theory and practice are improperly opposed. If a proposition is bad in practice, then its theory is wrong. A sound theory must work well, in law as elsewhere. Let us test the solution of the overdue paper problem, which we have laboriously framed out of legal theories, by the needs of the business world. Will it promote commerce if it is definitely understood that an honest purchaser of overdue paper can keep and collect it, regardless of the wrongs inflicted on former owners by the man from whom he buys? It is rare indeed that honest man and rogue face one another in court. In this instance, as so often in the law, we have to decide between two innocent persons who have both suffered through the acts of a scoundrel who vanishes with his ill-gotten gains. Does the law care more about the owner of property which is taken away from him, or about the honest man who buys it from the wrongdoer? Clearly there is no universal rule. If the property is a watch, the law protects the owner; if it is a five dollar bill, the acquirer. On which side of the line does overdue paper fall?

Why is the five-dollar bill treated differently from the watch?

"In the conflict of interests between owners and acquirers of certain special classes of property the free circulation of which is of particular business utility, the social importance of encouraging transactions, of 'preventing property from stagnating' has resulted in legal protection of the interests of the *bonâ fide* purchaser even at the expense of the property rights of the previous owner. These special classes of property tend to become more numerous as a nation becomes more industrial and commercial in its economy, but they are as yet exceptional." <sup>132</sup>

When a man acquires property of one of these classes, and does everything necessary to complete the transaction, gets possession, obtains any writing that has to be done by his transferor, and then pays over the price, he can rest easy.

Current negotiable paper of course forms one of these exceptional classes, and overdue paper should also be included. It is intended to circulate after it becomes due,<sup>133</sup> should it for any

<sup>132</sup> The Enforcement of Decrees in Equity, C. A. Huston, 130.

<sup>133</sup> Parker v. Stallings, Phil. L. (N. C.) 590, 593 (1868).

reason remain unpaid. There is nothing inherently iniquitous about its existence after maturity, or it would not be protected by the commercial law of the Continent.<sup>134</sup> It is frequently overdue from insolvency or temporary financial embarrassment of the parties. Shall it then be *caput lupinum*, an outlaw, to be knocked on the head? The conditions of the money-market do not favor prolonged inquiry. It must pass free from the claims of former owners, or it is very likely not to pass at all.

This is a consideration which should never be forgotten, that every defect of title to which an honest buyer is exposed by law is a serious injury to honest prospective sellers. For every purchaser who buys and loses, another may be scared off for fear of the hidden danger, unless the seller's credit is good or conditions are such that the lawfulness of possession can be easily investigated. Such investigation of overdue paper is very difficult, and unsuited to the conditions under which most negotiable instruments are bought and sold. The buyer will not be reassured by the statement that he is safe if an honest person owned the instrument before its maturity,<sup>135</sup> for how can he be sure of that fact? Consequently, if the buyer takes overdue paper at his own risk, he will often not take it at all. Not only wrongdoers but innocent investors will suffer accordingly. The moment their negotiable paper becomes overdue, it will tend to remain on their hands and become a drug on the market.

Whatever depreciates overdue paper depreciates current paper. It is less valuable before maturity if subject to the ever-present danger that it may become overdue for financial reasons and then be hard to sell. The easier it is to sell through its whole life, the more attractive an investment it becomes. Any one who is offered negotiable paper before maturity will buy it more readily if he is sure of getting money on it at maturity either by payment or by selling it. As a French writer observes,<sup>136</sup> "It is an economic error to separate circulation before maturity from circulation after maturity. If we look at things as a whole and preserve their true re-

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<sup>134</sup> See note 131.

<sup>135</sup> Negotiable Instruments Law, § 58 (last sentence); *Chalmers v. Lanion*, 1 Camp. 383 (1808).

<sup>136</sup> A. PICHON, *DE L'INOPPOSABILITÉ DES EXCEPTIONS AU PORTEUR D'UN TITRE À ORDRE*, p. 336. Paris, 1904.



lations, the rapidity of circulation before maturity depends in part upon the rapidity of circulation after maturity."

The rule advocated by this article will encourage negotiable paper, and such encouragement is especially needed at the present time. First, the tremendous destruction of capital for military purposes is liable to cause eventual financial stringency and inability to meet many obligations at maturity. No sensible person supposes that he buys a coupon bond at his peril because one or two coupons are overdue. This delay in payment does not necessarily indicate any theft or fraud, but suggests "only causes of a temporary nature."<sup>137</sup> Default of the principal will frequently occur during the next few years for the same reason. Such default makes it impossible for the investor to turn his securities into cash by obtaining payment. It should not also increase the difficulty of doing so by sale. The price will be low enough anyway after dishonor. It ought not to be forced down further by a sudden shift of the risk to the buyers and a consequent loss of market.

Secondly, negotiable paper and incidentally overdue paper ought to be encouraged for public as well as private reasons. It forms the basis of currency issues under the Federal Reserve Act, and should therefore be made as fluid a security as possible whether mature or not. Furthermore, the War, besides increasing the difficulty of meeting obligations, has vastly multiplied the bonds of all nations and has placed them in the hands of a new class of investors who should be given every confidence in these securities. A possible postponement of the payment of principal should not have any serious effect which can be avoided. Overdue coupons are a more immediate problem. Ignorant bondholders will often hold coupons past maturity through forgetfulness. They ought nevertheless to be easily convertible into money, which means that they should be free from hidden defects of title.

Consequently the courts — or better still, the legislatures,<sup>138</sup>

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<sup>137</sup> *Cromwell v. Sac*, 96 U. S. 51, 58 (1877).

<sup>138</sup> This result might be secured by an addition to section 57 of the Negotiable Instruments Law, somewhat in the following form: "A holder who has taken the instrument in compliance with the first, third, and fourth conditions of section fifty-two holds the instrument free from any defect of title of prior parties, but not free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties who have no defenses of their own."

should adopt a definite rule, that the honest buyer of overdue paper can hold it against all the world, and enforce it against all parties who have no defenses of their own.

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## APPENDIX: CASES ON CLAIMS TO THE OWNERSHIP OF OVERDUE PAPER

### A. *BONÂ FIDE* PURCHASER PROTECTED

A 1. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) who Obtained Possession Without the Consent of the Owner (O)*

National Bank *v.* Texas, 20 Wall. (U. S.) 72 (1873), — bearer bonds belonging to the state of Texas which the illegal secession government of the state was alleged to have transferred to raise money for use in the Civil War. The majority of the court held that it was not proved that the bonds in suit were among those transferred for this unlawful purpose. Swayne, J., concurring held that the transferee of an overdue instrument is subject only to equities of the obligor, citing *Murray v. Lylburn*.

*Sanderson v. Crane*, 2 Green (14 N. J. L.), 506, 509 (1834), *semble*.

A 2. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) to whom the Paper was Voluntarily Transferred by its Owner (O) before Maturity*

*Y. M. C. A. v. Rockford*, 179 Ill. 599, 54 N. E. 297 (1899), — order notes indorsed in blank by O; W, pledgee;

*Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 122 (1915, under N. I. L.), order notes indorsed in blank by O; W, custodian for collection of interest;

*Moore v. Moore*, 112 Ind. 149, 13 N. E. 673 (1887), — order note indorsed by fraud of W without consideration;

*Kiefer v. Klinsick*, 144 Ind. 46, 58, 42 N. E. 447 (1895) *semble* — explaining *Moore v. Moore*;

*Etheridge v. Gallagher*, 55 Miss. 458 (1877), — order note indorsed in blank by O, consideration failed;

*Priest v. Garnett*, 191 S. W. 1048 (Mo. App. 1917), — order note indorsed in blank by O; W, with power to pledge, sold.

A 3. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper which the Owner (O) Voluntarily Transferred after Maturity*

*Young v. MacNider*, 25 Can. S. C. 272 (1895), — W, administrator and agent of estate allowed by legatees to retain overdue bonds, pledged them;

*Wolf v. American*, 214 Fed. 761 (C. C. A. 7th, 1914), — overdue certificate of deposit specially indorsed by O to W, a pledgee, with power to repledge for limited amount; W repledged for more;

*Connell v. Bliss*, 52 Maine. 476 (1864), — order note indorsed in blank by O; W, attorney for purposes of suit;

*Eversole v. Maull*, 50 Md. 95 (1878), — W, agent for collection;



- Gardner v. Beacon, 190 Mass. 27, 76 N. E. 455 (1906), — order notes indorsed by O; W, fraudulent;
- Church v. Clapp, 47 Mich. 257 (1881), — W, mere bailee;
- Cochran v. Stewart, 21 Minn. 435 (1875); 57 Minn. 499, 59 N. W. 543 (1894), — order notes indorsed in blank by O; W, fraudulent and consideration failed;
- Lee v. Turner, 89 Mo. 489, 14 S. W. 505 (1886), — order note indorsed; W, agent for collection;
- Neuhoff v. O'Reilly, 93 Mo. 164, 6 S. W. 78 (1887), — order note indorsed by O in blank without delivery and by W, her administrator, who sold without inventorying it;
- Parker v. Stallings, Phil. L. (N. C.) 590 (1868), — order note indorsed in blank; W, agent for collection;
- Hill v. Shields, 81 N. C. 250 (1879), — order note indorsed in blank; W agreed O should not be liable (parol evidence rule as second ground);
- Bradford v. Williams, 91 N. C. 7 (1884), — order note indorsed in blank; W, agent for collection;
- Kempner v. Huddleston, 90 Texas, 182, 37 S. W. 1066 (1896), — order note specially indorsed to W for safe keeping.

A 4. *Cases which Protect the Bonâ Fide Purchaser from the Claims of Persons who have Never had Legal Title to the Instrument*

- Mohr v. Byrne, 135 Cal. 87; 67 Pac. 11 (1901), — order note indorsed by W, the payee, not subject to alleged fractional interest of outsider (probably overruling Chase v. Whitmore, 68 Cal. 545, in which *cestui's* equity was held to run; that case also rests on another ground, that the provision for attorney's fees rendered the note nonnegotiable);
- Crosby v. Tanner, 40 Iowa, 136 (1874), — order note indorsed, not subject to agreement by payee with outsider to cancel note and mortgage securing it so as to make outsider's second mortgage a first lien;
- Blake v. Koons, 71 Iowa, 356, 32 N. W. 379 (1887), — order note indorsed, not subject to equities of maker's creditors who assert the mortgage secured thereby is in fraud of creditors;
- Hibernian v. Everman, 52 Miss. 500 (1876), *semble*, — order notes properly indorsed, not affected with partnership rights of partner of payee's son, even if notes were overdue;
- Sanderson v. Crane, 2 Green (14 N. J. L.), 506 (1834), — order note indorsed by payee who had passed through insolvency but had concealed this note from his assignee not affected with equities;
- See also Osgood v. Bank, 30 Conn. 27 (1861).

B. *BONÂ FIDE PURCHASER NOT PROTECTED*

B 1. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) who Stole the Paper before Maturity*

- Texas v. White, 7 Wall. (U. S.) 700 (1868), — "O or bearer" bonds belonging to the state of Texas were sold after secession to raise money for use in war. The title of the state was not divested and it can recover the bonds from a *bonâ fide* purchaser for value. Swayne, Grier, and Miller dissent;
- Texas v. Hardenberg, 10 Wall. (U. S.) 68 (1869), — same bonds, but the purchase was not in good faith;

Huntington v. Texas, 16 Wall. (U. S.) 402 (1872), *semble*, — same bonds;  
 Vermilye v. Adams Express, 21 Wall. (U. S.) 138 (1874), — United States treasury notes payable to bearer, actual notice seems to be held though there was no bad faith, but negligence at most;  
 Von Hoffman v. United States, 18 Ct. Cl. 386 (1883), — bearer bonds; reversed by Morgan v. United States, 113 U. S. 476 (1885), solely on ground that the bonds were not overdue;  
 Gilbrough v. Norfolk, 1 Hughes C. C. 410 (1877), — bearer bonds;  
 Hinckley v. National Bank, 131 Mass. 147 (1881), — bearer coupons, *sed quære* as to voluntary transfer obtained by fraud;  
 Northampton v. Kidder, 106 N. Y. 221, 12 N. E. 577 (1887), — bearer bonds;  
 Wylie v. Speyer, 62 How. Pr. (N. Y.) 107 (1881), — bearer coupons.

B 2. *Cases which do not Protect the Bonâ Fide Purchaser for Value of Overdue Paper from a Wrongdoer (W) who Stole the Paper after Maturity*

Down v. Halling, 4 B. & C. 330 (1825), — check; theft or finding have the same effect;  
 Greenwell v. Haydon, 78 Ky. 332 (1880), — order bond, but indorsed in blank by payee and not by O, a later holder;  
 Davis v. Bradley, 26 La. Ann. 555 (1874), — order bill of exchange, indorsed in blank by the payee and not by O, a later holder;  
 McCorkle v. Miller, 64 Mo. App. 153 (1895), *semble*, — order note, indorsed in blank by the payee and not by O, a later holder;  
 Arents v. Commonwealth, 18 Grat. (Va.) 750 (1868), — bearer coupons.

B 3. *Cases which do not Protect the Bonâ Fide Purchaser for Value of Paper which was Lost before Maturity*

Vairin v. Hobson, 8 La. 50 (1835), — bearer check, purchase with notice a second ground for decision.

B 4. *Cases which Protect the Bonâ Fide Purchaser of Overdue Paper Voluntarily Transferred but have Dicta Distinguishing Theft, Finding, etc.*

Y. M. C. A. v. Rockford, 179 Ill. 599, 604, 54 N. E. 297 (1899), fraud included;  
 Justice v. Stonecipher, 267 Ill. 448, 108 N. E. 722 (1915);  
 Gardner v. Beacon, 190 Mass. 27, 76 N. E. 455 (1906);  
 Etheridge v. Gallagher, 55 Miss. 458, 469 (1877), fraud included.

B 5. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from a Wrongdoer (W) to whom the Owner (O) Voluntarily Transferred the Paper before Maturity*

Goggerly v. Cuthbert, 2 B. & P. N. R. 170 (1806), *semble*, — order bill indorsed by the payee, O, transferred to W for discount who absconded;  
 Foley v. Smith, 6 Wall. (U. S.) 492 (1867), — order note, indorsed in blank by O and O's agent for collection, sold by O's subagent;  
 Hide v. Alexander, 184 Ill. 416 (1900), — order note, but indorsed in blank by party prior to O; W, agent for renewal;  
 Merchants v. Welter, 205 Ill. 647, 56 N. E. 809 (1903), — order note indorsed in blank by maker; W, agent for renewal;  
 Bird v. Cockrem, 28 La. Ann. 70 (1876), — order notes, indorsed in blank prior to acquisition by O; W, a mere custodian;



- Ford v. Phillips, 83 Mo. 523 (1884), — order note indorsed; W, agent for collection;
- Quimby v. Stoddard, 67 N. H. 283, 35 Atl. 1106 (1892), — "O or bearer" notes; W, custodian for safe keeping;
- Osborn v. McClelland, 43 Ohio St. 284, 1 N. E. 644 (1885), McIlvaine, C. J., dissenting, — order note, indorsed in blank by O and delivered to W, a firm for temporary use in raising money, sale by member of firm after its dissolution and long after expiration of O's authority; court expressly repudiates any estoppel under the circumstances;
- Walker v. Wilson, 79 Texas, 185, 14 S. W. 798, 15 S. W. 402 (1890), — bearer note, used contrary to agreement.

*B 6. Cases which do not Protect the Bonâ Fide Purchaser when the Owner (O) Voluntarily Transferred after Maturity*

- Lee v. Zagury, 8 Taunt. 114 (1817), — order bill indorsed by payee probably in blank and also by O, who took it up after maturity, canceled his indorsement, and sent it for collection to W, who sold it;
- In re Sime*, 3 Sawy. (U. S.) 305 (Cal. D. C. 1875), *semble*, — order certificates of deposit indorsed by O, sale by W, in breach of agreement;
- Clark v. Sigourney, 17 Conn. 511 (1846), — order note indorsed in blank by payee who died before delivery, sale by executrix without further indorsement (a very questionable decision, two judges dissenting);
- Thomas v. Kinsey, 8 Ga. 521 (1850), — "O or bearer note;" W, agent for collection;
- Towner v. McClelland, 110 Ill. 542 (1884), — order note, indorsed in blank by party prior to O; W, agent for collection (case also rests on point that an assignee of a mortgage who seeks foreclosure is subject to the defense of payment to a prior assignee);
- McCormick v. Williams, 54 Iowa, 50 (1880), — W, agent for collection;
- Wood v. McKean, 64 Iowa, 16 (1884), — order note indorsed in blank by O, who pledged to W and left it in W's hands after paying W;
- Henderson v. Case, 31 La. Ann. 215 (1879), — order bill indorsed in blank; W, agent for collection;
- McKim v. King, 58 Md. 502 (1882), — bearer coupons; W, depository for re-funding;
- Emerson v. Crocker, 5 N. H. 159 (1830), — order notes indorsed in blank by party prior to O; W, agent for collection;
- Farnham v. Fox, 62 N. H. 673 (1883), — probably order note; W, authorized to pledge for a certain amount and pledged for more;
- Midland v. Hitchcock, 37 N. J. Eq. 349 (1883), — bearer bonds; W, bailee for reorganization (judges differ on reasons);
- Farrington v. Park Bank, 39 Barb. (N. Y.) 645 (1863), — notes transferable by delivery; W, agent to deposit for collection who misappropriated;
- Weathered v. Smith, 9 Texas, 622 (1853), — "O or bearer" note; W, agent for collection.

*B 7. Cases which do not Protect the Bonâ Fide Purchaser when the Owner (O) Transferred the Paper Voluntarily but it is Uncertain whether the Transfer was before or after Maturity*

- Stern Brothers v. Germania Bank, 34 La. Ann. 1119 (1882), — bearer coupons; W, agent for collection.

B 8. *Cases which do not Protect the Bonâ Fide Purchaser of Overdue Paper from the Claims of Persons who Never had Legal Title to the Instrument*

Ashurst v. Royal Bank of Australia, 27 L. T. 168 (1856), — bearer note transferred to a *bonâ fide* purchaser for value by a bankrupt when overdue is subject to claim of his assignee, (but the same result would follow if it were not overdue because bankruptcy is constructive notice);

*In re* European Bank, L. R. 5 Ch. App. 358 (1870), — W bought overdue bills with money of O's he had to invest;

West v. MacInnes, 23 U. C. Q. B. 357 (1864), — W bought note with money of O's he had to invest;

Young v. MacNider, 25 Can. S. C. 272, 277 (1895), *semble*, — estoppel held;

Turner v. Hoyle, 95 Mo. 337, 8 S.W. 157 (1888), — order note, indorsed in blank, bought from a trustee when overdue, affected with *cestui's* rights (also there was notice of the trust from the papers);

Mayer v. Columbia, 86 Mo. App. 108 (1900), — same result (with no notice from papers);

Owen v. Evans, 134 N. Y. 514, 31 N. E. 999 (1892), *semble*, — indorsee after agreeing to sell an overdue note and mortgage to the plaintiff, who paid value, transferred them many years later to the defendant who was not a *bonâ fide* purchaser for value, and was not protected;

Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982 (1891), — the payee of a note secured by mortgage transferred the mortgage and a forged copy of the note for value to the plaintiff, and afterwards indorsed the true note, now overdue, to the defendant and agreed to assign to him the mortgage; the defendant though a *bonâ fide* purchaser for value of the note is subject to the plaintiff's equity. (The defendant would have priority if he had bought before maturity). Kernohan v. Manss, 53 Ohio St. 118, 41 N. E. 258 (1895).



# HARVARD LAW REVIEW

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RESTRAINT OF TRADE: BOARD OF TRADE RULE LIMITING HOURS OF TRADE. — One of the standard forms of trading on the Board of Trade of Chicago is in sales "to arrive," — that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. Trading in grain "to arrive" is carried on each day at special sessions termed the "Call." These sessions are not limited as to duration, but they usually last about half an hour. In 1906 the board adopted a rule by which members were prohibited from purchasing or offering to purchase, in the interval between the close of the "call" and the opening of the session on the next business day, grain "to arrive" at any price other than the closing bid at the "call."

*In Board of Trade of Chicago v. United States* this rule was adjudged to be in violation of the Anti-Trust Act,<sup>1</sup> the lower court striking from the record allegations by the defendants that the purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade which had been acquired by four or five warehousemen. The case was rested by the government upon the proposition that a rule or agreement, by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day, was an illegal restraint of trade under the Anti-Trust Act.

This decree was reversed by the Supreme Court of the United States,<sup>2</sup> the court saying: "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrained competition. Every agreement concerning trade, every regulation of trade, restrains.

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<sup>1</sup> 26 STAT. AT L. 209.

<sup>2</sup> 38 Sup. Ct. Rep. 242 (1918).

To bind, to restrain is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Examining the facts, the court concluded that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Act.

The chief questions which the enforcement of the Anti-Trust Act has required the courts to answer are (1) what acts concern and affect "commerce among the several states;" and (2) what acts are "in restraint" of trade or commerce, and what acts "monopolize" trade or commerce.

In *United States v. E. C. Knight Co.*<sup>3</sup> the court held that acts, tending to give to one business unit the control of the business of refining sugar, related to manufacture and not to commerce. If facts similar to those which doubtless existed in the Knight Case were today properly pleaded and proved, the decision would probably be that the acts did affect interstate commerce. The Knight Case has ceased to be a safe guide as to the conclusion which the court will probably draw from similar facts. But the question to which the court addressed itself in the Knight Case of course remains as the question logically first to be considered in any proceeding under the Anti-Trust Act. In the principal case the acts in question admittedly concerned and affected interstate commerce.

Therefore the question arises: Was the rule in question "in restraint of trade"? If we split this phrase into four words, and give to each word its dictionary value, we must answer that of course the rule was in restraint of trade. By its operation all the members of the board of trade of the greatest grain market in the world were restrained, about nineteen hours out of every twenty-four, from trading in grain "to arrive" except at a specified price. They were restrained from contracting to buy at any price which they might desire to pay.

This decision may accordingly properly be cited as an authority that the court will not treat the phrase "in restraint of trade" as a phrase to be interpreted simply by taking the dictionary value of each of the four words used. If this standard is rejected, what standard is to be applied?

The phrase "contract in restraint of trade" has been used in the law in the sense of any contract by force of which a person put some restraint upon his activities in trade. Thus, if a person sold a business, including the good-will incident to such business, and contracted not to compete with his vendee for five years, within an area of five miles, this contract might be called a contract "in restraint of trade." In the early common law, this use of the phrase was the common use. But the phrase also came to be used with a sinister connotation, — as the equivalent of "to the detriment of trade." The Anti-Trust Act was passed in 1890, and abundant illustrations of the use of the phrase, with a sinister connotation, can be found prior to 1890 in American constitutions, statutes, and judicial decisions. It would be difficult to say which use of the phrase was the more common in America in 1890.

The Supreme Court of the United States has been called upon to determine in which sense Congress used the phrase. If Congress used

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<sup>3</sup> 156 U. S. 1 (1894).



the phrase, taking the words in the early common-law meaning, then the person (engaged in interstate commerce) who sold out his business and agreed not to compete with his vendee was intended by Congress to be treated as a criminal; likewise, of every person (engaged in interstate commerce) who entered into any contract calling for his exclusive services; likewise, of the members of a labor union (engaged in interstate commerce) who agreed between themselves not to work more than a specified number of hours a day. It would be easy to multiply examples which make it seem very unreasonable to suppose that Congress used the phrase in the early common-law meaning.

This is made even plainer if we consider the closely associated question of the interpretation of the word "monopolize." A monopoly, as that word was used in the early common law, meant an exclusive control of some branch of trade through royal grant. In 1890, the only things in the United States analogous to monopolies in this sense were patents and copyrights. Congress did not intend to treat as criminals persons (engaged in interstate commerce) who controlled patented or copyrighted articles. This word was used with a sinister connotation, — to indicate acquiring control of some part of interstate commerce by improper means. As indisputably "monopolizing" is not used in its early common-law meaning, but is used with a sinister connotation, it is reasonable to suppose that Congress may have used the phrase "in restraint of trade" with a sinister connotation, and not in its early common-law meaning.

On this construction of the statute — which, by reason of these considerations, seems to be plainly the proper construction — it becomes the duty of the court to examine the facts of each case, and to determine whether the acts alleged to be "in restraint of trade" are to the detriment of trade. This is precisely the manner in which the court approached the problem in the principal case.

The court, however, used one sentence which may come back to give trouble. "The true test of legality," it said, "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." The Anti-Trust Act condemns acts which are in restraint of "trade," not acts which are in restraint of "competition." The thought that "competition is the life of trade" has received such wide acceptance that, it is submitted, the court might wisely adopt a secondary rule, for the construction of the Anti-Trust Act, to the effect that acts which limit the freedom of competition (including internal competition) shall be treated as, *prima facie*, acts which are to the detriment of trade. But a cessation of competition *may* conceivably be to the advantage of trade, — may make for more trade rather than less trade, and may produce this beneficial result without the infliction of hardship upon anyone.

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PROXIMATE CAUSE. — NEGLIGENT OMISSION OF DUTY AS INTERVENING ACT. — The question of proximate causation is often so complicated with questions of negligence and of "last clear chance" as to be difficult of solution without careful analysis. The general legal principles

governing proximity of causation are neither complex nor difficult. Proximity and remoteness are terms conditioned upon distance in the "propulsion of cause on cause"<sup>1</sup> rather than upon distance in time or space. If between a given cause and a given result no new cause comes in to influence the action of the former cause the result must of course be proximate; that is, a direct result is always proximate.<sup>2</sup> If however a second cause intervenes to combine with the first cause, and thus to change its course and affect the nature of the result, the second cause must in some way be so related to the first, linked up with it, as to make the first cause responsible for the interference of the second cause with the nature of the result. This relation of the two causes may be established by showing that the second cause was actually brought into action by the first; as for instance by inviting the action of the second cause,<sup>3</sup> or by calling it into existence as a defense against the action of the first cause, or against its further consequences.<sup>4</sup> Thus, the publisher of a newspaper is responsible for a purchase by a reader of the paper of goods he advertises, since he advises it;<sup>5</sup> one who unlawfully attacks another is responsible for the effect of an act in self-defense;<sup>6</sup> and one who sets a fire is a proximate cause of injury incurred in the effort to extinguish it.<sup>7</sup> On this ground, too, one who inflicts a physical injury is a proximate cause of an injury inflicted by a surgeon in the effort to cure.<sup>8</sup> Another and more frequent way in which the relation between the two causes may be established is by showing that the first cause created an appreciable risk of concurrence with the second cause. This is usually expressed by the common phrase that the intervention of the second cause must be foreseeable;<sup>9</sup> though there are cases where the foreseeability of the second cause is not of itself enough to make the first cause a proximate cause of the result.<sup>10</sup>

That a failure to perform a legal duty may constitute a cause equally with a positive act is clear;<sup>11</sup> and it may therefore be a second cause cooperating with a positive act or another failure of duty to bring about a result.<sup>12</sup> It seems, however, that a failure to act can never so influence

<sup>1</sup> BACON'S MAXIMS, Reg. 1.

<sup>2</sup> *Lynn Gas & Electric Co. v. Meridan Ins. Co.*, 158 Mass. 570, 33 N. E. 690 (1893); *McCahill v. New York Transp. Co.*, 201 N. Y. 221, 94 N. E. 616 (1911); *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204 (1870).

<sup>3</sup> *Guille v. Swan*, 19 Johns. 381 (1822).

<sup>4</sup> *Clark v. Chambers*, 3 Q. B. D. 327 (1878); *Eckert v. Long Island R. R.*, 43 N. Y. 502 (1871); *Maclean v. Segar*, [1917] 2 K. B. 325.

<sup>5</sup> *Rex v. De Marny*, [1907] 1 K. B. 388.

<sup>6</sup> *Ricker v. Freeman*, 50 N. H. 420 (1870); *Bloom v. Franklin Ins. Co.*, 97 Ind. 478 (1884); *Scott v. Shepherd*, 2 W. Bl. 892 (1773).

<sup>7</sup> *Illinois Central R. R. v. Siler*, 229 Ill. 390, 82 N. E. 362 (1907).

<sup>8</sup> *Com. v. Hackett*, 2 Allen (Mass.) 136 (1861); *Sauter v. New York, etc. R.R.*, 66 N. Y. 50 (1876).

<sup>9</sup> *Derry v. Flitner*, 118 Mass. 131 (1875); *Gilman v. Noyes*, 57 N. H. 627 (1876); *Fairbanks v. Kerr*, 70 Pa. 86 (1871); *Harrison v. Berkeley*, 1 Strobh. (S. C.) L. 525 (1847).

<sup>10</sup> *Denny v. New York Central R. R.*, 13 Gray (Mass.) 481 (1859); (but see *Green-Wheeler Shoe Co. v. Chicago, etc. Ry.*, 130 Iowa, 123, 106 N. W. 498 (1906)); *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383 (1901); *Admiralty Commrs. v. The Amerika*, [1917] A. C. 38.

<sup>11</sup> *Regina v. White*, L. R. 1 C. C. 311 (1871); *Regina v. Instan*, [1893] 1 Q. B. 450.

<sup>12</sup> *Regina v. Lowe*, 3 C. & K. 123 (1850); *Washington, etc. R. R. v. Hickey*, 166 U. S. 521 (1897).



the course of events set up by a prior cause as to make the latter remote from the result of it.<sup>13</sup> The one subject to the duty ought to act, and thereby put an end to the force started by the original actor, or so deflect the force as to prevent the injurious result. By failing to act and to intervene in the course of events, he allows the force of the original actor to continue unchecked and undeflected until it directly results in the injury complained of. The failure to act, instead of interfering with the operation of the original force, has wrongly failed to do so.

A recent case in the Supreme Court of the United States, *Union Pacific Railroad Co. v. Hadley*, 38 Sup. Ct. 318, brings out this point very neatly. A brakeman, injured by a rear-end collision, had neglected his duty of going back to signal the following train. It was held that the negligence of the company in running the following train was a proximate cause of the injury, and the brakeman was allowed to recover upon the Federal Employer's Liability Act. This decision, in view of the considerations stated above, seems to be thoroughly sound even though, as Mr. Justice Holmes pointed out, the negligence of the brakeman should be deemed "the logical last."

It is to be noticed that in such a case, in spite of the fact that the defendant is a proximate cause of the result, an individual plaintiff who has neglected to act as he should do is usually barred from recovery because of his own contributory negligence or because the consequence in question was avoidable. In the case under discussion the plaintiff would be barred from recovery if the Employers' Liability Act had not abolished the defense of contributory negligence.

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THE VIRGINIA-WEST VIRGINIA DEBT CONTROVERSY. — The Supreme Court has left open a point of exceptional interest in holding over for reargument the rule requiring West Virginia to show cause why in default of payment of the judgment in favor of Virginia an order should not be entered directing the levy of a tax by the legislature, and a motion by West Virginia to dismiss the rule.<sup>1</sup> The decision by the chief justice points out that Congress as required by the Constitution ratified the agreement by which West Virginia assumed its proportional share of the debt of Virginia and indicates his opinion that under the doctrine of *McCulloch v. Maryland*<sup>2</sup> Congress has the power to enforce its performance. But in the absence of congressional action has the Supreme Court power to mandamus the legislature of West Virginia to levy a tax to pay its obligation? The argument in the affirmative suggested by the court, is that the grant to the judicial power of jurisdiction to determine controversies between two or more states must have been an effectual grant, and that the power to pronounce judgment must include the power to enforce the judgment. But such reasoning though persuasive is not conclusive. Words have no absolute meaning, but

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<sup>13</sup> *Regina v. Holland*, 2 Moo. & R. 351 (1841).

<sup>1</sup> *Commonwealth of Virginia v. State of West Virginia*, 38 Sup. Ct. 400 (1918).

<sup>2</sup> 4 WHEAT. 316 (1819).

must be interpreted in the Constitution as elsewhere in the light of history and policy. Thus the prohibition of involuntary servitude though absolute in terms, does not prevent compulsory military service.<sup>3</sup> The history of the Fourteenth Amendment is an epic of interpretation from the points of view of both history and the growth of political theory.<sup>4</sup>

That judicial power should as a general proposition include the power to enforce its judgments is obviously necessary to obtain justice from the imperfection of human nature. But jurisdiction has been taken and judgments rendered in a class of cases where the power to enforce them has existed so entirely in theory alone as to raise doubts that it existed at all. In *The Spanish Ambassador v. Bingley*<sup>5</sup> it was decided that a foreign sovereign might bring a bill in chancery. *The Colombian Government v. Rothschild*<sup>6</sup> held that he must bring it in such a way — by some public officer or otherwise — that justice could be done the defendants in case they chose to bring a cross bill. In *Hullett v. King of Spain*<sup>7</sup> the Spanish Government had deposited money in London which it had received from France to hold in trust for Spanish subjects having claims against the French government under a treaty. The money was also on deposit as security for performance by Spain of its obligations. The court interpreted the various treaties and decreed payment to the King of Spain. If we may suppose for a moment the intervention of the *cestuis que trust* and the French government and the necessity of a decree ordering the disposition of the fund according to a view of the treaty which neither France nor Spain could accept, the difficulties of enforcement in anything more than a highly technical sense are clearly discerned.<sup>8</sup> The fact is that the courts go, and must go, in these cases on the theory which one of our own judges has expressed that they cannot presume that a sovereign state will knowingly disobey the judgment of the court and do injustice.<sup>9</sup> And though at first blush this appears the thinnest fiction, it would seem to be on a sound basis. For the function of the courts is to determine the rights of the parties; and though in the common run the coercive power is merely an adjunct to judicial administration, a vast increase in the degree may make a difference in kind and change a question of judicial administration to one of political expediency. It may well become one of those questions, which, in the language of the Duke of York's Case, is "too high" for the court.<sup>10</sup> Such under our own Constitution is the question of the existence of a state government.<sup>11</sup> And it may be argued that the decision whether any state government is or is not republican in form is of the same nature and must be made by Congress and not by the court.<sup>12</sup> So also, it would seem, is

<sup>3</sup> *Emma Goldman and Alexander Berkman v. United States*, 38 Sup. Ct. 166 (1918).

<sup>4</sup> Holmes, J., dissenting, in *Lochner v. New York*, 198 U. S. 45 (1905).

<sup>5</sup> HOB. 113.

<sup>6</sup> 1 Sim. 94.

<sup>7</sup> 2 Bligh (P. C.) (N. S.) 31.

<sup>8</sup> See also and compare *Nabob of the Carnatic v. East India Co.*, 1 Vesey, 371, and *Nabob of the Carnatic v. East India Co.*, 2 Ves. Jr. 56.

<sup>9</sup> *Massachusetts v. Rhode Island*, 12 Pet. 657, 750 (1838).

<sup>10</sup> ROTULI PARLIAMENTORUM, 375; WAMBAUGH'S CASES ON CONSTITUTIONAL LAW, I.

<sup>11</sup> *Luther v. Borden*, 7 How. 1 (1849).

<sup>12</sup> *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 1 (1911).



this question as to what method to pursue to force one of our partially sovereign units to pay a debt due to another. The decision should be made by the representatives of the entire people and then enforced by all the processes which the court has at its command.

Historically the case for the existence of this power in the court is no better.

The pre-Revolutionary period gives us little help. The jurisdiction of the English courts was extremely narrow, the mass of appeals being decided by the administrative committee of the Privy Council in charge of Plantation Affairs.<sup>13</sup> Furthermore, the theory was fundamentally different, being that of a sovereign administering dependencies. The Articles of Confederation, however, provided that Congress should be the "last resort on appeal" in cases of disputes between the states.<sup>14</sup> The method of settlement included a notification of the parties to appear, and a direction by Congress that they should appoint judges "who shall constitute a court for determining the matter." In case of failure to agree an elaborate system was provided for appointing judges "to hear and finally determine the controversy." The judges were to report their decision to Congress, which entered it among its acts as "security for the parties." In essence the scheme was that in case of controversy Congress should by law create a court to decide the case. The court performed the judicial function. Then Congress enacted the decision to give security to the parties. The enforcement was clearly by legislative process, if enforcement was necessary.

In view of this situation what power of enforcement is implied in the provision that judicial power shall extend to controversies between two or more states?<sup>15</sup> Formerly in such cases the judicial function had been performed by a court which admittedly had no power to enforce. And we have seen that coercion even to secure justice may develop into a purely political matter. In *The Cherokee Nation v. Georgia*,<sup>16</sup> Chief Justice Marshall said, "that part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with the proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and restrain its physical force. The propriety of such an interposition by the court may well be questioned. It savours too much of the exercise of political power to be within the province of the judicial department." As bearing on the general belief of the Constitutional Convention as to the coercive power of the judiciary over the states, it is interesting to note that while that department was early given jurisdiction over cases where foreigners were interested in treaties, yet in all drafts up to the final formulation the executive was required to coerce any state which opposed the execu-

<sup>13</sup> The King's Bench had *jurisdiction* only in cases of *quo warranto*, and Chancery only in cases between Lords Proprietary as private subjects. See *Massachusetts v. Rhode Island*, 12 Pet. 657, 739 (1838); SNOW, ADMINISTRATION OF DEPENDENCIES, chap. V.

<sup>14</sup> Article IX.

<sup>15</sup> CONSTITUTION OF UNITED STATES, Article III, § 2.

<sup>16</sup> 5 Pet. 20 (1831).

tion of a treaty.<sup>17</sup> It is also significant that for some time the convention was inclined to reserve disputes between the states in regard to territory and sovereignty — which of all would have seemed the only ones which might need enforcement — for the Senate.<sup>18</sup> And when the broad grant of jurisdiction to the judicial power was finally made we find a contemporary diarist noting that it extended to all controversies of a legal nature between the states.<sup>19</sup> Granting as we do that all disputes between units of a federation are justiciable we may also insist that the coercion of a unit may well be beyond the limitation implied in the words “of a legal nature.” Otherwise it would be difficult to explain why so bitter an opponent of Article III as Luther Martin — who also desired that rebellion under state authority should not be treason<sup>20</sup> — took no exception to this grant of power.

It would not seem unreasonable, then, to believe that neither the framers of the Constitution nor subsequent judicial expounders considered that the court had this enforcing power over the states in the absence of a direction by Congress. It is clear both from the history of the case and the language of the opinion that the court finds weighty considerations of policy against claiming it now. Where both historical authority and long judicial practice can consistently join with sound political policy it is well gratefully to declare the union.

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SUIT UNDER FOREIGN STATUTE GIVING PERSONAL REPRESENTATIVE THE RIGHT TO RECOVER FOR DEATH BY WRONGFUL ACT. — In considering the subject of statutory right of action for death by wrongful act three questions in the main present themselves: (1) Where may such an action be maintained? (2) In what capacity does the personal representative bring suit? (3) As properly construed, what is the scope of the term “personal representative” as used in these so-called “death statutes”? In general, these questions have not been answered by the courts in a wholly satisfactory manner. It will be profitable to set forth what is conceived to be the correct way of dealing with the subject on principle as illustrated by the more satisfactory decisions, before indicating the effects produced by erroneous theories.

Despite its statutory origin, the right of action for death by wrongful act should be placed in the category of transitory actions on which suit may be maintained in any tribunal having jurisdiction over the person of the defendant. This proposition, sustained by the weight of authority,<sup>1</sup> is of course subject to the qualification that the foreign statute creating the right must be consistent with the policy of the *lex fori*.

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<sup>17</sup> FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, Vol. I, 245, 247; Vol. II, 157.

<sup>18</sup> FARRAND, *supra*, Vol. II, 160, 170, 183, 186.

<sup>19</sup> FARRAND, *supra*, Vol. III, 169.

<sup>20</sup> FARRAND, *supra*, Vol. III, 223.

<sup>1</sup> Dennick v. Ry. Co., 103 U. S. 11 (1880); Knight v. Ry. Co., 108 Pa. 250 (1885). *Contra*, Wabash Ry. Co. v. Fox, 64 Ohio St. 133, 59 N. E. 888 (1901); Richardson v. N. Y., etc. Ry. Co., 98 Mass. 85 (1867). See TIFFANY, DEATH BY WRONGFUL ACT (2 ed.), §§ 196, 198.



However, the existence of a "death statute" in the jurisdiction where suit is brought should not be indispensable to indicate a similarity of policy.<sup>2</sup>

The statutes vary in their provisions respecting the party or parties plaintiff in actions thereunder.<sup>3</sup> As the statute of the *locus delicti* creates the right, it should be, and is usually held to be, determinative as to the person or persons who are vested with that right.<sup>4</sup> Where the heirs, widow, husband, parents, guardian, or beneficiaries are designated, no difficulty arises as to the capacity in which they maintain suit, or as to the interpretation of terms. Where, however, the right of action is conferred upon the personal representative, it becomes necessary to determine whether he sues *qua* executor, *qua* administrator, or otherwise, and whether, properly construed, the term "personal representative" includes one appointed by a court other than that of the *locus delicti*. The common statute, of which Lord Campbell's Act is the prototype, creates a wholly new right of action.<sup>5</sup> Damages recovered thereunder are for the benefit of the widow or next of kin and are not assets of the estate of the deceased. Hence the administrator or executor does not sue in his representative capacity but as trustee for the designated beneficiaries.<sup>6</sup> Therefore his ability to maintain suit in any jurisdiction should not be conditional upon his securing ancillary letters of administration.

There seems no justification for placing a narrow interpretation on the term "personal representative." The statutes under consideration are remedial; hence the usual rule of liberal construction should be applied and any representative held authorized to sue irrespective of the jurisdiction in which he was appointed.<sup>7</sup> Confining the meaning of the term to an appointee of the *locus delicti* is not defensible on principle. Normally the domiciliary representative is the first to be appointed. Hence the right of action should accrue to him, and suit thereon be maintainable by him alone.<sup>8</sup>

It is submitted, therefore, that the right of a personal representative to recover under a "death statute" should not be conditioned upon his laying the venue in the jurisdiction where the death occurred, nor upon

<sup>2</sup> As "death statutes" have been almost universally enacted, the discussion of policy usually turns on the extent of similarity between the local and foreign enactments. The existence of some such statute in the *locus fori* was held requisite in *Leonard v. Columbia, etc. Co.*, 84 N. Y. 48 (1881). For an analogous situation, in which the contrary opinion prevailed, see *Herrick v. Minneapolis, etc. Ry. Co.*, 31 Minn. 11, 16 N. W. 413 (1883), quoted from and approved in *Northern Pac. Co. v. Babcock*, 154 U. S. 190 (1893).

<sup>3</sup> See TIFFANY, *DEATH BY WRONGFUL ACT* (2 ed.), xix-lxxi.

<sup>4</sup> *Usher v. West Jersey Ry. Co.*, 126 Pa. 206, 17 Atl. 597 (1889); *Wooden v. Ry. Co.*, 126 N. Y. 10, 26 N. E. 1050 (1891). *Contra*, *Stewart v. Baltimore, etc. Ry. Co.*, 168 U. S. 445 (1897).

<sup>5</sup> *Leggott v. Great Northern Ry. Co.*, 1 Q. B. D. 599 (1876); *Whitford v. Panama Ry. Co.*, 23 N. Y. 465 (1861); *Quinn v. Chicago, etc. Ry. Co.*, 141 Wis. 497, 124 N. W. 653 (1910).

<sup>6</sup> *Connor v. N. Y., etc. Ry. Co.*, 28 R. I. 560, 68 Atl. 481 (1908); *Boulden v. Pa. Ry. Co.*, 205 Pa. 264, 54 Atl. 906 (1903); *Kansas, etc. Ry. Co. v. Cutter*, 16 Kan. 568 (1876).

<sup>7</sup> *Dennick v. Ry. Co.*, *supra*, note 1.

<sup>8</sup> There is a *dictum* to this effect in *McCarty v. N. Y., etc. Ry. Co.*, 62 Fed. 437, 438 (1894).

his acquiring ancillary letters of administration in the *locus fori*, nor upon his being appointed by the court of the *locus delicti*, but simply upon the court's having jurisdiction over the person of the defendant as required by due process.

Let us turn now to the erroneous theories and the effects produced thereby. In some jurisdictions it is held that the statutes under consideration do not create a new cause of action, but merely permit a survival to the personal representative of a right which had accrued to his decedent.<sup>9</sup> He must therefore bring suit in his representative capacity and is subject to the rule requiring him to take out ancillary letters in case the venue is not laid in the jurisdiction of the domicile.<sup>10</sup> A further limitation is placed upon the statutory right of action by a singularly narrow interpretation of the term "personal representative." The recent case of *Baltese v. Union Pacific Ry. Co.*<sup>11</sup> denies that a domiciliary administrator is within this term for purposes of suit under a foreign statute, apparently confining the right of action to an appointee of the *locus delicti*.<sup>12</sup> A combination of these two theories produces the following undesirable results: (1) Assuming that the defendant can be served with process neither at the domicile of the decedent nor in the jurisdiction where the death occurred, ancillary letters of administration must be secured from both the *locus delicti* and the *locus fori*. (2) As the right of action is not for the benefit of the estate, the grant of letters of administration may be denied in a jurisdiction where the decedent left no assets.<sup>13</sup> (3) Where conflicting interpretations are placed on the term "personal representative," *quaere* as to the person in whom is vested the right of action. The construction of a statute of any jurisdiction is for its own courts.<sup>14</sup> However, in the usual case involving the present considerations, a court is called on to construe a foreign statute which has not been interpreted by the court of the jurisdiction of its enactment. The most that can be derived from such a construction is an implied assent that the local statute be similarly construed by foreign tribunals.<sup>15</sup>

## RECENT CASES

CHOSSES IN ACTION — RIGHTS AND LIABILITIES OF ASSIGNEE — CONTRACT RUNNING WITH A BUSINESS. — A telegraph company agreed to construct and maintain a telegraph line along the right of way of a railroad, as part of the railroad system. The railroad company became bankrupt, and the property

<sup>9</sup> *Bellamy v. Whitsell*, 123 Mo. App. 610, 100 S. W. 514 (1907); *St. Louis, etc. Ry. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102 (1909); *Louisville Ry. Co. v. Raymond's Adm'r*, 135 Ky. 738, 123 S. W. 281 (1909).

<sup>10</sup> *Brooks v. Southern Pac. Ry. Co.*, 148 Fed. 986 (1906).

<sup>11</sup> 170 Pac. 811 (Kan.) (1918). See Recent Cases, page 1164.

<sup>12</sup> *Hall v. Southern Ry. Co.*, 146 N. C. 345, 59 S. E. 879 (1907); *Louisville, etc. Ry. Co. v. Brantley's Adm'r*, 96 Ky. 297, 28 S. W. 477 (1894).

<sup>13</sup> *Perry v. St. Joseph Ry. Co.*, 29 Kan. 420 (1883); *Jeffersonville Ry. Co. v. Swayne's Adm'r*, 26 Ind. 477 (1866). *Contra*, *Hutchins v. St. Paul, etc. Ry. Co.*, 44 Minn. 5, 46 N. W. 79 (1890); *Findlay v. Chicago, etc. Ry. Co.*, 106 Mich. 700, 64 N. W. 732 (1895). See 1 WOERNER, AMERICAN LAW OF ADMINISTRATION (2 ed.), § 205.

<sup>14</sup> See 2 SUTHERLAND STATUTORY CONSTRUCTION (2 ed.), § 319.

<sup>15</sup> See 23 HARV. L. REV. 554.



was sold on foreclosure to the plaintiff and all contracts assigned to him. Upon notice that the telegraph company considered the contract at an end, the plaintiff filed a bill to compel performance. *Held*, that the defendant was still bound by the contract. *Detroit, etc. R. Co. v. Western Union Tel. Co.*, 166 N. W. 494 (Mich.).

It is fundamental that an assignor cannot, by assigning a contract, relieve himself from liability thereunder. *Ferguson v. McBean*, 91 Cal. 63, 27 Pac. 518; *Springer v. De Wolf*, 194 Ill. 218, 62 N. E. 542. Indeed, unless the parties make a novation, or, in jurisdictions allowing a beneficiary to recover, the assignee expressly agrees to perform for the benefit of the original promisee, the latter's only relief is against the assignor. *Lisenby v. Newton*, 120 Cal. 571, 52 Pac. 813. See 2 ELLIOTT, CONTRACTS, § 1456. If, then, the assignor becomes insolvent or goes out of existence, the promisee's security for the performance of the promisor is so jeopardized or destroyed that he should be warranted in repudiating the contract. *Central Trust Co. v. Chicago Auditorium Co.*, 240 U. S. 581. Hence, although the assignee in the principal case assumed liability under the contract it would follow, on ordinary contract principles, that the defendant cannot be forced to perform, for a novation cannot be thrust upon him against his consent. Courts of equity have, however, regarded contracts made for the benefit of a business as passing with the business to the purchaser thereof and enforceable by him, even without express assignment, just as a contract for the benefit of land runs in equity with the land. *Abergarrv Brewing Co. v. Holmes*, [1900] 1 Ch. 188. Mutuality of performance can be secured by a conditional decree. *Courage & Co. v. Carpenter*, [1910] 1 Ch. 262. The difficulty that equity is enforcing continuous performance is offset by the consideration of the great hardship which would otherwise result to the plaintiff, and the public interest in carrying out the contract. *Dominion Iron & Steel Co. v. Dominion Coal Co.*, 43 Nova Scotia, 77; *Union Pac. R. Co. v. Chicago, etc. R. Co.*, 163 U. S. 564.

CONFLICT OF LAWS — OBLIGATIONS EX DELICTO: CREATION AND ENFORCEMENT — STATUTE GIVING PERSONAL REPRESENTATIVE RIGHT TO SUE FOR DEATH BY WRONGFUL ACT. — Plaintiff's intestate was killed by defendant's negligence in Nebraska, where a statute gives the personal representative a right of action for death by wrongful act. Plaintiff, appointed administrator by the Kansas court, sues in Kansas to recover under the Nebraska statute. *Held*, that the action cannot be maintained, as "personal representative" refers to one appointed by the state whose statute created the right of action. *Battese v. Union Pacific Ry. Co.*, 170 Pac. 811 (Kan.).

For a discussion of this case see Notes, page 116.

CONSTITUTIONAL LAW — CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONS — STATE JURISDICTION OVER FEDERAL LANDS. — The defendant was convicted in an Idaho court for violation of a statute of Idaho prohibiting the grazing of sheep under certain circumstances. The offense was committed on United States government lands in the state in which grazing was permitted by the federal authorities. *Held*, that the conviction should be affirmed. *Omaechevarria v. Idaho*, 38 Sup. Ct. Rep. 323.

Where the federal government succeeds to the title of land within a state with the consent of the state legislature the federal jurisdiction over the land is exclusive of all state authority. U. S. CONSTITUTION, Art. I, § 8, clause 17; *Commonwealth v. Clary*, 8 Mass. 72. Even here it has been held that state courts have jurisdiction of a local action between private parties with respect to land ceded to the United States until Congress has made new regulations touching the administration of civil cases arising therein. *Barrett v. Palmer*, 135 N. Y. 336, 31 N. E. 1017. But over land acquired by the federal govern-

ment by purchase or eminent domain without the consent of the state legislature the state jurisdiction remains "complete and perfect," subject to the limitation that it cannot be exercised antagonistically to federal governmental interests. *People v. Godfrey*, 17 Johns. (N. Y.) 225. The same is true of land belonging to the federal government at the date of admission of the state in which the land lies and over which Congress has not reserved exclusive jurisdiction. *United States v. Stahl*, 1 Woolw. (U. S. Cir. Ct.) 192. See also 14 OPINIONS, ATTORNEYS GENERAL, 33. The instant case falls within this last rule.

CONSTITUTIONAL LAW — CONTROVERSIES BETWEEN TWO OR MORE STATES — POWER TO MANDAMUS STATE LEGISLATURE. — Argument of the rule to show cause why, in the default of payment of the judgment against West Virginia in favor of Virginia, an order should not be entered directing the levy of a tax by the legislature of West Virginia, and the motion by that state to dismiss the rule. *Held*, the case should be restored to the docket for further argument, such argument to embrace (1) the right to award the madamus prayed for; (2) if not, the power and duty to direct the levy of a tax; (3) if means for doing so be found to exist, the right, if necessary, to apply such other and appropriate remedy by dealing with the funds or taxable property of West Virginia or the rights of that state as may secure an execution of the judgment. *Commonwealth of Virginia v. State of West Virginia*, 38 Sup. Ct. 400.

For a discussion of this case, see Notes, page 1158.

CONSTITUTIONAL LAW — DUE PROCESS — MINIMUM WAGE FOR WOMEN AND MINORS. — The legislative of Minnesota in 1913 passed an act establishing a minimum-wage commission and prohibiting every employer from employing any woman or minor at less than the living wage as determined by order of the commission. Plaintiffs sought to restrain the enforcement of orders of the commission on the ground that the statute was unconstitutional. *Held*, that the act is constitutional. *Williams v. Evans*, 165 N. W. 495 (Minn.).

For a discussion of this case and other cases involving recent labor legislation, see Notes, page 1013.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE — DELEGATION OF LEGISLATIVE POWER TO BOARD OF HEALTH. — A Massachusetts statute empowered the State board of health to "make rules and regulations to prevent the pollution . . . of all such waters as are used as sources of water supply." (MASS. R. L., c. 75, § 113, as amended by St. 1907, c. 467, § 1.) In pursuance of this authority the board passed a regulation forbidding anyone to fish in a certain lake without a permit. *Held*, that this does not constitute an unconstitutional delegation of legislative power. *Commonwealth v. Hyde*, 118 N. E. 643 (Mass.).

The general proposition that legislative power cannot be delegated is a familiar maxim in American jurisprudence. *Wayman v. Southard*, 10 Wheat. (U. S.) 1. See 19 HARV. L. REV. 203. The basis for the doctrine rests primarily in the express grant in federal and state constitutions of the legislative power to a designated branch of the government. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210; *Winchester, etc. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692. See *Dreyer v. Illinois*, 187 U. S. 71, 83. In the nature of things, however, no precise demarcation is possible between legislative enactment and mere administrative regulation. See *Chicago, etc. Ry. Co. v. Dey*, 35 Fed. 866, 874. The result is a great confusion among the cases as to what powers may be granted to administrative boards. Cf. *United States v. Louisville, etc. R. Co.*, 176 Fed. 942; *Pierce v. Doolittle*, 130 Ia. 333, 106 N. W. 751; *State v. Carlisle*, 235 Mo. 252, 138 S. W. 513; *State v. Southern R. Co.*,



141 N. C. 846, 54 S. E. 294. A well-established exception to the general rule, based mainly on historical grounds, exists in the case of delegation of legislative power to municipal corporations. *Commonwealth v. Bennett*, 108 Mass. 27; *Noonan v. City of Hudson*, 52 N. J. L. 398, 20 Atl. 255; *Gloversville v. Howell*, 70 N. Y. 287. And this exception has been extended by analogy to local boards of health. See *Brodline v. Revere*, 182 Mass. 598, 601, 66 N. E. 607, 608. But powers quite as broad and similarly legislative in character have been granted to state boards of health. *Blue v. Beach*, 155 Ind. 121, 56 N. E. 89. The reason then advanced for the large delegation of power is the necessity of leaving to such bodies a wide discretion in the adoption of measures for the preservation of the public health. See *Brodline v. Revere*, *supra*. Then, by analogy with the broad powers given to boards of health, powers which once would have been denominated clearly legislative in character have been delegated to administrative tribunals of all sorts. See *Commonwealth v. Sisson*, 189 Mass. 247, 252, 79 N. E. 619, 621. Cf. *Munn v. Illinois*, 94 U. S. 113, 133; *Railroad Commission v. Central R. Co.*, 170 Fed. 225. The explanation of this development is found primarily in the growing realization that administrative boards are better fitted to deal with these problems, both legislatively and administratively, than are legislatures. The original prohibition against the delegation of legislative power has thus been whittled down until today, in many jurisdictions, so long as the legislative body prescribes the general policy and the purpose to be attained, the means of effectuating this policy may be left entirely to an administrative commission. See *Blue v. Beach*, 155 Ind. 121, 132, 56 N. E. 89, 93.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACT NOT TO SUE BUT TO SUBMIT TO TRIBUNAL OF BENEFIT SOCIETY. — The constitution of a mutual benefit association provided that certain claims for disability "shall be addressed to the systematic benevolence of the brotherhood, and shall in no case be made the basis of any legal liability." The plaintiff was disabled, and having been refused payment on his certificate by the beneficiary board of the brotherhood, sued to enforce his claim. *Held*, that he could recover. *Miller v. Brotherhood of Local Trainmen*, 118 N. E. 713 (Ill.).

This sort of provision has given rise to two lines of decisions. Cases in accord with the principal case have held the provision void on the ground that the parties should not be allowed, by contract, to preclude themselves from invoking the aid of the court. *Pepin v. Societe St. Jean Baptiste*, 23 R. I. 81, 49 Atl. 387; *Austin v. Searing*, 16 N. Y. 112; *Wood v. Humphreys*, 114 Mass. 185. On the other hand, the provision has been held valid because it was voluntarily agreed to by the insured who by this agreement waived nothing he did not have the right and power to waive. *Osceola Tribe v. Schmidt*, 57 Md. 98; *Van Poucke v. Netherland, etc. Society*, 63 Mich. 378, 29 N. W. 863. The reasonable rule would seem to be that the association may provide methods for determining the facts speedily and definitely, and compel its members to resort to a prescribed mode of procedure before invoking the aid of the courts, but that it cannot entirely prohibit suit so that recovery by the insured will depend upon the caprice of the association.

INNKEEPERS — DUTIES TO TRAVELERS AND GUESTS — LIABILITY TO BOARDER FOR GOODS STOLEN. — The defendant operated a hotel and gave to the plaintiff a lease of a suite for a term of six months. Certain tennis trophies were stolen from the plaintiff's rooms. *Held*, that the extraordinary liability of an innkeeper did not attach to this relation. *Hackett v. Bell Operating Co.*, 169 N. Y. Supp. 114.

It has long been well settled that the innkeeper is liable to the guest for baggage stolen, without regard to negligence. *Carr's Case*, 1 Roll. Abr. 3;

*Calye's Case*, 8 Coke Rep. 32 a; *Hall v. Pike*, 100 Mass. 495. See BEALE, INNKEEPERS, §§ 183-85, 188. It is equally axiomatic that the lodging-house keeper is liable only for reasonable care. *Holder v. Soulbey*, 8 C. B. (N. S.) 254. See *Scarborough v. Cosgrove*, [1905] 2 K. B. 805. See also 19 HARV. L. REV. 534. The public duty and extraordinary liability of the innkeeper exist only in regard to a traveler. *Rex v. Luellin*, 12 Mod. 445. See Bruce Wyman, "The Inherent Limitation of the Public Service Duty to Particular Classes," 23 HARV. L. REV. 339, 340. Where an innkeeper entertains boarders as well as guests, he is nevertheless liable to the boarder only as a lodging-house keeper and not as an innkeeper. *Lamond v. Richard*, [1897] 1 Q. B. 541; *Manning v. Wells*, 9 Humph. (Tenn.) 746; *Horner v. Harvey*, 3 N. M. 197, 5 Pac. 329; *Crapo v. Rockwell*, 48 Misc. 1, 94 N. Y. Supp. 1122. See BEALE, INNKEEPERS, §§ 201, 202; 2 PARSONS, CONTRACTS, 8 ed., 159. See also 10 HARV. L. REV. 519. In many cases it is a difficult question of fact to determine whether the person entertained is a guest or a boarder. The courts seem to assume that he is a guest, unless the contrary is clearly shown. Cf. *Hancock v. Rand*, 94 N. Y. 1, and *Shoecraft v. Bailey*, 25 Iowa, 553. But cf. *Meacham v. Galloway*, 102 Tenn. 415. In the principal case, the lease negatives the possibility of the innkeeper relation.

INTERNATIONAL LAW — CHANGE OF SOVEREIGNTY — EFFECT OF RECOGNITION OF FOREIGN GOVERNMENT. — During the revolution of General Carranza against Huerta, officers of the former, in pursuance of military orders, seized property and sold it to a United States citizen. Subsequent to the seizure, the United States government recognized Carranza's government as the *de jure* government of Mexico. This suit was brought to determine whether the purchasers from Carranza's officers acquired good title as against someone claiming under the former owner. *Held*, that good title was acquired. *Ricaud v. American Metal Co.*, 38 Sup. Ct. Rep. 312.

The acts of one sovereign state done within its own territory are not subject to review by the courts of another. *Underhill v. Hernandez*, 168 U. S. 250; *American Banana Co. v. United States Fruit Co.*, 237 U. S. 347. This principle has even been extended to acts done by a *de facto* as well as a *de jure* government. *O'Neill v. Central Leather Co.*, 87 N. J. L. 552, 94 Atl. 789. It belongs exclusively to the political department of the government to recognize who the sovereign of a territory is, and this recognition is absolutely binding on the courts of that government. *Jones v. United States*, 137 U. S. 202; *O'Neill v. Central Leather Co.*, *supra*; *State of Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219; *United States v. Palmer*, 3 Wheat. (U. S.) 610; *Williams v. Suffolk Ins. Co.*, 13 Peters (U. S.), 415. The recognition by this government of a foreign sovereign relates back to the inception of the latter government, and makes binding in this country its acts from the beginning. *Underhill v. Hernandez*, *supra*; *State of Yucatan v. Argumedo*, *supra*. See *Williams v. Bruffy*, 96 U. S. 178, 186.

JUDGES — DISQUALIFICATION — PARTICIPATION OF DISQUALIFIED JUDGE. — In the hearing of an action to construe a statute fixing the salaries of members of the supreme court, four of the five justices withdrew in favor of four district judges. One justice participated in the determination of the cause. His presence was not necessary to constitute a quorum, nor did his vote decide the result. The state constitution provides that if a judge of the supreme court is in any way interested in a case before the court, the remaining justices shall call one of the district judges to sit with them in the hearing of that cause. (N. D. CONST. § 100.) *Held*, that the mere presence of the disqualified judge did not render the judgment void. *State ex rel. Langer v. Kositzky*, 166 N. W. 534 (N. D.).



At common law a judge was disqualified if he was a party to the cause or interested in it financially, but his judgment was merely voidable. Generally the disqualification might be waived by the parties. *Dimes v. Grand Junction Canal*, 3 H. L. 759. Where statutes expressly forbid persons performing judicial functions from acting when they are interested, such interest, if subsequently shown, is usually held to render the judgment void. *Moses v. Julian*, 45 N. H. 52; *Oakley v. Aspinwall*, 3 N. Y. 547. But see *Hine v. Hussey*, 45 Ala. 496. See FREEMAN, JUDGMENTS, 4 ed., § 146 *et seq.* See also 20 HARV. L. REV. 152; 30 *Id.* 103. A disqualified judge may make a purely formal order. See *Estate of White*, 37 Cal. 190, 192. Judgments of a *de facto* judge, unlike those of a disqualified judge, stand against collateral attack. *State v. Alling*, 12 Ohio St. 16. Where the vote of the disqualified judge does not decide the result, there is no settled authority as to the effect of his participation. The situation is analogous to the case of the director with whom the board, of which he is a member, contracts on behalf of the corporation. If the interested director takes no part in the proceedings, the weight of American authority is that the contract is not void. *Fort Payne Rolling Mill v. Hill*, 174 Mass. 224, 54 N. E. 532. But see *Stewart v. Lehigh Valley Co.*, 38 N. J. L. 505. Both as to judges and directors, the earlier cases were disinclined to consider degrees of influence. See *Hesketh v. Braddock*, 3 Burr. 1847, 1856. When the disqualified judge is not necessary to the decision, there is no reason for pushing the rule against participation to extremes, and the present decision may be supported notwithstanding the seeming impropriety of the judge's conduct. But see *Seaward v. Tasker*, 143 N. Y. Supp. 257. Cf. *Matter of Ryers*, 72 N. Y. 1; *State v. Polley*, 34 S. D. 565, 138 N. W. 300.

PROXIMATE CAUSE — EFFICIENT CAUSE OF INJURY — CAUSAL CONNECTION NOT BROKEN BY FAILURE TO ACT. — A brakeman on a freight train negligently failed to signal another train which, because of the railroad company's negligence, was following dangerously close. A rear-end collision occurred, in which the brakeman was killed. His administrator sued under the Federal Employers' Liability Act. *Held*, that he could recover. *Union Pacific Railroad Co. v. Hadley*, 38 Sup. Ct. 318.

For a discussion of this case, see Notes, page 1158.

PUBLIC SERVICE COMPANIES — REGULATION OF PUBLIC SERVICE COMPANIES — POWER OF STATE TO ALTER RATES FIXED BY MUNICIPAL FRANCHISE. — An ordinance granting a sewer company permission to operate within municipal limits imposed a condition that rates for service to property owners should not exceed a maximum fixed therein. The state subsequently created a public utilities commission with power to fix rates. The sewerage company petitioned the commission for authority to charge rates higher than the maximum fixed in the ordinance. *Held*, that the commission had jurisdiction to grant the authority sought. *Collingswood Sewerage Co. v. Borough of Collingswood*, 102 Atl. 901 (N. J.).

The rather common provision that a public service company must secure the consent of the municipality in which it proposes to operate, and that, in granting such permission, the municipality may or shall impose conditions, results in a peculiar agreement between the public service company and the municipality or its residents and property owners. Until and unless the state acts this agreement is binding on both parties. See 31 HARV. L. REV. 879. But it is clear that the state may, without encountering the contract clause of the federal constitution, legislate such agreements out of existence, or modify them in any way. The state may authorize the public service company to charge rates in excess of the maximum provided by the agreement. *City of Worcester v. Worcester, etc. Ry. Co.*, 196 U. S. 539; *Board of Survey of Arlington v.*

*Bay State St. Ry. Co.*, 224 Mass. 463, 113 N. E. 273. And the state may reduce rates below those fixed in the agreement. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624. The reason lies in the strong policy in favor of governmental regulation of services vital to the public good. *Munn v. Illinois*, 94 U. S. 113. The agreement between the municipality and public service company is usually called a contract. But the features just noted show that we have here a kind of agreement that does not come within the usual conception of a contract. Either there is some lack of capacity of parties to contract with reference to the subject matter, or there is something peculiar in the agreement itself. Whatever the defect may be, it is submitted that the court was correct in the principal case in saying, "The truth in an ordinance of this kind is a grant upon condition, rather than a contract." The grant is of all right which the municipality can give, and the condition is that it shall be subject to state regulation or alteration. This description better suits the nature of the agreement, and it avoids the confusion that arises from the idea of a contract not protected against state legislation by the contract clause of the federal constitution.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — RULE OF BOARD OF TRADE FIXING GRAIN PRICES. — The Chicago Board of Trade adopted a rule prohibiting its members from dealing in grain "to arrive," during the interval between the close of the daily "call" session and the opening of the next day's "call," at any other price than the closing bid at the "call." *Held*, not a violation of the Sherman Anti-Trust Law. *Board of Trade of Chicago v. United States*, 38 Sup. Ct. 242.

For a discussion of this case, see Notes, page 1154.

SEAMEN — SEAMEN'S ACT OF 1915 — REQUIREMENT OF GOOD FAITH. — The Seamen's Act (38 STAT. AT. L. 1165), provides that "every seaman of a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs a one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. . . . This section shall apply to seaman of foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seaman for its enforcement." Libellants demanded half their wages pursuant to this section. This demand was part of a concerted purpose to leave the ship because of the submarine danger. The demand was refused. The libellants left the ship. *Held*, they cannot recover for wages. *The Belgier*, 246 Fed. 966.

A quitting of the ship *non animo revertendi* has always been a reprehensible offense at the maritime law. It was justified by cruelty, deviation, or a failure to supply provisions, and by practically no other grounds. *Sherwood v. McIntosh, Ware* (U. S. Dist. Ct.), 109; *The Eliza*, 1 Hagg. Adm. 182; *The Castilia*, 1 Hagg. Adm. 59; *Brower v. The Maiden*, Gilp. (U. S. Dist. Ct.) 294. See 3 KENT, COMMENTARIES, 11 ed., 270-72. See also 11 HARV. L. REV. 411. A desertion forfeited the wages due the seaman. *The Bark Merrimac*, 1 Ben. (U. S. Dist. Ct.) 490; *Coffin v. Jenkins*, 3 Story (U. S. Cir. Ct.) 108. The Seaman's Act abolished arrest and imprisonment as a penalty for desertion. The avowed purpose of the act was to encourage the desertion of seamen from foreign vessels in the harbors of the United States and thereby to remove the economic handicap which higher wages have placed on American shipping. The act was a piece of "international bad manners," and the result reached by the court is no doubt salutary, but *quaere* whether it was justified in overriding the legislative intent by reading "good faith" into the statute.



TRUSTS — CREATION AND VALIDITY — DISCLAIMER BY ONE OF SEVERAL *CESTUIS*. — The plaintiff transferred property in trust to be divided at his death among his three children. One of them was to receive a certain sum, on condition that he immediately pay over \$500 thereof to a stranger. This *cestui* refused to accept or be bound by the gift. The plaintiff sued to recover back all the property on the ground that this disclaimer was a breach of condition precedent to the creation of the trust. *Held*, that he could recover. *Sloan v. Sloan*, 118 N. E. 709 (Ill.).

When property is transferred in trust for another, the great weight of authority is that the beneficial interest immediately vests in the *cestui* subject to his disclaimer. *Middleton v. Pollock*, 2 Ch. D. 104; *Minor v. Rogers*, 40 Conn. 512; *Martin v. Funk*, 75 N. Y. 134; *O'Brien v. Bank of Douglas*, 17 Ariz. 203, 149 Pac. 747. Once created, the only method of terminating a trust where the settlor has not expressly provided therefor is by a renunciation on the part of all the beneficiaries. *Minot v. Tilton*, 64 N. H. 371; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659. Disclaimer by one *cestui* does not affect the interests of the others. *Cf. Willis v. Thompson*, 85 Texas, 301, 20 S. W. 155. Furthermore, courts have gone a long way in construing express words of condition as creating a trust to be enforced, not by forfeiture, but by the usual methods of compelling performance of a trust. *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072; *Mills v. Grace Church*, 54 N. J. Eq. 659; *Stanley v. Colt*, 5 Wall. (U. S.) 119. Under such a construction the *cestui* in the principal case would receive his share of the property in trust to pay part thereof to another. Hence disclaimer by him would be *pro tanto* disclaimer as trustee and not as *cestui*. The court could appoint a new trustee for this amount and the third party's interest would not be affected. *Adams v. Adams*, 21 Wall. (U. S.) 185. Although the trust failed as to the remainder of this *cestui*'s share in the property, it is difficult to see why the other *cestuis* should not take. If the carrying out of the condition by the former was such an essential part of the trust scheme that failure to comply with its terms would defeat the whole purpose of the trust, the decision could be understood. It would be analogous to cases where the trust can only be carried out by one particular trustee. *Security Co. v. Snow*, 70 Conn. 288. The facts of the principal case, however, do not justify such an interpretation.

WILLS — INCORPORATION BY REFERENCE — REFERENCE TO AN EXISTING DOCUMENT AS EXISTING. — A testator directed that trust funds be paid as his wife's last will should direct, and that if it should be impossible to tell whether he predeceased her, his will should be construed on the basis that he had predeceased her. At the same time the wife made a will reciting the power and disposing of the property. Both died in the same accident, so that it was not known which predeceased the other. *Held*, that the property passed according to the wife's will. *In re Fowles' Will*, 118 N. E. 611 (N. Y.).

The case must be taken as a step in the adoption of the predominating doctrine of incorporation by reference. As such it is a departure from the orthodox New York view that incorporation will not be permitted. *In re Emmons' Will*, 110 App. Div. 701, 96 N. Y. Supp. 506; *Booth v. Baptist Church*, 126 N. Y. 215, 28 N. E. 238. But in at least one other case the decision seems explicable only on the ground that the court allowed an unexecuted document to be incorporated into the testator's will by reference. *Matter of Piffard*, 111 N. Y. 410, 18 N. E. 718. See also *Condit v. De Hart*, 62 N. J. L. 78, 40 Atl. 776. In each of these cases the donee of the power to appoint by his will predeceased the testator giving the power. The will of the testator did not refer specifically to the will of the donee as then existing although the republication of the will of the former by a codicil executed after the death of the latter caused the will to refer to an existing document. The cases are as indefensible as the

instant case, under the strict doctrine of incorporation requiring the reference to be to an existing document as being in existence. *Allen v. Maddock*, 11 Moo. P. C. 427; *Magnus v. Magnus*, 80 N. J. Eq. 346, 84 Atl. 705; *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579.

## BOOK REVIEWS

STUDIES IN THE PROBLEM OF SOVEREIGNTY. By Harold J. Laski. New Haven: Yale University Press. London: Humphrey Milford. Oxford University Press. 1917. pp. (10)+ 297.

The nature of the state and its attributes have been subjects of fascinating interest at least since the time when Aristotle developed in bold outline that science of politics which perhaps it is not too much to say has dominated the thinking of men to this day. A conception of sovereignty appears clearly enough in Aristotle's discussion of the state; but the term itself seems to have been first used by Bodin in his treatise, *De la Republique* (1576). To Blackstone sovereignty was "the supreme authority in which the *jura summi imperii* reside," a definition which has been quoted approvingly by more than one American supreme court. To most of the better known writers it is absolute, supreme, indivisible. This is the quality which prevailing political theory has attributed to the state, a quality, moreover, which even some modern states have not been slow to assert, and not altogether unsuccessfully to employ.

To this claim, this attempted exertion of unlimited authority, Mr. Laski and certain other modern political writers oppose a bold challenge and denial. What, they ask, are the facts? Has the state succeeded *always* in exerting absolute power when it has sought to do so? For a single failure would seem to be fatal to this claim of absolutism.

Very little real thinking about the nature of the state has been done in America. Despite our democratic institutions and ideas, and ignoring our division of the powers of "indivisible" sovereignty and all the numerous "checks and balances" upon governmental functioning which have given a new meaning to constitutional law, we have tended rather docilely to accept, perhaps, through the medium of Blackstone's wholly mechanistic and fictional treatment, a theory of the absolute state, totally at variance with the spirit of our history or with any actuality which we propose to submit to. Doubtless, too, Rousseau's *Contrat Social* did much to shape and color the views of our early publicists in this as in all their political thinking. The more carefully formulated Austinian theories and the profound and compelling philosophy of Hegel have of course been principal factors in holding our adherence to what may be called the orthodox abstraction of sovereignty.

It cannot be denied that the mind finds a degree of satisfaction in the symmetry, the completeness of this theory, and of the orderliness, the strength, and safety which it may seem to assure. But is the theory realized anywhere in the life of states? Can it be? Those who ask this question, and who scrutinize history to find the answer, are sometimes stupidly lumped in one common lot by debonair critics, and their studies lightly dismissed because of a supposed failure to distinguish between the state and sovereignty and government. Nevertheless the realists are having their influence, and absolute and indivisible sovereignty is being questioned and dissected by a school or schools of growing strength and influence. The state theories of the leading modern thinkers, German and French, are admirably, though possibly not wholly judicially summarized and criticized by M. Léon Duguit in 31 HARVARD LAW REVIEW, pages 1 to 185. In England, Maitland has brilliantly uttered an arresting word in



the introduction to his translation of Gierke's *Genossenschaftsrecht*, and others, notably Dr. Figgis, have published inquiries as to what the history of certain institutions has revealed regarding the real nature of the state.

Into this discussion Mr. Laski has entered with his "Studies in the Problem of Sovereignty," and in the restricted field which he has selected for this first book his work is distinctly illuminating. He is frankly a realist, and though assuredly he recognizes that sovereignty is an abstraction, a quality attributed to the state, and that the state functions only through government, he nevertheless convincingly asserts that we cannot understand the state or its qualities without studying its functional expression. Quite apart from the details of his discussion and the conclusions reached, Mr. Laski has rendered a distinct service to the study of political science in America, Englishman though he be, by publishing here and in part at least stimulated by his observation of American institutions and his contacts with American scholars, studies based upon the functioning of the state rather than upon *a priori* metaphysical assumptions or mere descriptions of its mechanism. This newer viewpoint and method of approach has characterized most of the recent fruitful study of the natural sciences, of jurisprudence and to some extent of economics. We have had masses of merely descriptive essays in "government" and political science, much of it useful, even necessary; but after all that is the method of externalism, and alone it can never lay bare the heart of a living subject. By this it is not meant to suggest that the analytical method does not find its useful place. An admirable example may be seen in a paper, "The Juristic Conception of the State" by Dr. W. W. Willoughby, 12 Amer. Polit. Sci. Rev. 209.

In his interesting first chapter, Mr. Laski states his problem, attacks the monistic theory of the state, and in the undoubted and often unyielding allegiance to church, trade-union, party, and club finds the justification and the necessity for a pluralistic conception. "The will of the State," he says, "obtains preëminence over the wills of other groups exactly to the point where it is interpreted with sufficient wisdom, to obtain general acceptance, and no further. It is a will to some extent competing with other wills, and, Darwin-wise, surviving only by its ability to cope with its environment. . . . But, it may be objected in such a view sovereignty means no more than the ability to secure assent. I can only reply to the objection by admitting it," (page 14).

The greater part of the book is devoted to an historical examination of certain controversies between state and church which afford rich material for the testing of the Hegelian theory of the state. The first of these studies, entitled the "Political Theory of the Disruption," is a running account of and commentary upon the stubborn and successful struggle of Dr. Chalmers and his dissenting followers against the Established Church in Scotland with its state-controlled patronage, a struggle which ended in the disruption of that church, a result hardly to be reconciled with a unitary theory of the state.

Then follow two extended studies of the Oxford Movement and the Catholic Revival in England. With no pretense of developing new sources, the author has sketched these deeply significant movements with great brilliancy, maintaining an attitude at once sympathetic and objective with rare judicial skill. The issue of those struggles is well known and certainly lends no support to the assumption of an absolute and supreme state in England. If, as Mr. Laski suggests, "it seems a little grimly ironical to connect the name of Bismarck with the spirit of religion" (page 239), it seems not less so to yoke De Maistre the arch apostle of ultramontanism with Bismarck, the man of "blood and iron," and yet that is what has been done in the final chapter, with interesting results and suggestion. Of De Maistre, whose theory is summarized with skill, Mr. Laski says: "He is the real author of that Ultramontanism by which the nineteenth century Papacy sought the restoration of its prestige." But

fundamentally, as Mr. Laski demonstrates, the theory developed by De Maistre, is no other than that with which Bismarck undertook the complete subordination of the church to the state, "Where De Maistre speaks of the Church, Bismarck speaks of the State: where De Maistre discusses the Papacy, Bismarck is discussing the German Empire. Otherwise, at bottom, the thought is essentially the same" (page 263). "Each saw in a world of individualization the guarantee of disruption and evolved a theory to secure its suppression. Each loved passionately the ideal of unity since that seemed to them both the surest guarantee of survival. Each saw truth as one and therefore doubted the rightness of a sovereignty that was either fallible or divisible; and each in the end came to the realization that his theories were inconsistent with the facts of life" (page 264).

Two brief appendices, entitled respectively "Sovereignty and Federalism" and "Sovereignty and Centralization," bring some phases of American experience to bear upon the problem.

Most of us who must confess to origin in the now much despised Victorian period, are probably not prepared to have the state reduced to the level of a public-service company, and indeed that is not what Mr. Laski urges; but it is high time that we address ourselves seriously to the task of evolving a theory of our American state which accords with the facts; and an Austinian theory is no longer wholly satisfying. If, as Mr. Laski admits in any such voluntarism as he speaks for, "room is left for a hint of anarchy" (page 24), the danger of the opposed theory is at least equally great. To quote the author again, "The thing of which I feel afraid, if the State be admitted limitless power, Professor Dewey has expressed felicitously in a single phrase, 'It has been instructed [he is speaking of the German State] by a long line of philosophers that it is the business of ideal right to gather might to itself in order that it may cease to be merely ideal.' Nor is what he urges true of Germany alone" (page 20).

But what we most need to do is to discover the facts and from them the truth. The state will never be absolutely secure and no unsupported theory is likely long to seriously increase or diminish the germs of conflict and danger which lie in any human society. But a theory slowly corrected by the facts, and by them brought into harmony with actuality, must aid greatly in the amelioration of the strife which the human race seems unable to avoid.

Many will doubtless disagree with Mr. Laski's conclusions; some will consider them "dangerous," but his book is an admirable essay, sound in method, vivid and scholarly, and pointing in the direction in which it is to be hoped he and others will go farther.

HENRY M. BATES.

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AN OUTLINE SKETCH OF ENGLISH CONSTITUTIONAL HISTORY. By George Burton Adams. Yale University Press. 1918.

The publication of this little book recalls the fact that it is now almost half a century since the appearance of another book similar in scope and purpose and upon the same subject, the work of an unacknowledged master in the field whose importance is by no means commensurate with its small size. A comparison of Professor Adams' "Sketch" with Freeman's "Growth of the English Constitution" brings out contrasts more significant than mere differences of intellectual scholars. It is the twentieth-century view of the English constitution that stands out, sometimes in almost startling contrast over against that of the nineteenth. For Freeman gave eloquent voice to the conception of the origins of our institutions considered orthodox in his day, and one, it is not much to say, which still prevails amongst the older generation of lawyers and has not yet disappeared entirely from the textbooks.



Let us note a few differences. For the nineteenth century the constitutional developments of the centuries after the Norman Conquest are only "an altered garb of principles as old as the days when we got our first sight of our forefathers in their German forests. Changed as it is in all outward forms and circumstances, the England in which we live has in its true life a spirit far more in common with the English of the earliest times than it has with the English of days far nearer to our own." To Professor Adams "the tests which determine race in history are the characteristics of a civilization" rather than blood and "in this sense and upon the constitutional side our history (as Americans) on English soil begins in the Norman Conquest of England by William the Conqueror in 1066." Freeman is deeply impressed by the fact that the English sovereign of his day should "in so many respects hold the place of Alfred rather than the place of Richards and Henries of later times," while Professor Adams feels "compelled to say that it was the Norman conception of the office and practical operation of the kingship, not the Saxon, which became fundamental in the English constitution." As with the king, so with the Parliament after the Norman Conquest. "Be it Witenagemot, Great Council, or Parliament," says Freeman, "there has always been some body of men claiming with more or less right to speak in the name of the nation." "The Individual Baron," as Professor Adams sees him, "was not prone to regard his share in the public affairs as privilege or opportunity for the exercise of influence on the conduct of government but rather as a burden." Both these writers are filled with the greatest enthusiasm for the English constitution; Professor Freeman, because it is English, Professor Adams, because it is a constitution. The latter's departure from the older orthodoxy is entire, but his general interpretation of English history is one from which few present-day legal scholars would dissent. Here and there his statements may be considered too strong, his anti-Saxonism too complete, but the truth of his general picture of the Norman and Angevin kinds cannot easily be disputed. Whatever their origin these institutions at that time were flowing through a feudal channel and they can only be truly described in terms that are feudal, not national or popular.

The theme of Professor Adams' book is the limited monarchy, and it began, he thinks, with Magna Carta in 1215. Previous limitations of the king's power are feudal rather than national or constitutional, and even the self-limitation implied by the earlier kings' charters carried with it no machinery by which that limitation may be made effective. Magna Carta for the first time provides for a faithless or oppressive king a punishment which goes beyond the feudal *diffidatio* and rebellion of his vassals; it permits the Barons to coerce him by a collective and legalized rebellion which may be termed not inappropriately constitutional. From this crude beginning follows the long development through the baronial and parliamentary control of ministers which culminates in the modern cabinet system under which "a legislature could exercise an executive authority which in theory it did not have." The book is not a constitutional history of England. It implies rather than supplies the framework of dates and events necessary to a real history. The author's evident intention is rather to give an interpretation of these facts, his desire is "to show how modern liberty came to be what it is and what foundations our institutions have in the past history of the race." And that past history, though English, he considers as much "ours" as it is the possession of modern England. No two authors would treat this great theme in the same way, with the same emphasis, or in the same proportion. In this study, administrative history is practically omitted after Henry II, almost the whole attention being focused on the beginnings of representation and legislation; but this is not strange. The administrative history of England in the later Middle Ages and for some time after is still in manuscript. On the whole, a

reader's appreciation of this essay is likely to be greater in direct proportion to the amount of his knowledge of the facts of English history. The only positive misstatement noted is the reference to Doctor Cowell, author of the famous *Interpreter* as an "Oxford Scholar." He was Regius professor of the Civil Law at Cambridge.

C. H. McILWAIN.

M. KPITOU TOY ΠΑΤΖΗ ΤΙΠΟΥΚΕΙΤΟΣ. Sive Librorum LX Basilicorum Summarium. Libros I-XII Graece et Latine ediderunt Contardus Ferrini-Johannes Mercati. Romae, Typis Polyglottis Vaticani MCMXIV (Coll. Studi e Testi. Vol. 25).

It is well known among Romanists how helpful the Byzantine compilations of laws are for the restoration and the interpretation of the sources of Roman law. But most of the Byzantine compilations themselves in order to be of real service are still to be edited and some of those already edited need critical revision. The most important of these compilations are the sixty books, "Τὰ βασιλικά," which reached us in a mutilated condition and were edited by the Heimbach brothers in six volumes (Lipsiae, 1833-70). A seventh volume of "Supplementa" was added by two Italian scholars, C. Ferrini and G. Mercati, in 1897. To fill the gaps and to supply the missing parts of the Basilics, Heimbach made use of the ΤΙΠΟΥΚΕΙΤΟΣ. It is a large summary or a repertory (τί ποῦ κοῦται; *Where is it?*) of the Basilics, made in the eleventh century and to be found in only one manuscript (Vatican, 853). But in Heimbach's reading of the passages, he quotes from the Tipoukeitos so defectively, and the text of the first twelve books which he gives *in extenso* in the third volume of the Basilics was edited with so little critical accuracy as to make the work useless. In only one passage of a little more than twenty lines, Prof. F. Brandileone ("Buletino dell' Istituto di Diritto Romano," I, pag. 106) remarked more than twenty misreadings and omissions. As early as in the year 1888, the Italian Institute of Roman Law planned an edition of the Tipoukeitos, and Professor Brandileone himself was put in charge of the preliminary work. But various difficulties, especially of a financial character, interfered with the plan, which was given up entirely after some time. Later on Prof. C. Ferrini took upon himself the by no means easy task of translating and editing the Tipoukeitos, in collaboration, for the philological part of the work, with G. Mercati, the well-known Italian scholar of the Vatican Library.

No man was more fitted for such a task than Professor Ferrini. After the death of Zacharia von Lingenthal, Ferrini was considered the most authoritative European scholar in Greco-Roman law, and Von Lingenthal himself, when old and almost blind had trusted to Ferrini his papers and notes. His edition of the Paraphrasis of the Institute of the so-called "Theophilus Antecessor" (Berlin 1883-97), the volume of "Supplementa" to the Basilics and other works of the same kind, had already established his absolute competency for editing, translating, and commenting upon the Byzantine law texts. But his work on the Tipoukeitos did not progress farther than the first twelve books, because of his unexpected death by heart failure in October, 1902. He was only forty-two years old, and at his death his bibliography numbered almost two hundred publications on Roman and Byzantine law. In 1909 one of his posthumous works was published in the "Fontes Juris Romani Ante-Justiniani in usum scholarum — Leges, Auctores, Leges saeculares," edited by S. Riccobono, J. Baviera, and C. Ferrini (Florence, Barbera, two volumes, 1909). Ferrini's contribution to this publication was the third part, where he gave the Latin translation of the "νόμοι saeculares" from the Syriac version of the London manuscript. Previously he had already published the Latin



translation of another text of the same νόμοι, contained in a manuscript of Paris (Savigny-Stiftung. XXIII, pag. 101-43).

The book published now in the collection "Testi e Studi" of the Vatican Library, contains the text of the first twelve books of the Tipoukeitos critically edited by Mercati, and the Latin translation of Ferrini. An elaborate preface by Mercati gives an accurate account of the Vatican manuscript and of the text; then it discusses at length the question of the authorship, concluding that the work is due to Patze, who wrote it about the end of the eleventh century. The nature of the evidence on which Mercati bases his conclusion is such that this question may be considered as definitely settled, and the hypotheses formulated in the past by Allatius Heimbach and Zacharia must be discarded. The text is given in the exact form in which it is contained in the manuscript, but attention is called to mistakes due to the *scriba*, and the probable original words and phrases either misspelled or omitted in the text, are proposed by the editor in scholarly notes. Ferrini's Latin translation is, as usual, faithful and clear, and couched in the exact terminology of the Roman law.

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GEORGE F. LA PIANA.

CRIMINOLOGY. By Maurice Parmelee, Ph.D. New York: The Macmillan Co. 1918. pp, xiii, 522.

Old-fashioned lawyers regard Criminology as a pseudo-science, quite unworthy serious attention; and even progressive lawyers have doubted the title of its literature to be included in a law library of the highest class. This book will give aid and comfort to the holders of such opinions.

The reviewer believes firmly that there is a useful and sufficiently exact science of Criminology; that among its materials are comparative criminal law, the history of crime, criminal psychology as illustrated in reported trials, and penology as a study of the social effect of punishments. Such a Criminology, a study of legal and social phenomena as a means to a social end, should be a fruitful subject of investigation for a lawyer. Doubtless Dr. Parmelee would claim that this book represents such a study and with such an object. If so, he has chosen the wrong material, or his social aim is unsound, or his lack of legal training prevents him from writing a useful book for a lawyer.

Dr. Parmelee is an earnest and conscientious writer; he has brought together many facts and opinions about crime and punishment which ought to be in the minds of counsel, judges, and legislators. The book is a useful compendium for the careful reader in a subject where better books are hard to find. But it is not the result either of original investigation or of special knowledge in its field; and its errors in the field of law lead a lawyer to distrust the book in other less familiar branches of knowledge.

The author's treatment of every subject is didactic; and he mistakes assertion for proof. Hardly an actual case is cited. Logic is not one of the numerous sciences he mentions as useful to a criminologist. If he were familiar with the practice of the science he could hardly assert woman's physical inferiority to man in one paragraph, and in the next deny the possibility of her moral superiority on the ground that she inherits from both male and female parents (page 240). His superficial knowledge of law is represented by his conjecture (page 256) that the Roman law is frequently called the Civil law because the Romans developed the civil side of their law more fully than the criminal side. We are surprised to learn (page 311) that the election of judges "in the olden days when the power of kings and of the aristocratic class was still great . . . was a valuable guarantee of popular rights." His idea of a special law-school course in criminology "for those who wish to prepare for this branch of the

judiciary," namely, the criminal magistracy (page 330) shows an imperfect knowledge of that social structure which he desires to reform. His misconception of the nature of crime, which seems fundamental, may be illustrated by his statement (page 247) that prostitution is not really crime, although made so by statute, because the action is due to natural human impulses, does not give rise to a conflict between individual interests, and is a professional activity.

These, it may be urged, are mere microscopic defects in a comprehensive work. They seem to the reviewer to indicate an ignorance of the essential subject-matter of the science. But the author seems to have fundamental limitations which lead him to ignore valuable factors in civilization, and thus reach a partial, if not a partisan, view of the subject. To him, religion is merely superstition; morality is only the *scientia morum*; education, the assembling of information about the physical world. The gross materialism of his philosophy is united with a sort of mechanical sentimentality on the subject of penology which hardly carries conviction.

J. H. BEALE.

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THE LAW OF TRADING WITH THE ENEMY. By Charles Henry Huberich. New York: Baker Voorhis Company. 1918.

This book is primarily a commentary on the Act of Congress of October 6, 1917, known as "The Trading with the Enemy Act"; as a commentary its value is doubtful. The proofs were closed too late to include certain fundamental executive orders of February, March, and April, and certain fundamental decisions have changed something of what is stated as law in the book. Some problems, moreover, that have been discussed in recent decisions are not touched upon in the volume. Though this is not the author's fault, it of course renders the book far less valuable than a slightly later book would have made it. Nor does Mr. Huberich point out the important particulars in which American legislation differs from the English Act of 1914. He does not distinguish adequately what is new in substance and effect in the present law in its relation to older theories of neutrality and contraband. He does not give the forms of the war trade board or the custodian of alien property, though he does summarize the certain orders and a treasury decision preceding the act. Mr. Huberich's views are valuable but uneven. His wide continental experience makes his comments upon the position and powers of an alien enemy particularly useful. Its citations are accurate and full. It is certainly an improvement on the volumes of Schuster and of Campbell which have come to us from England. Its practical utility lies in the fact that it is the latest treatment we possess upon the subject which yesterday was all but academic and today is of vital importance. It will be a source of satisfaction to every student of International Law if Mr. Huberich would so revise his book as to make it that standard of treatise he is so uniquely qualified to write.

CHARLES MARVIN.

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HANDBOOK OF CRIMINAL PROCEDURE. By William L. Clark, Jr. Second Edition by William E. Mikell. West Publishing Company. 1918. pp. xi, 748.

This is one of the "Hornbook Series" and presents the familiar features of that series. It is an attempt to state in summary fashion the existing law. The scope of the field and the importance of local technicalities add to the difficulties of such treatment. The editor speaks in his preface of the uneven progress toward de-technicalization of criminal procedure which has marked



the two decades since the appearance of the first edition. The fact that about one-third of the present volume is devoted to the requirements of indictments suggests that something is left to be accomplished in that field of legal reform.

Others might differ with the author's judgment as to the proper limitations of his subject. Fifty pages devoted to questions of evidence seem either too much or too little. And one might expect to find discussion of some matters which are omitted. For instance the book is silent upon the technical and important questions of procedure which arise when a federal offender is apprehended in a district other than that in which the indictment was returned.

Probably the fact that this is a second edition indicates that the work has found a place with the profession. Those to whom it has been helpful will be glad to have the notes and citations brought up to date. Those who prefer the Reports and Digests or local manuals of practice and procedure will continue to use them.

H. LA RUE BROWN.

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MODERN BUSINESS CORPORATION. By William Anna Allen Wood. Second Edition. Indianapolis: The Bobbs Merrill Company. 1917.

This is a compact manual of Corporation Law which may be useful to the student of economics and the ordinary reader. It includes a chapter on Taxation which has a special utility for those public officials upon whom devolves the administration of tax laws. The book is not especially valuable for lawyers, and on some topics, notably on the subject of *Ultra Vires*, to which one page is allotted, the treatment is so sketchy as to be worthless. The one hundred and forty-eight corporate forms are gone through *seriatim*, and some useful comment is made upon articles of agreement by unincorporated associations. The most valuable part of the book is the Appendix, in which are included the rules of the New York Stock Exchange, federal statutes regulating corporations, a typical blue-book law, and various tables of the income-yielding capacity of stocks and bonds; but were this not a second edition this volume would hardly be a justified addition to a field already more than fully occupied.







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